

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:)	
)	CFTC Docket No.: 01-22
)	
)	
THOMAS A. JOHNS,)	ORDER INSTITUTING
)	PROCEEDINGS PURSUANT TO
)	SECTIONS 6(c) AND 6(d) OF THE
)	COMMODITY EXCHANGE ACT,
Respondent.)	MAKING FINDINGS AND IMPOSING
)	REMEDIAL SANCTIONS
)	
)	

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that Thomas A. Johns (“Johns”) has violated Sections 6(c), 6(d), and 9(a)(2) of the Commodity Exchange Act, as amended (the “Act”), 7 U.S.C. §§ 15, 13b, and 13(a)(2) (1994). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether Johns engaged in the violations set forth herein, and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of an administrative proceeding, Johns has submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Without admitting or denying the findings of fact in this Order, Johns consents to the entry of this Order in full and final settlement of any alleged violations of the above referenced laws and acknowledges service of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions (“Order”). Johns consents to the use of the findings in this Order only in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.¹

¹ Johns does not consent to the use of the Offer or this Order, or the findings to which he has consented in the Offer, as the sole basis for any other proceeding brought by the Commission, other than a proceeding brought to enforce the terms of this Order. The findings to which Johns has consented in the Offer, as contained in this Order, are not binding on any other person or entity named as a respondent in this or in any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

Today, the Commission issued an Order finding that Avista Energy, Inc. (“Avista Energy”) violated, *inter alia*, Sections 6(c), 6(d), and 9(a)(2) of the Act, by engaging in trading specifically designed to manipulate the settlement price of the Palo Verde and California-Oregon-Border electricity futures contracts traded on the New York Mercantile Exchange. *See In re Avista Energy, Inc.*, CFTC Docket No. _____, (Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) Of The Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions against Avista Energy, Inc. and Michael T. Griswold).²

As Avista Energy’s Vice President of Trading, Johns was responsible for Avista Energy’s trading operations. In that capacity, Johns was a controlling person of Avista Energy and supervised the Avista Energy traders who engaged in trading specifically designed to manipulate certain electricity futures prices. As a controlling person of Avista Energy, Johns had constructive knowledge and, therefore, knowingly induced, directly or indirectly, the manipulative trading by Avista Energy’s traders. Therefore, as shown below, pursuant to Section 13(b) of the Act, Johns is liable as a controlling person for Avista Energy’s violations of the Act.

B. RESPONDENT

Thomas A. Johns currently resides at 5411 North Timber Rim Drive, Spokane, Washington 99212. Johns was Avista Energy’s Vice President of Trading during all relevant times. Johns has never been registered with the Commission in any capacity.

C. FACTS

On several occasions during the period of April 1998 through August 1998 (the “Relevant Period”), a small group of Avista Energy employees (“Avista Energy’s Traders”)³ engaged in a scheme to manipulate the settlement price of Palo Verde (“PV”) and California Oregon Border (“COB”) (collectively, “Western U.S.”) electricity futures contracts that were traded on the New York Mercantile Exchange (“NYMEX”). Prior to and during the Relevant Period, Avista Energy entered into various over-the-counter (“OTC”) electricity derivatives, including cash-settled OTC option contracts (“OTC Options”), whose value at expiration was based on the daily settlement price of the corresponding Western U.S. electricity futures contracts on the expiration day of options trading (the “Options Expiration Day”). Through this manipulative scheme, Avista Energy was able to realize or increase its net gain on these OTC Options that were in or near the money.

² Neither Avista Energy nor Michael T. Griswold admitted or denied the findings of fact contained in that Order by consenting to its entry. *See* Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions (“Order”) at 1.

³ None of Avista Energy’s Traders is currently employed by Avista Energy, its parent or affiliates.

Avista Energy was able to create artificial settlement prices in NYMEX PV and/or COB electricity futures contracts through the manner in which it placed large orders for NYMEX Western U.S. electricity futures contracts on the Options Expiration Days in April, May, July and August 1998. Specifically, Avista Energy's Traders engaged in these manipulative practices: (a) selling May and June 1998 NYMEX PV electricity futures contracts at prices less than the prevailing bids during the close on the April and May 1998 Options Expiration Days; (b) purchasing August and September 1998 NYMEX PV electricity futures contracts at prices higher than the prevailing offers during the close on the July and August 1998 Options Expiration Days; and (c) purchasing August 1998 NYMEX COB electricity futures contracts at prices higher than the prevailing offers during the close on the July 1998 Options Expiration Day.

As Avista Energy's Vice President of Trading, Johns exercised broad powers. Johns was involved in the start-up of Avista Energy in 1997. At all relevant times, except for August 1998, all of Avista Energy's traders, in both its Spokane and Houston offices, reported to Johns, including those traders involved in the manipulative trading activity. After the first week of August, only the traders in the Spokane office reported to Johns. Johns was responsible for hiring, firing and preparing performance appraisals for those traders, and he was responsible for the company's overall trading strategies and for establishing company-wide trading-position parameters. Johns failed to stop the manipulative trading activity of Avista Energy's Traders.

D. LEGAL DISCUSSION

Johns is liable for Avista Energy's violations of Sections 6(c), 6(d), and 9(a)(2) of the Act because he, as Vice President of Trading, was a controlling person pursuant to Section 13(b) of the Act. Under Section 13(b) of the Act, controlling person liability exists for one who directly or indirectly controls any person who has violated any provision of the Act (or regulations promulgated thereunder) and who either acted with a lack of good faith or knowingly induced the acts that constitute the violation. *Monieson v. CFTC*, 996 F.2d 852, 859 (7th Cir. 1993). Johns is liable as a controlling person because he:

1. Exercised general control over Avista Energy;
2. Possessed the power or ability to control the specific transaction or activity upon which the manipulative trading violations are predicated; and
3. Acted with a lack of good faith or knowingly induced, directly or indirectly, the acts constituting the violations.

Id.

1. Johns exercised general control over Avista Energy

Control is defined as the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting

securities, by contract or otherwise. *Id.* Johns was responsible for all of Avista Energy's Traders and the trading strategies that they pursued. All of the traders reported to him, and he made hiring, firing, and related decisions regarding the traders. By these actions, Johns was a controlling person of Avista Energy.

2. Johns controlled the manipulative trading activities

As Avista Energy's Vice President of Trading, Johns had the ability to and did exercise supervisory control of the transactions and activities upon which Avista Energy's primary violations of the Act are predicated, that is, the manipulative trading activities at issue. Johns was responsible for hiring and supervised Avista Energy's Traders, strategized with them and approved their general trading positions, and had responsibility for the company's trading strategies.

3. Johns acted with constructive knowledge and, therefore, knowingly induced Avista Energy's manipulative trading

A controlling person knowingly induces the acts constituting a violation when, through a conscious act or omission, he causes, directly or indirectly, the controlled person to violate the Act or Commission Regulations. *In re Spiegel* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,232 at 34,765 (CFTC August 21, 1986). To establish knowing inducement of a violation under Section 13(b), it must be shown that the controlling person "had actual or constructive knowledge of the core activities that constitute the violation at issue and allowed them to continue." *In re Armstrong* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,332 at 42,613 (CFTC Mar. 10, 1995) (citation omitted). The facts show that for purposes of Section 13(b) of the Act, Johns, by virtue of his role in strategizing about and overseeing Avista Energy's trades, had constructive knowledge and accordingly knowingly induced the manipulative trading that violated Sections 6(c), 6(d) and 9(a)(2).

Accordingly, Johns is liable for Avista Energy's violations of Sections 6(c), 6(d) and 9(a)(2) of the Act as a controlling person under Section 13(b) of the Act.

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Johns violated Sections 6(c), 6(d), and 9(a)(2) of the Act, as amended, 7 U.S.C. 15, 13b, and 13(a)(2) (1994).

V. OFFER OF SETTLEMENT

Johns has submitted an Offer of Settlement in which, without admitting or denying the allegations or the findings herein, he: acknowledges service of the Order; admits jurisdiction of the Commission with respect to the matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based upon violations or for enforcement of the Order; waives service of a complaint and notice of hearing, a hearing, all post-hearing procedures, judicial

review by any court, any objection to the staff's participation in the Commission's consideration of the Offer, any claim of double jeopardy based on the institution of this proceeding or the entry of any order imposing a civil monetary penalty or other relief, and all claims which he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412 (1994), as amended by Pub. L. No. 104-21, §§ 231-32, 110 Stat. 847, and Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1 *et seq.*, relating to, or arising from, this action; stipulates that the record basis on which this Order is entered consists solely of this Order, including the findings in this Order; and consents to the Commission's issuance of this Order, in which the Commission makes findings, including findings that Johns, pursuant to Section 13(b) of the Act, violated Sections 6(c), 6(d), and 9(a)(2) of the Act and orders that he cease and desist from violating the provisions of the Act he has been found to have violated; that he pay a civil monetary penalty of fifty thousand dollars (\$50,000.00) within ten (10) business days of the entry of this Order, and that Johns be prohibited, for a period of twelve (12) months beginning on the day the Order is issued, from trading on or subject to the rules of any registered entity, as that term is defined by Section 1a(29) of the Act, as amended by the Commodity Futures Modernization Act of 2000, Appendix E, Pub. L. 106-554, 114 Stat. 2763 (2000), 7 U.S.C. § 1a(29), and that requires all registered entities to refuse Johns privileges thereon; and that he comply with his undertakings.

VI. ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Johns shall cease and desist from violating Sections 6(c), 6(d), and 9(a)(2) of the Act; and
2. Johns shall pay a civil monetary penalty in the amount of fifty thousand dollars (\$50,000.00) within ten (10) days of the date of the Order. Johns shall make such payment by U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and addressed to Dennese Posey, or her successor, the Division of Trading and Markets, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581 under cover of a letter that identifies Johns and the name and docket number of the proceeding. Copies of the cover letter and the form of payment shall be simultaneously transmitted to Phyllis J. Cela, Acting Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, N.W., Washington, D.C. 20581, and to Charles J. Sgro, Regional Counsel, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1 World Trade Center, Suite 3747, New York, NY 10048. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9a(2), if Johns fails to pay the full amount of this penalty within fifteen (15) days of the due date, he shall be automatically prohibited from the privileges of all registered entities until he shows to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of payment has been made;
3. Johns shall be prohibited, for a period of twelve (12) months beginning on the day the Order is issued, from trading on or subject to the rules of any registered entity, as that term is defined by Section 1a(29) of the Act, as amended by the Commodity Futures Modernization Act

of 2000, Appendix E, Pub. L. 106-554, 114 Stat. 2763 (2000), 7 U.S.C. § 1a(29), and requires all registered entities to refuse Johns privileges thereon; and

4. Johns shall comply with the following undertakings:

A. neither he nor any of his agents or employees, if any, shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order, or creating, or tending to create, the impression that the Order is without a factual basis; provided, however, that nothing in this provision affects Johns's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party; Johns shall take all steps necessary to ensure that his agents or employees, if any, understand and comply with this undertaking; and

B. to cooperate fully with the Commission and its staff in this proceeding by, among other things: 1) responding promptly, completely, and truthfully to any inquiries or requests for information; 2) authenticating documents; 3) testifying completely and truthfully; and 4) not asserting privileges under the Fifth Amendment of the United States Constitution.

By the Commission.

Dated: August 21, 2001

Catherine D. Dixon
Assistant Secretary to the Commission
Commodity Futures Trading Commission