UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

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

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 SUBPOENA

I. Introduction

Applicant U.S. Commodity Futures Trading Commission ("Commission"), by its attorneys, submits this Memorandum of Points and Authorities in Support of its Application for an Order to Show Cause and an Order Requiring Compliance with Administrative Subpoena.

On April 15, 2005, the Commission served a subpoena *duces tecum* on Respondent, The McGraw-Hill Companies ("McGraw-Hill"), requiring it to produce information about natural gas transactions submitted to McGraw-Hill's division, Platts, by a certain United States-based energy marketing company ("Energy Company").[1] McGraw-Hill objects to the production of responsive documents, relying on the qualified "reporter's privilege" recognized in

[1] As discussed more fully herein, the Commission is investigating potential violations by the Energy Company of the false reporting and anti-manipulation provisions of the Commodity Exchange Act. The investigation is non-public. The identity of the Energy Company therefore is disclosed only in the accompanying Declaration of Anthony M. Mansfield ("Mansfield Declaration") submitted herewith *under seal*.

certain jurisdictions, which protects the interests of reporters and the public in preserving the confidentiality of journalist's sources.[2] The privilege does not apply to the records the Commission seeks. Even assuming, *arguendo*, that the privilege does apply, it is overcome by the Commission in its pursuit of information as part of a law enforcement action.

The 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) ("Act"). Pursuant to its regulatory powers, the Commission through its Division of Enforcement is conducting a non-public investigation of the Energy Company to determine whether traders at the Energy Company submitted false information about natural gas transactions to various companies, including McGraw-Hill.[3] McGraw-Hill's division, Platts, uses the information reported by entities like the Energy Company to compile "index" prices for natural gas markets throughout the United States. Market participants, including utilities and speculators, use the indices to price natural gas contracts valued in the billions of dollars.[4] Natural gas traders, including futures traders, refer to these indices for price discovery and assessing price risks.

The Division has evidence that the Energy Company voluntarily submitted information about natural gas transactions ("trade data") to Platts for use in the calculation of the indices. From the information currently available, however, the Division is unable to confirm the universe of the trade data the Energy Company submitted to Platts, its accuracy, receipt by Platts, and how Platts used the trade data to compile its indices. There are only two sources for the information the Commission seeks: the Energy Company and McGraw-Hill. As outlined in

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2 The specific requests at issue are set forth in *Appendix A* to the Memorandum of Points and Authorities.

3 *See* Mansfield Declaration, ¶ 2 submitted herewith.

4 *See id., Exhibits 5 & 6.*

the accompanying Mansfield Declaration, the Energy Company no longer possesses the information. Pursuant to its investigative authority, the Commission, therefore, subpoenaed McGraw-Hill, seeking, *inter alia*, production of trade data the Energy Company submitted to Platts, and documents concerning Platts' use of that data in the indices which it calculates.[5]

Despite the Energy Company's voluntary waiver of any confidentiality that may apply to the information the company's traders submitted to Platts,[6] McGraw-Hill refuses to turn over the documents. However, the qualified reporter's privilege upon which McGraw-Hill relies should not bar production for three reasons. First, the purpose for which Platts receives trade data and calculates its indices does not involve traditional newsgathering and therefore does not trigger the privilege. Second, traders at the Energy Company submitted trade data to Platts with the understanding that Platts would disseminate this information independent from its publications to other market participants. Thus, any expectation of confidentiality and the concomitant threat that absent such confidentiality unfettered communications would be chilled -- the hallmark of the privilege -- is absent. Third, even if the Court finds that the privilege does apply, it is overcome because the documents the Commission seeks are directly relevant to its investigation of the Energy Company, and there are no reasonable means to obtain the subpoenaed documents other than from McGraw-Hill.

McGraw-Hill's refusal to produce all of the documents demanded in the subpoena is impeding the Commission's investigation of the Energy Company. The Commission respectfully requests that the Court compel McGraw-Hill's full and complete compliance with the subpoena to protect the public, and to fulfill the Commission's mandate of enforcing the Act.

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[5] Copies of the subpoena and McGraw-Hill's response are attached as *Exhibits 2* and *3* to Mansfield Declaration

[6] *See id., Exhibit 4.*

II. The Commission's Investigation Of Price Reporting In The Natural Gas Markets

A. The Conduct Under Investigation

Since 1985, Platts has compiled first-of-the-month ("FOM") index prices for more than 40 natural gas markets throughout the United States.[7] Platts describes its *Inside FERC's Gas Market Report* ("Inside FERC"), wherein the FOM index prices are listed, as "the leading news source on the gas industry markets."[8]

Platts states that it calculates its indices using trade data, including price and volume information, submitted by market participants, including energy companies. The data submitted to Platts ostensibly represents the participant's actual natural gas transactions. Platts then circulates these indices through various subscription newsletters, which are used by energy companies, public utilities, and speculators, among others, to price natural gas transactions, for price discovery, and to assess price risks. Platts' indices, thus, have a financial impact upon billions of dollars worth of natural gas transactions, and the utility rates paid by the public.[9]

McGraw-Hill publicly acknowledged as recently as 2003 that "some energy companies and individual traders have repeatedly attempted to manipulate the price indexes produced by publishers such as Platts."[10] Former McGraw-Hill employee, Michelle Markey went further, testifying before the State of California that (i) it was common practice among traders to exaggerate the transactions submitted to the price reporters; (ii) during the fourth

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7 *See* Mansfield Declaration, *Exhibit 7*. A "first-of-the-month" or "baseload" transaction refers to a natural gas trade that requires the seller to deliver physical natural gas to the buyer, ratably, over the course of the following month. In exchange, the seller is paid the index price for the gas. Platts also generates daily index prices ("*Gas Daily*") that reflect natural gas transactions for next-day delivery.

8 *See id.*

9 *See id., Exhibits 5 & 6.*

10 *See id., Exhibit 8.*

quarter of 2000 and 2001, end users and marketing companies complained to the index compilers about the accuracy of the indices; and (iii) in late 2001, McGraw-Hill, which had acquired *Gas Daily* in August 2001, nevertheless canceled an audit by Price Waterhouse to assess the accuracy of the data submitted to McGraw-Hill's *Gas Daily* publication.[11] Numerous companies publicly confirmed that they reported inaccurate information about natural gas trades to McGraw-Hill.[12]

The Energy Company is one of dozens of energy companies the Commission is investigating, or previously investigated, concerning price reporting. The Commission has charged and/or entered into public settlements with dozens of companies for false reporting and/or attempting to manipulate the price of natural gas. To date, the Commission has not charged a perfected manipulation, through price reporting, of any natural gas price.[13]

B. <u>The Commission's June 2003 Subpoena Enforcement Action</u>

As part of the Commission's investigation of price reporting by certain companies, it issued two subpoenas to McGraw-Hill in February 2003, requesting many of the same categories of information it now seeks with regard to the Energy Company, including trade data submitted to Platts, and documents showing how Platts incorporated this information into its indices. The Commission needed the information, *inter alia*, in order to determine whether attempts to manipulate the indices compiled by Platts were successful. The February 2003 subpoenas encompassed 23 energy companies. They did not, however, include the Energy Company, which was not under investigation at the time.

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11 *See id., Exhibit 9*, pp. 15-18.

12 *See id., Exhibits 10 through 14.*

13 *See id.*, ¶ 3.

As here, McGraw-Hill objected to production of many responsive documents, invoking the qualified reporter's privilege. After negotiations failed, based on McGraw-Hill's insistence that the Commission reveal, on a company-by-company basis, whether it was in possession of facts establishing false reporting as a condition to McGraw-Hill's compliance with the subpoenas, the Commission commenced an action in the United States District Court for the Southern District of Texas, *Miscellaneous Action H-03-187*, seeking to enforce the February 2003 subpoenas.[14]

The Commission filed the action in Houston, Texas pursuant to 7 U.S.C. § 15(c), which states, "[i]n case of contumacy by, or refusal to obey a subpoena . . . the Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business . . ." Platts has offices in Houston, New York, and Washington, D.C. When the Commission commenced the action, Houston was essentially the energy trading capital of the United States, and traders provided data directly to Platts' offices in Houston.[15]

On July 14, 2003, the Texas court heard oral argument on the Commission's application. To date, the Texas court has not ruled on the underlying application.

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[14] The Commission objected to this demand based on its obligation to maintain the confidentiality of its investigations.

[15] On June 18, 2003, McGraw-Hill filed a response to the Commission's action. *See Respondent's Memorandum of Law in Opposition to Application for Order Requiring Compliance with Administrative Subpoenas.* McGraw-Hill accused the Commission of bad faith in filing the action in Houston and not New York, where, McGraw-Hill argued, the subpoenas were served, all prior negotiations and documents productions occurred, and where virtually all of the relevant McGraw-Hill and Platts' personnel and documents are located. *Id.* at 10. McGraw-Hill went on to state that "[t]o the extent any other jurisdiction [other than New York] has relevance, that jurisdiction is Washington, D.C., where *Inside FERC* has its offices and where the bulk of the requested documents are located." *Id.* at 13. The Commission disagrees. *See Applicant's Reply Memorandum of Law in Support of its Application for an Order Requiring Compliance with Administrative Subpoenas* filed in the Texas action. However, to avoid any unnecessary delay by McGraw-Hill predicated on this complaint, the Commission filed this action in Washington, D.C. consistent with 7 U.S.C. § 15(c), and where McGraw-Hill concedes an action of this kind may appropriately reside.

C. The Commission's April 2005 Subpoena To McGraw-Hill Concerning The Energy Company

The Commission has asked for, and believes it has received, the trade data Energy Company traders claim to have submitted to Platts' *Inside FERC* that is still in the Energy Company's possession.[16] However, based on the statements of traders at the Energy Company, the Commission does not believe that the Energy Company possesses all of the information the company's traders delivered to *Inside FERC*.[17]

On April 15, 2005, the Commission served a subpoena *duces tecum* on McGraw-Hill, requesting information pertaining to the Energy Company for a three-year period. On April 19, 2005, counsel for McGraw-Hill informed Commission staff that McGraw-Hill intended to object to the subpoena. At that time, counsel inquired whether Commission staff was willing to discuss McGraw-Hill's concerns. Staff responded that the Division of Enforcement was, indeed, willing to discuss McGraw-Hill's concerns.

On April 28, 2005, counsel for McGraw-Hill forwarded the company's responses and objections. Counsel informed Commission staff that, upon further review, McGraw-Hill did not believe that discussions focused on narrowing the scope of the subpoena would be useful, given the subpoena's breadth.[18] On May 4, 2005, counsel clarified the company's position, stating that McGraw-Hill was amenable to negotiation, but that any proposal to address McGraw-Hill's concerns "should come from the CFTC and not from McGraw-Hill."[19]

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16 *See* Mansfield Declaration, ¶ 10.

17 *See id.*, ¶ 11.

18 *See id., Exhibit 15.*

19 *See id., Exhibit 16.*

By letter dated May 9, 2005, the Commission declined McGraw-Hill's invitation to revise the Commission's subpoena, noting that, from the Commission's perspective, the subpoena, as drafted, was not objectionable.[20]

III. Argument

As it has done previously, McGraw-Hill seeks to cloak itself in the protections of the qualified reporter's privilege. However, for reasons articulated below, the privilege, should it even be recognized by this Court, does not apply to Platts' data compilation and issuance of price indices. Should the privilege nevertheless be recognized by this Court, it does not apply to Platts' particular relationship with the Energy Company. Even if the Court finds otherwise, McGraw-Hill still must produce documents because the Commission, in its pursuit of a valid law enforcement action, easily meets the criteria necessary to overcome the privilege.

A. The Subpoena Is Within The Commission's Authority

The D.C. Circuit holds that "enforcement of an agency's investigatory subpoena will be denied only when there is 'a patent lack of jurisdiction' in the agency to regulate or to investigate." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 820 (2002) (citation omitted); *SEC v. McGoff*, 647 F.2d 185, 191 (D.C.Cir. 1981), *cert. denied*, 452 U.S. 963 (1981) (enforcement of administrative subpoenas is appropriate where the information sought "bears a sufficient relationship to possible violations" under the authority of the agency). To determine whether an agency retains jurisdiction, courts look to whether the information sought "is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *RTC v. Walde*, 18 F.3d 943, 946 (D.C. Cir. 1994) (citation omitted); *In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1415-16 (D.C.

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20 *See id., Exhibit 17.*

Cir. 1994). Where an administrative subpoena meets these criteria, it must be enforced. *See Walde*, 18 F.3d at 946.

1. The information the Commission seeks is within its authority

Section 8(a) of the Act states, "[f]or the efficient execution of the provisions of this Act . . . the Commission may make such investigations as it deems necessary to ascertain the facts regarding the operations of . . . other persons subject to the provisions of this Act." 7 U.S.C. § 12(a). Like other agencies charged with seeing that the laws are enforced, the Commission's power is broad. *See* 17 C.F.R. § 11.2 (2004) (an investigation may be conducted "to determine whether any persons have violated, are violating, or are about to violate the provisions of the [Act]. . ."); *Collins v. CFTC*, 737 F. Supp. 1467, 1485 (N.D. Ill. 1990) (the Commission has the power to issue subpoenas to determine whether persons have "complied with or run afoul of" the Act or Regulations).

On November 7, 2003, the Commission issued a formal order, authorizing members of the Commission's Division of Enforcement to "determine whether, in connection with energy trading during the years 1999 through 2003, [the Energy Company] or any related person, firm or entity, has engaged, is engaging or is about to engage in acts and practices in violation of Sections 6(c), 6(d), and 9(a)(2) of the [Act]. . ." *See* Mansfield Declaration, ¶ 4. The McGraw-Hill subpoena was issued pursuant to and is consistent with this order. *See CFTC v. Harker*, 615 F. Supp. 420, 424 (D.D.C. 1985) (finding that a Commission investigation was authorized under Section 8(a) because it was investigating possible violations of the Act).

2. The Commission's demand for documents was not indefinite

There is nothing indefinite about the subpoena served on McGraw-Hill. The subpoena is limited to a discrete 3-year period during which the Commission has evidence of, or

reason to believe, that the Energy Company submitted information to Platts, and it seeks information about the Energy Company's price reporting. *See* Mansfield Declaration, *Ex. 2.*

3. The information sought is relevant to the investigation

Under Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2), it is a violation for "[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce . . . or knowingly to deliver or cause to be delivered . . . false or misleading or knowingly inaccurate reports concerning . . . market information or conditions that affect or tend to affect the price of any commodity in interstate commerce . . ." Here, the Commission is investigating whether traders at the Energy Company delivered inaccurate trade data to companies that compile index prices in violation of the Act.

Pursuant to Section 6(c) of the Act, 7 U.S.C. § 15, the Commission, "[f]or the purpose of securing effective enforcement of the provisions or this Act, [or] for the purpose of any investigation or proceeding under this Act . . . may require the production of any books, papers, correspondence, memoranda or other records that the Commission deems relevant or material to the inquiry." There is no dispute that Platts compiles index prices, and that the Energy Company submitted trade data to Platts for use in compiling these indices. The documents the Commission seeks relate directly, and only, to the information the Energy Company submitted to Platts. The information, therefore, bears a "sufficient relationship" to a possible violation of the Act.

B. McGraw-Hill's Invocation Of The Reporter's Privilege Is Inappropriate

McGraw-Hill's failure to comply with the subpoena is not warranted under the qualified reporter's privilege. The privilege is inapplicable to McGraw-Hill because McGraw-Hill's division, Platts, is not engaged in traditional newsgathering. Platts merely gathers trade

data from, in this case, natural gas traders to formulate price indices. Even assuming, *arguendo*, that the privilege does apply to Platts, it is overcome because the documents the Commission seeks are critical to its investigation, and there are no other available means -- indeed, McGraw-Hill is the only source -- to obtain the subpoenaed documents.

1. The qualified reporter's privilege, if it exists, is narrower than McGraw-Hill has previously suggested

Courts, including, until recently, courts in this jurisdiction, recognize a qualified privilege with respect to information gathered in connection with the publication of an article. "This qualified privilege serves '. . . to protect important interests of reporters and the public in preserving the confidentiality of journalists' sources.'" *SEC v. Seahawk Deep Ocean Technology, Inc.*, 166 F.R.D. 268, 270 (D.Conn. 1996), quoting, *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 7-8 (2d Cir. 1982), *cert. denied sub nom. Arizona v. McGraw-Hill, Inc.*, 459 U.S. 909 (1982). This protection, however, "does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed." *Branzburg v. Hayes*, 408 U.S. 665, 682-83 (1972) (citation omitted).

Recognizing the essential role the government plays in enforcing valid laws serving substantial public interest, courts refuse, for example, to extend the privilege to protect a journalist from appearing before, or otherwise providing evidence to, a grand jury. *Id.* at 690. As the Supreme Court explained, among other reasons, "[f]air and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process . . . [W]e perceive no basis for holding that the public interest in law enforcement

and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain burden on news gathering . . ." *Id.*

The United States Court of Appeals for the District of Columbia recently affirmed this principle in a strongly worded decision in *In Re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005) *reh'g en banc denied* 2005 WL 889719 (April 19, 2005). There, the Court confirmed the Supreme Court's refusal to extend the First Amendment protections to a reporter faced with a grand jury subpoena, evoking the Supreme Court's "transparent and forceful" reasoning -- namely that "[t]he grand juries and the courts operate under the longstanding principle that the public has a right to every man's evidence except for those persons protected by constitutional, common law, or statutory privilege . . ." *Id.* at 969-70 (citations and internal quotations omitted).[21] The Court further rejected appellant's suggestion that Justice Powell's concurring opinion could somehow be read as a seed of some First Amendment protection, noting that "Justice Powell's concurring opinion was not the opinion of a justice who refused to join the majority. He joined the majority by its terms, rejecting none of Justice White's reasoning on behalf of the majority." *Id.* at 971.

As discussed more fully herein, the Commission is a regulatory agency tasked with administering and enforcing the Commodity Exchange Act. And as Congress expressed in the Act's statement of "Findings and Purpose," "[t]he transactions subject to this Act are entered into regularly in interstate and international commerce and are **affected with a national public interest** . . ." 7 U.S.C. 5(a) (emphasis supplied). Indeed, billions of dollars of natural gas

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[21] With regard to the existence of a common law reporter's privilege, the *Miller* Court remarked that it "is not of one mind," however, "all believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing." *Id.* at 973.

transactions are priced off of indices compiled by, among others, Platts.[22] *See* Mansfield Declaration, *Exhibits 5 & 6*. Accordingly, like other administrative agencies charged with seeing that the laws are enforced, the Commission "has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the 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." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). Furthermore, the "public" -- if McGraw-Hill's assertion that Platts was engaged in newsgathering for dissemination to the "public" is to be believed -- has a right, and a need, to know. Thus, the reporter's privilege should not be applied in this case.

a. Platts' purpose was not to disseminate news to the "public"

In determining whether the privilege applies, the most important factor is the nature of the entity's relationship with the source. *See Compuware Corp. v. Moody's Investor's Services, Inc.*, 324 F. Supp. 2d 860, 862 (E.D. Mich. 2004). For the privilege to apply, the relationship must be based on "the intent to disseminate the information to the public garnered from that relationship." *Alexander v. FBI*, 186 F.R.D. 21, 50 (D.D.C. 1998), quoting, *von Bulow v. von Bulow*, 811 F.2d 136, 144-45 (2d Cir. 1987).

The burden is on the party claiming the protection of the reporter's privilege "to establish those facts that are the essential elements of the privileged relationship." *Alexander*, 186 F.R.D. at 49, quoting, *In re Grand Jury Subpoena Dated January 4, 1984,* 750 F.2d 223, 224 (2d Cir. 1984). In order to claim the privilege successfully, the party involved in newsgathering

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[22] For example, the cost of natural gas to end users is regulated by state and federal laws. Some states, including California and Illinois, calculate this cost by comparing the actual cost to procure the gas to the expected cost. Where the actual cost is less than the expected cost (also know as the "benchmark"), a portion of this savings is applied to the consumer to reduce the cost of gas. The benchmark is calculated by reference, *inter alia*, to the index prices compiled by companies like Platts.

or activities associated with that process must demonstrate "through competent evidence, the intent to use material—sought, gathered, or received—to disseminate information to the public and that such intent existed at the inception of the news gathering process." *Id.* at 50, quoting, *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987); *see Tripp v. Dep't of Defense*, 284 F. Supp. 2d 50, 57-58 (D.D.C. 2003) (citations omitted).

Although McGraw-Hill insists that Platts is engaged in gathering news for dissemination to the public and thus must protect its sources, with respect to formulation of price indices, it is not. On its website, Platts describes itself as "the world leader in providing energy information." Mansfield Declaration, *Ex. 7.* It provides this information through newsletters, reports, and real time "alerts," all of which are available at a subscription price. However, as distinct from traditional newsgathering services, the clients to which Platts markets its services are not the general public. Rather, Platts gathers trade data from sources in the natural gas markets, like the Energy Company, for the purpose of distributing that information (repackaged in the form of price indices) back largely to the same market for a fee. Indeed, former McGraw-Hill employee, Michelle Markey, testified before the State of California, Senate Select Committee to Investigate Price Manipulation of the Wholesale Energy Market, that energy marketer Enron, which was one of the largest contributors of prices and volumes of natural gas transactions to Platts, was also Platts' "number one customer" for Platts' subscription services. *See* Mansfield Declaration, *Ex. 9*, p.18.

The Second Circuit Court of Appeals' decision in *In re Fitch, Inc. v. UBS Paine Webber, Inc.*, 330 F.3d 104 (2d Cir. 2003), lends support to the conclusion that McGraw-Hill cannot avail itself of the reporter's privilege with regard to Platts. In *Fitch*, the Second Circuit considered the application of the reporter's privilege to a company in the business of analyzing

and rating securities and debt offerings. The company argued that "it conducts research, fact-gathering, and analytical activity that is directed towards matters of general public concern, just like any journalist, and note[d] that it makes the information available on its web site to the general public." *Id.* at 109. The Court, however, rejected the company's argument finding that Fitch had taken a significant role in structuring the transaction it rated. *Id.* at 111. The Second Circuit noted that "the level of involvement with the client's transactions [] is not typical of the relationship between a journalist and the activities upon which the journalist reports." *Id.*

Referring again to Ms. Markey's testimony before the State of California, she stated that it was common practice among traders to exaggerate the transactions they submitted to the price reporters; that McGraw-Hill received repeated complaints about the accuracy of McGraw-Hill's indices in 2000 and 2001; but that ultimately McGraw-Hill continued to compile index prices based on the very information it had grounds to suspect was inaccurate. *See* Mansfield Declaration, *Ex. 9*, pp. 15-17. Even more, Ms. Markey said nothing to refute the suggestion of one California State Senator that, in approximately the fall of 2001, McGraw-Hill canceled a previously scheduled audit intended to test the accuracy of the information being submitted to Platts for use in compiling its indices because the main suspect for reporting false information to Platts was the company's largest subscriber, Enron. *Id.* at pp. 17-18.

Similar to the facts of *Fitch*, Platts stepped outside its role as a journalist in the context of compiling natural gas price indices and was engaged in an activity that was more akin to reporting on specific transactions for which it was hired. Thus, it cannot rely upon the reporter's privilege.

b. Traders perceived the submission of trade data to Platts as a way to enhance their reputation in the natural gas markets

Given that the "most important factor in determining whether an entity may assert the journalist's privilege is the nature of the entity's relationship with the source," *Compuware Corp.*, 324 F. Supp. 2d at 862, how traders at the Energy Company perceived their relationship with Platts is also telling. In testimony before the Commission, at least one trader at the Energy Company testified that he submitted trade data to Platts with the expectation that the Platts' representative would relay the information to other traders, thereby getting the word out that the Energy Company trader was a big player. *See* Mansfield Declaration, ¶ 7.

The reporter's privilege serves "to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources." *In re Petroleum Products Antitrust Litig.*, 680 F.2d at 7-8. However, where, as here, the source did not expect the reporter to maintain in confidence either the information the source forwarded to the reporter, or, in light of the relationship between the Energy Company and Platt's, the source's identity, but rather hoped that the reporter would circulate this information to the marketplace, the application of the privilege, as McGraw-Hill now demands, is misplaced. This is particularly true where "[t]he claim is . . . that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future." *Branzburg*, 408 U.S. at 682.

2. The reporter's privilege is overcome

Even if the Court finds that the reporter's privilege is otherwise applicable to Platts' relationship to the Energy Company, the Commission overcomes the privilege. Whether predicated on protections afforded in the First Amendment or federal common law, courts in this jurisdiction have previously sought to balance the competing constitutional and societal interests,

identified by Justice Powell in his concurring opinion in *Branzburg*, and implicated by the requests for a reporter's source information. *See McGoff*, 647 F.2d at 192 (*Branzburg* was not inapplicable "because an agency rather than a grand jury issued the subpoena."); *In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 10 (D.D.C. 1996).[23]

In its most familiar form, the balancing test is articulated as follows: assuming that the privilege is applicable, the party seeking to overcome the privilege must prove that: (1) the information sought goes to the "heart of the matter" and (2) that he has exhausted all reasonable alternatives available to him to obtain the information. *See Tripp*, 284 F. Supp. 2d at 59; *see Zerilli v. Smith*, 656 F.2d 705, 713 (D.C.Cir. 1981); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15, 18 (D.D.C. 2003), *appeal dismissed,* 2003 WL 22890063 (D.C. Cir. Dec. 3, 2003).

The elements of this test, however, may vary depending on the nature of the underlying proceeding. *See In re Grand Jury 95-1*, 59 F. Supp. 2d at 13, quoting, *In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 571 (D.C.Cir. 1977) (To determine whether the reporter's privilege applies, "[t]he line should be drawn at the nature of the proceeding; not depending on how the reporter obtained the information at issue."). Thus, where the proceeding is that of a grand jury, case law suggests that, absent harassment or bad faith, even broad grand jury subpoenas issued to journalists may be valid. *Id.* at 14. In the civil context, however, courts in the District of Columbia have applied a balancing test and considered the conflicting interests at issue in the case. *See, e.g., McGoff*, 647 F.2d at 192; *National Labor Relations Board v. Mortensen*, 701 F. Supp. 244, 247 (D.D.C.1988).

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[23] Although the *Miller* Court rejected any suggestion of a reporter's privilege predicated on the First Amendment, it noted that it "is not of one mind on the existence of a common law privilege." 397 F.3d at 973. In a subsequent decision denying Appellants' Petition for Rehearing *En Banc*, Judge Tatel wrote a concurring opinion in which he affirmed that the Court "determined neither whether any common law privilege exists nor what standard would govern its application if it did," and recognized that, "future panels of this court remain free to recognize any privilege (or no privilege) consistent with the results of this case, and those panels may, as necessary, clarify the standards governing reporter-source relationships." 2005 WL 889719 at *1 (Tatel, J., concurring).

The distinction between criminal and civil proceedings would appear to reflect the essential societal purpose that is attributed to grand jury proceedings. *See, e.g., In re Grand Jury 95-1*, 59 F. Supp. 2d at 13 (citation omitted) ("This Court declines to ignore the importance of the fact that this case involves subpoenas issued by a grand jury and "the essential societal interest in the detection and prosecution of crime."); *cf. Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 335 (D.D.C. 1994) (in candidate's action against hotel for invasion of privacy, court held that compelled disclosure of information used by reporter in preparing news article was precluded by First Amendment and District of Columbia Free Flow of Information Act where candidate had not shown societal interest which outweighed protection of reporter's sources or other public interest in disclosure); *United States v. Liddy*, 354 F. Supp. 208, 213 n.14 (D.D.C. 1972) (if "instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalist's news sources will often be weightier than the private interest in compelled disclosure.").

a. The Commission's investigation of the Energy Company is akin to a proceeding before a grand jury

In this instance, the Commission's investigation of the Energy Company is analogous to a grand jury proceeding. *See Morton Salt Co.*, 338 U.S. at 642-43 (finding that agency tasked with seeing that the laws are enforced was analogous to grand jury). Indeed, Section 5 of the Act, 7 U.S.C. § 5(b), expressly states,

> It is the purpose of [the Act] to serve the public interests described in subsection (a) . . . To foster these public interests, it is further the purpose of this Act to deter and prevent price manipulation or any other disruptions to market integrity...[and] to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets..."

In this role of administering and enforcing federal law, courts recognize that the Commission seeks to effectuate the public policy of the Act rather than adjudicate private rights. *See CFTC v. AVCO Fin. Corp.*, 979 F. Supp. 232, 235 (S.D.N.Y. 1997), *aff'd in part,* 228 F.3d 94 (2d Cir. 2000) ("Insofar as the CFTC is a 'governmental unit,' this action was brought to enforce the CFTC's police power and effectuate the public policy of the CEA rather than adjudicate private rights or pursue restitution for the government . . ."); *Harker*, 615 F. Supp. at 421 (Commission is responsible for regulating the nation's commodity markets and enforcing the Commodity Exchange Act).

Given the public interest the Commission is tasked to promote and protect, the Court should enforce the Commission's subpoena, which, for reasons articulated above, was issued pursuant to the Commission's police power to effectuate the public policy of the Act, and was neither intended to harass McGraw-Hill nor issued in bad faith. *See In re Grand Jury 95-1*, 59 F. Supp. 2d at 14 (citation omitted).

b. The result is the same under the balancing test articulated in *Zerilli*

In the Texas action, McGraw-Hill vigorously challenged, and will likely challenge here, any suggestion that the Commission's investigation of the Energy Company, or any person for that matter, is like a grand jury proceeding, the Supreme Court's suggestion in *Morton Salt Co.* notwithstanding. However, even under the standard articulated by the D.C. Circuit in *Zerilli v. Smith*, 656 F.2d at 713, the Commission overcomes the reporter's privilege.

1. The information sought goes to the "heart of the matter"

In cases in which the qualified reporter's privilege is invoked, the information sought goes to the "heart of the matter" if the information is crucial to the case. *Zerilli*, 656 F.2d at 713. Conversely, disclosure may be difficult to justify if the information sought is only

marginally relevant. *Id.* As set forth above, Section 9(a)(2) makes it a violation of the Act for "[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce . . . or knowingly to deliver . . . false or misleading or knowingly inaccurate reports . . ." 7 U.S.C. § 13(a)(2). In addition, Section 6c(d)(1) of the Act, as amended by, 17 C.F.R. § 143.8(a)(1)-(2), provides that the Commission may seek a civil penalty for each violation of the Act. 7 U.S.C. § 13a-1(d)(1). Every time a company submits inaccurate trade data, the Act is violated. Determining what data the Energy Company submitted to Platts, and how Platts may have used that information, therefore, goes to the "heart" of any possible violation and penalty the Commission may pursue against the Energy Company.

McGraw-Hill, and McGraw-Hill alone, possesses such records. For these reasons, the information the Commission seeks from McGraw-Hill is "crucial" to its investigation into whether the natural gas market was manipulated.

2. The Commission has exhausted all reasonable alternatives to obtain the requested information

Under *Zerilli* and its progeny, the exhaustion of alternative sources "requires only that all 'reasonable' sources of evidence be tapped. It does not require proof positive that the knowledge exists no where else on earth but in the minds of the journalists and their anonymous confidants." *Lee*, 287 F. Supp. 2d at 23. Moreover, where the journalist appears to be the only one with access to information relevant to the case, courts in this jurisdiction are willing to compel disclosure. *See Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1972), *cert. dismissed,* 417 U.S. 938 (1974) (a party is not required to engage in "wide-ranging and onerous discovery burdens where the path is...ill-lighted."). This is even the case where an independent federal regulatory agency like the Commission seeks to examine the reportorial and editorial process of a journalist. *See Mortensen*, 701 F. Supp. 244.

The district court's analysis in *Mortensen* is particularly instructive to this case. There, the court applied *Branzburg* in the context of a subpoena enforcement action initiated by the National Labor Relations Board ("Board") in pursuit of its enforcement authority. The court dismissed the notion that the subpoenas did not implicate cognizable First Amendment interests, finding that the "[w]hether [the Board] seek[s] confidential or non-confidential sources, or whether [it] seek[s] disclosure or verification of statements, the Board is attempting to examine the reportial and editorial processes." *Id.* at 247. The court, however, held that the Board could obtain discovery to authenticate statements made in press interviews which, if true, were relevant to violations of the National Labor Relations Act by the National Football League Management Council ("Management Council").

To determine whether the Board overcame the qualified reporter's privilege, the court required the Board to prove that the information it sought was crucial to the claim, that it had made an effort to obtain the information from other sources, and that the only access to the information sought was through the journalist and its sources. *Id.* at 248. The court found that the authentication of the statements was central to the Board's ability to prove that the Management Council engaged in unfair labor activities, *id.* at 250, and that the Board had attempted to obtain the information elsewhere and exhausted possible alternative sources of information. The court reasoned that (i) the Board had subpoenaed the three Management Council members involved; (ii) none admitted the statements attributed to them, *id.* at 246, 249; and thus (iii) unresolved questions remained. *Id.* at 249. Given these facts, the court held that "the Board must turn to the keepers of the information themselves, the reporters who actually wrote the statements and conducted the interviews," *id.*, noting that the reporters are the "direct

and most logical source of information" about the statements since they were the other participants in the conversations from which the statements were taken.

As in *Mortensen*, there are only two sources of the trade data the Energy Company submitted to Platts: the Energy Company and McGraw-Hill. Through the Division's investigation of the company, the Commission obtained documents and other records evidencing that traders at the Energy Company submitted trade data to Platts' *Inside FERC*, and certain of the information was inaccurate. *See* Mansfield Declaration, ¶¶ 7-9.

The Commission has further identified the specific traders at the Energy Company who either did, or may have, reported data to *Inside FERC*, and has taken their testimony to explore, *inter alia*, (i) the duration and frequency of their reporting; (ii) their methodology; (iii) their knowledge about the specific information Platts required; (iv) their intent with regard to reporting trade data; (v) their understanding about, if, how, and to what extent Platts used the information each trader submitted; and finally (vi) their familiarity regarding the reporting practices of other Energy Company traders. *See* Mansfield Declaration ¶¶ 12-13.

However, the Commission has not been able to confirm, either from the traders' testimony or from its review of the documents the Energy Company produced,[24] the scope of the Energy Company's reporting to Platts and how Platts used the information. Indeed, although one Energy Company trader confirmed that he reported to *Inside FERC* and he submitted false information with an intent to move the indices, he could not remember (i) when or how many times he engaged in this activity; (ii) the specific market(s) or hub(s) he sought to manipulate; and (iii) whether he ever succeeded. *See* Mansfield Declaration, ¶ 9.

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[24] The Energy Company has produced documents and recordings of telephone conversations to the Division pertaining to price reporting by Energy Company traders. *See* Mansfield Declaration, ¶ 10. However, a comparison of these records to the testimony of Energy Company traders suggests that the Energy Company no longer is in possession of all of the price reports Energy Company traders submitted to companies like Platts. *Id.* at ¶ 11.

McGraw-Hill is the sole source of information concerning whether it used the trade data Energy Company traders submitted and, if so, to what extent it used this information. Given this fact, it would appear that only McGraw-Hill can confirm whether information reported by the Energy Company caused or contributed to artificial index prices. McGraw-Hill stands between those that report the information and the regulator responsible for protecting the integrity of the commodity markets. Essentially, in this investigation, as in others, McGraw-Hill has blocked the Commission from acquiring information that is critical to enforcing the Act.

Finally, inasmuch as the Energy Company acknowledges providing information to Platts concerning natural gas transactions, but cannot document that all the information was received by Platts, the Commission needs to verify that the documents that the Energy Company was able to produce were, in fact, transmitted by the Energy Company to Platts for evaluation for the indices. Simply stated, McGraw-Hill is the direct and most logical source of the information transmitted by the Energy Company to Platts since it was the only other participant to the exchange, and it is the sole source of information regarding the configuration of the indices integral to the Commission's ability to quantify the harm when the data submitted was false.

C. McGraw-Hill Has Been Compelled To Produce Much Of The Information The Commission Seeks In Analogous Proceedings

Although no court has ruled on the applicability of the reporter's privilege in any action between the Commission and McGraw-Hill, at least one court in Texas compelled the company to produce the same type of information the Commission now seeks, without limitation, in response to a subpoena issued by a grand jury as part of a criminal investigation.

In *In re Grand Jury Subpoena*, United States District Court for the Southern District of Texas, Houston Division, *Miscellaneous No. 04-77*, the Office of the United States Attorney for the Southern District of Texas issued a subpoena to McGraw-Hill, seeking

documents concerning the company's use of trade data submitted by a certain energy company to Platts in the compilation of Platts indices. McGraw Hill moved to quash the grand jury subpoena, invoking the qualified reporter's privilege. *See* Mansfield Declaration, *Ex. 18.* In response, the Government pointed out that to prove that the false reporting in question constituted criminal conduct, it had to show that the false reports affected the index prices Platts compiled. *Id.* at pp. 22-23. As is the case here, McGraw-Hill was the only source of this information. *Id.* The District Court (Hittner, J.) rejected McGraw-Hill's invocation of the privilege and required it to produce the information without redaction. *See id, Ex. 19.*

The Commission does not suggest that this Court is bound by Judge Hittner's decision in the context of a grand jury subpoena. However, the obstacles to the criminal investigation created by McGraw-Hill's refusal to produce the requested records are the same obstacles the Commission faces in completing its investigation of the Energy Company -- namely, the information McGraw-Hill, and McGraw-Hill alone, possesses concerning the trade data the Energy Company submitted to Platts and how Platts used this information to compile its indices, is critical to showing the scope of the Energy Company's inaccurate submissions and whether the Energy Company succeeded in manipulating Platts' indices. Given that the Commission seeks this information from McGraw-Hill pursuant to a valid law enforcement action intended to protect the public interest, the Commission respectfully suggests that McGraw-Hill be compelled to produce the requested information and documents.

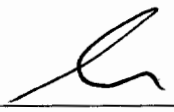
IV. Conclusion

For the foregoing reasons, this Court should issue an order to show cause, requiring McGraw-Hill to appear and demonstrate why an order should not be entered compelling it to comply fully with the subpoena issued by the Commission. As no good cause

can be shown, this Court should order McGraw-Hill to comply immediately in all respects with the Commission's subpoena.

Dated: June 16, 2005
Washington, D.C.

Respectfully submitted,



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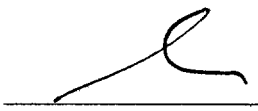
CERTIFICATE OF SERVICE

I, Anthony M. Mansfield, hereby certify that on June 16, 2005 I caused a copy of *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 Subpoena* to be served by Federal Express on counsel for The McGraw-Hill Companies, Inc., Victor Kovner, Esq., Davis Wright Tremaine LLP, 1633 Broadway, New York, New York 10019.



Anthony M. Mansfield

Appendix A[1]

Request No. 2:

All documents containing any information, which references, indicates or discusses any false, inaccurate or otherwise incorrect price and volume information about natural gas transactions submitted to McGraw-Hill by Energy Company.

Response No. 2:

McGraw-Hill objects to this request on the grounds that it is overbroad, vague, unduly burdensome, and calls for the production of documents protected by the reporter's privilege. A supplemental response setting forth the basis for McGraw-Hill's claim of privilege was annexed to McGraw-Hill's November 12, 2002 response to a prior subpoena in *In the Matter of Certain Trading by Energy and Power Marketing Firms* and is hereby incorporated by reference.

Request No. 3:

All documents reflecting submissions by Energy Company received or used by McGraw-Hill to gather, calculate and publish price and volume information about natural gas transactions.

Response No. 3:

McGraw-Hill objects to this request on the grounds that it is overbroad, vague, unduly burdensome, and calls for the production of documents protected by the reporter's privilege.

Request No. 4:

All documents concerning communications between Energy Company and McGraw-Hill including, without limitation, written correspondence (*e.g.* facsimile), electronic correspondence (*e.g.* email and/or instant message), telephone logs, audio recordings, notes, memoranda, and diary or journal entries.

Response No. 4:

McGraw-Hill objects to this request on the grounds that it is overbroad, vague, unduly burdensome, and calls for the production of documents protected by the reporter's privilege.

Request No. 5:

All documents reflecting, discussing and implementing the formulas used to calculate index prices for each natural gas delivery point at which Energy Company submitted price and volume information on each day of the Relevant Time Period.

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[1] The Relevant Time Period for all of the requests, as defined in the subpoena, is from January 1, 2000 to December 31, 2002.

Response No. 5:

McGraw-Hill objects to this request on the grounds that it is overbroad, vague, unduly burdensome, and calls for the production of privilege documents. Notwithstanding these objections, and subject to same, McGraw-Hill notes that it does not use "formulas" to calculate index prices, but rather utilizes published methodologies. Certain documents responsive to this request were previously produced by McGraw-Hill in response to prior CFTC subpoenas in *In the Matter of Certain Trading by Energy and Power Marketing Firms* at MGH 152 through 156 and MGH 296 through 322 (produced on or about November 12, 2002) and MGH 325 through MGH 335 (produced on or about March 26, 2003). Additional documents are submitted herewith at MGH 2461 through 2466.

Request No. 6:

All documents containing or describing any price and volume data about natural gas transactions submitted to McGraw-Hill by Energy Company that were rejected from, or otherwise not included in, a calculation of a price index.

Response No. 6:

McGraw-Hill objects to this request on the grounds that it is overbroad, vague, unduly burdensome, and calls for the production of documents protected by the reporter's privilege.

Request No. 10:

All documents reflecting any complaints received from any person or any conversation concerning false, inaccurate or otherwise incorrect price and volume information or manipulation by Energy Company.

Response No. 10:

McGraw-Hill objects to this request on the grounds that it is overbroad, vague, unduly burdensome, and calls for the production of documents protected by the reporter's privilege.

Request No. 14:

All documents concerning reporting of information about natural gas transactions McGraw-Hill provided to Energy Company, including, without limitation, instructions about the types of natural gas transactions for which Energy Company should submit information.

Response No. 14:

McGraw-Hill objects to this request on the grounds that it is overbroad, unduly burdensome, and calls for the production of documents protected by the reporter's privilege.