

III.

The Commission finds the following:

A. SUMMARY

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”)² 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 cash-settled over-the-counter (“OTC”) derivatives contracts, whose value at expiration was based on the daily settlement price of one of the 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 option contracts that were in or near the money.

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. In addition, Avista Energy’s Traders supported one of the manipulations through non-competitive trading. Avista Energy also failed to keep adequate records of the positions established through its OTC derivatives contracts or its cash-market positions as required of reportable traders.

Griswold, one of the small group of Avista Energy’s Traders who traded in the OTC physical market for Western U.S. electricity (the “physical market”), willfully aided and abetted Avista Energy’s manipulations. Specifically, Griswold helped to devise the manipulative scheme with other Avista Energy personnel and, as part of the manipulative scheme, traded in the physical market. As part of the manipulative scheme, Griswold’s physical market trading was designed, on occasion, to create a false impression of Avista Energy’s need for Western U.S. electricity and, on other occasions, to hedge positions in NYMEX Western U.S. electricity futures contracts that were entered into as a result of Avista Energy’s manipulative scheme.

² None of Avista Energy’s Traders is currently employed by Avista Energy, its parent or affiliates.

B. RESPONDENTS

Avista Energy, Inc., a Washington corporation, with offices at 201 W. North River Drive, Spokane, Washington, is a wholly owned subsidiary of Avista Capital, Inc., which in turn is a wholly owned subsidiary of Avista Corporation (known until January 1999 as Washington Water Power Company). Avista Corporation, a publicly traded company, is a diversified energy business and the parent of a number of subsidiaries, almost all of which are located in the State of Washington. Avista Energy, which was incorporated in April 1997, is Avista Corporation's energy marketing and trading subsidiary. Currently, Avista Energy's principal trading office is in Spokane, Washington. In 1998, Avista Energy also had a trading office in Houston, Texas. Avista Energy never has been registered with the Commission in any capacity.

Michael T. Griswold currently resides at 2415 Western Avenue, Apartment 401, Seattle, Washington. During the Relevant Period, Griswold was an energy trader in Avista Energy's Spokane, Washington office. Griswold primarily traded in the physical market. Griswold never has been registered with the Commission in any capacity.

C. FACTS

1. The NYMEX Western U.S. Electricity Futures Contracts

On March 29, 1996, NYMEX launched two electricity futures contracts focusing on the west coast power grid: PV, based on delivery of a monthly block of on-peak electricity at the Palo Verde switchyard in Arizona; and COB, based on delivery of on-peak electricity at the California/Oregon border. The contracts were designed to serve as hedging and pricing instruments for investor-owned, municipal and federal electric utilities, marketers and retail end users which generate, trade or consume electricity in the western and southwestern United States.

Under NYMEX rules during the Relevant Period, the last trading day of the NYMEX PV and COB electricity futures contracts was the fourth business day prior to the first calendar day of the delivery month. Under the relevant rules, NYMEX options expired on the business day immediately preceding the last futures trading day (sometimes referred to as the "penultimate" day). Thus, for example, the August 1998 NYMEX PV electricity futures contract ceased trading on July 28, 1998, and options on the August 1998 NYMEX PV electricity futures contract expired on July 27, 1998. Pursuant to NYMEX Rule 6.52C, during the Relevant Period, the daily settlement price of the nearby month on Options Expiration Days was calculated as the weighted (by transaction size) average of the transaction prices occurring during the last two minutes of trading (the "Close"). On the Options Expiration Days during the Relevant Period, the Close of trading on the NYMEX PV electricity futures contracts began at 3:23 p.m. Eastern time and ended at 3:25 p.m. Eastern time, while the Close of trading on the NYMEX COB electricity futures contracts began at 3:28 p.m. Eastern time and ended at 3:30 p.m. Eastern time.

During the Relevant Period, the NYMEX futures markets in Western U.S. electricity were illiquid, exhibiting relatively low volume and open interest, and exhibiting relatively wide bid-ask spreads. Volume was substantially higher than normal on Options Expiration Days.

However, open interest tended to decline significantly from its peak during the weeks before Options Expiration Day. Experienced floor brokers and traders generally considered an order of 25 or 30 contracts to be large enough so that it could move prices materially in the NYMEX Western U.S. electricity futures contracts.

2. Avista Energy's Power Trading Group

Avista Energy staffed its new Spokane power marketing and trading operation with options and futures traders, most of whom came from other energy marketing and trading firms, as well as schedulers, real time traders and OTC traders, most of whom came from Avista Corporation. Avista Energy opened an office in Houston, Texas in the Summer of 1997. It staffed the Houston office with traders and support personnel from outside and inside Avista Corporation and its subsidiaries and affiliates in the second half of 1997. The Houston office traded in natural gas and eastern and western United States power, both OTC and on the NYMEX. Avista Energy traded in the hourly, daily, forwards, futures, options, and swaps markets. Although most of the OTC trading, scheduling, and real time trading took place out of the Spokane office, virtually all of the trading of NYMEX Western U.S. electricity futures contracts took place in the Houston office. Avista Energy first began trading Western US electricity futures contracts in March 1998, one month prior to the first manipulation described below. The trading activity discussed below was developed by and involved a small group of employees. All of the trading was done for the account of Avista Energy.

3. The Strategy Behind the Manipulative Scheme

During and prior to the Relevant Period, several electricity trading firms, including Avista Energy, traded OTC option contracts that were cash-settled based on the NYMEX daily settlement price of either NYMEX PV or COB electricity futures contracts on Options Expiration Day. Avista Energy's OTC option contracts were profitable only when the settlement price of the NYMEX Western U.S. electricity futures contracts rose or fell to certain levels and became more profitable as the settlement price exceeded or declined from those levels.

In light of the illiquidity of the market for NYMEX Western U.S. electricity futures contracts, Avista Energy's strategy was that under certain circumstances it might be possible to materially raise or lower the settlement price of NYMEX Western U.S. electricity futures contracts on Options Expiration Day with a large buy or sell order. To the extent that Avista Energy's Traders could distort the price for futures contracts with an order at the Close on Options Expiration Day that was smaller than the positions created by Avista Energy's OTC derivatives contracts, Avista Energy's Traders thought that they might be able to profit via an artificially created increase in the value of its OTC derivatives contracts. This would be so because the value of those contracts would exceed any losses incurred from buying NYMEX Western U.S. electricity futures contracts at an artificially high price or selling futures contracts at an artificially low price.

Avista Energy's Traders recognized that there was a risk associated with the manipulative scheme of placing a large buy or sell order for NYMEX Western U.S. electricity futures contracts on the Close to benefit Avista Energy's OTC derivatives contracts. With the OTC

derivatives contracts expiring, Avista Energy would be left with a significant and risky position in NYMEX Western U.S. electricity futures contracts as trading commenced on the last futures trading day, that is, the business day after the Options Expiration Day. Thus, the manipulative scheme involved two strategies to mitigate this risk.

The first strategy involved trading forward contracts in the physical market in quantities and for delivery periods and locations that were approximately equal and opposite to the orders for trades that Avista Energy was placing for NYMEX Western U.S. electricity futures contracts on the Close. Because the physical market was much more liquid than the market for NYMEX Western U.S. electricity futures contracts, trades in the physical market could be executed without materially affecting prices in the physical market. Avista Energy's position the next day as a result of this strategy was a low-risk spread between its physical market positions and the expiring NYMEX Western U.S. electricity futures contracts, which could easily be unwound.

The other strategy involved placing orders for NYMEX Western U.S. electricity futures contracts prior to the Close on Options Expiration Day (either during the days leading up to Options Expiration Day or earlier in the trading day on Options Expiration Day) opposite to those that Avista Energy would place on the Close on that day. Thus, for example, during July 1998, Avista Energy shorted August 1998 NYMEX Western U.S. electricity futures contracts because the manipulative scheme on the July Options Expiration Day involved placing a large buy order. These short positions, which were accumulated slowly and in a manner designed to avoid influencing prices in the market, would be offset by the large buy orders during the Closes of the NYMEX Western U.S. electricity futures contracts. Many of these short futures positions were accumulated via Exchange for Physicals (EFPs) transactions pursuant to NYMEX rules. In each EFP, a short futures position and an opposite long physical position were acquired in a simultaneous transaction.

4. The Manipulative Scheme on Friday, April 24, 1998

April 24, 1998 was the Options Expiration Day for the May 1998 NYMEX PV electricity futures contract. Avista Energy's OTC derivatives contracts would increase in value as the settlement price of the May 1998 NYMEX PV electricity futures contract declined.

Some of Avista Energy's Traders had several conversations before the Close on April 24 to strategize about Avista Energy's trading on the Close in order to move the price of the May 1998 NYMEX PV electricity futures contract down on the Close.

Immediately prior to the beginning of the Close, one of Avista Energy's Traders placed an order to sell 50 May 1998 NYMEX PV electricity futures contracts and instructed a NYMEX floor broker to sell those contracts at as low a price as possible because Avista Energy was seeking a certain settlement price. During the Close, as prices for May 1998 NYMEX PV electricity futures contracts were declining, another of Avista Energy's Traders placed another order to sell 10 more May 1998 NYMEX PV electricity futures contracts as low as possible. The floor broker responded by violating prevailing bids, that is, selling contracts at a price lower than the bid price available in the electricity ring at that time, while executing Avista Energy's order during the Close to effectuate the manipulative scheme and by selling, for the most part, May

1998 NYMEX PV electricity futures contracts at progressively lower prices. After the Close, one of Avista Energy's Traders told the broker that he wanted the lowest settlement price possible. That trader also used another floor broker to sell May 1998 NYMEX PV electricity futures contracts during the Close, instructing that floor broker that the sales should occur at as low a price as possible.

After the Close, in speaking with Griswold, one of Avista Energy's Traders observed that Avista Energy "took this market down just like sixty cents in seventy lots," and that "it was successful [what] we did at the end there." Griswold stated that the physical market followed "right down too," that Avista Energy would "probably end up making money on the net hedge," and that they should "do it again sometime." In another conversation, Griswold explained that, to benefit its OTC options contracts, one of Avista Energy's Traders was "selling on the NYMEX [while] I was going over the counter and buying." Griswold further explained that it was "interesting how you can move that market around" and that the market "doesn't reflect value at all, it just reflects . . . whatever someone's agenda is."

5. The Manipulative Scheme on Friday, May 22, 1998

May 22, 1998 was the Options Expiration Day for the June 1998 NYMEX PV electricity futures contract. Avista Energy's OTC derivatives contracts would increase in value as the settlement price declined in the June 1998 NYMEX PV electricity futures contract.

Before the Close, Avista Energy's Traders discussed and strategized about the manipulative scheme for the settlement price of the June 1998 NYMEX PV electricity futures contract. The manipulative scheme in May involved placing large sell orders to be executed during the Close to achieve the lowest settlement price possible. As in April, Griswold's role in May was to purchase electricity deliverable in June in the physical market to hedge Avista Energy's large order to sell futures contracts on the NYMEX.

Before the Close, one of Avista Energy's Traders placed an order to sell June 1998 NYMEX PV electricity futures contracts and instructed that not only did Avista Energy want the lowest price possible, but that if such price could not be achieved, Avista Energy did not want any sales to occur.

During the Close, Avista Energy placed orders and instructed the floor brokers to sell June 1998 NYMEX PV electricity futures contracts on the Close at the lowest possible price.

The floor brokers followed the instructions given by one of Avista Energy's Traders by selling at progressively lower prices, except for one trade. Avista Energy sold a total of 180 June NYMEX PV electricity futures contracts on the Close. In conversations after the Close, one of the floor brokers boasted to one of Avista Energy's Traders that he violated prevailing bids in executing Avista Energy's order during the Close to effectuate the manipulative scheme. According to that broker: "whatever bid they gave me, 'cause they were bidding for three's and two's, I offered right through them . . . said 'sold' 'at 20,' they gave me a 40 bid, 'at 20,' . . . so that made it very simple."

In a conversation with a trader from another firm, occurring on June 24, 1998, one of Avista Energy's Traders admitted that he had manipulated the April and May Closes on Options Expiration Day. He boasted that the price for NYMEX Western U.S. electricity futures contracts was "easily manipulated."

6. The Manipulative Scheme on Monday, July 27, 1998

July 27, 1998 was the Options Expiration Day for the August 1998 NYMEX PV and COB electricity futures contracts. Avista Energy's OTC derivatives contracts would increase in value as the settlement price increased in the August 1998 NYMEX Western U.S. electricity futures contracts.

To effectuate the manipulative scheme on July 27, 1998, one of Avista Energy's Traders stated that his intention was to trade in such a manner as to drive up the settlement prices of the August 1998 NYMEX Western U.S. electricity futures contracts. Again, he enlisted the help of brokers and had discussions with a broker's phone clerk about the manipulative scheme and how best to execute it.

Shortly before the start of the PV Close, one of Avista Energy's Traders called a floor broker and told the broker to bid up the price of the August 1998 NYMEX PV electricity futures contract. He further instructed that the floor broker could buy up to 10 August 1998 NYMEX PV electricity futures contracts, but that Avista Energy did not care whether the floor broker actually bought any of those contracts as long as the floor broker simply "stay[ed] on the bid strong." This trader then instructed another floor broker's phone clerk that Avista Energy wanted the price on the August 1998 NYMEX PV electricity futures contracts to "go to the moon"

This trader remained on the line with the floor broker's phone clerk during the PV and COB Closes, and repeatedly instructed the clerk to get the settlement prices higher. During and after the Closes, one of Avista Energy's Traders instructed that he wanted the settlements as "high as can be" and, with reference to COB, that he wanted the settlement price to be "well above" \$45.00. After being told by the phone clerk that the price of the August 1998 NYMEX PV electricity futures contracts had increased two dollars as a result of Avista Energy's and the floor broker's actions, this trader responded that he "wanted it more than that."

To further increase the PV settlement price, one of Avista Energy's Traders and another broker entered into a non-competitive trade. Following the COB Close, one of the floor brokers who traded for Avista Energy during the Closes called one of Avista Energy's Traders to discuss another NYMEX floor broker who had "a problem" because that broker had overbought August 1998 NYMEX COB electricity futures contracts. This trader was told that this other broker will "get settlement wherever you want it . . . will work with us and get the settlement where we need it." This trader declined to purchase additional August 1998 NYMEX COB electricity futures contracts, but did agree to buy an additional 25 lots of August 1998 NYMEX PV electricity futures contracts, provided that this trade would count in the calculation of the settlement price of the August 1998 NYMEX PV electricity futures contract. This trader stated that Avista Energy wanted the PV settlement price "to be up there," and initially proposed buying the 25 August

1998 NYMEX PV electricity futures contracts at a price of \$57.00. The broker responded that the settlement price for August 1998 NYMEX PV electricity futures contracts would be above \$57.00 and thus the price that this trader initially suggested would have the effect of lowering the settlement price. At the suggestion of the floor broker, Avista Energy agreed to a purchase price of \$58.00, which was only ten cents less than the high for August 1998 NYMEX PV electricity futures contracts during the Close.

While one of Avista Energy's Traders was placing NYMEX trades during the Closes, Griswold simultaneously bought electricity deliverable in August in the physical market. Avista Energy's Traders believed that such trading in the physical market would better enable Avista Energy to further drive up the settlement prices of the August 1998 NYMEX Western U.S. electricity futures contracts.

7. The Manipulative Scheme on Tuesday, August 25, 1998

August 25, 1998 was an Options Expiration Day for the September 1998 NYMEX PV electricity futures contract. Avista Energy's OTC derivatives contracts would increase in value as the settlement price rose above \$45.00 in the September 1998 NYMEX PV electricity futures contract.

Early in the day on August 25, 1998, some of Avista Energy's Traders discussed their trading strategy for the day. One of Avista Energy's Traders told Griswold that he was "bidding [PV] up on the floor" and that he had to buy additional September 1998 NYMEX PV electricity futures contracts. In another conversation the same trader stated that \$45.00 was an important number for Avista Energy in PV, that PV was close to trading at that level, and that he planned to buy over 100 contracts during the Close. Griswold said he too had a position that would benefit from a \$45.00 price, and he asked whether it could be pushed up to that level.

As he had done during the prior Options Expiration Days, one of Avista Energy's Traders deliberately traded in a manner to manipulate the settlement price of the September 1998 NYMEX PV electricity futures contract. In effectuating the manipulative scheme, a floor broker filled Avista Energy's order at progressively-increasing prices and violated prevailing offers.

At the same time, Griswold bought in the physical market electricity deliverable in September. Avista Energy's Traders believed that such trading in the physical market would better enable Avista Energy to further drive up the settlement prices of the September 1998 NYMEX PV electricity futures contract.

D. LEGAL DISCUSSION

1. Secondary Liability

Avista Energy, as does any company or entity, acts through its employees or other agents. Avista Energy contends that the violative actions were taken without authorization or knowledge of the President of Avista Energy or of management of its parent companies, a contention about which the Commission makes no findings.³ Nonetheless, Section 2(a)(1)(A)(iii) of the Act, 7 U.S.C. §4, provides authority to hold Avista Energy liable for the act(s), omission(s), or failure(s) of Avista Energy's Traders in connection with the trading activity described above. Thus, as discussed in more detail below, in pursuing the course of action set for the above, Avista Energy attempted to manipulate and did manipulate the price of Palo Verde and COB futures contracts on or subject to the rules of a contract market, in violation of Sections 6(c), 6(d), and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13(b) and 13(a)(2).

2. Overview of the Law of Attempted Manipulation and Manipulation

Section 9(a)(2) provides that it is unlawful for “[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity.” Sections 6(c) and 6(d) together authorize the Commission to serve a complaint and provide for the imposition of, among other things, fines and penalties if the Commission “has reason to believe that any person ... has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market ... or otherwise is violating or has violated any of the provisions of [the] Act.”

Together, Sections 6(c), 6(d), and 9(a)(2) of the Act prohibit both manipulation and attempted manipulation. To sustain a charge of manipulation in cases involving congested markets, i.e., squeezes or corners, the following four factors have been used: (1) that the respondent had the ability to influence market prices; (2) that the respondent specifically intended to do so; (3) that artificial prices existed; and (4) that the respondent caused the artificial price. *See In re Cox* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,786 at 34,061 (CFTC July 15, 1987).

The following elements generally are required to show an attempted manipulation: (1) an intent to affect the market price; and (2) some overt act in furtherance of that intent. *See In re Abrams*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,479 at 43,136 (CFTC July 31, 1995). *See also In re Hohenberg Brothers*, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,271 at 21,477 (CFTC Feb. 18, 1977).

³ Avista Energy contends that the actions described in this Order were unauthorized by Avista Energy's President, and management of Avista Capital, its parent, and Avista Corporation, and its dba Avista Utilities. It contends further that its President and management of its parent companies were unaware of the manipulative trading activity. The Commission makes no findings with regard to those contentions. Regardless of those contentions, Avista Energy is properly found to have violated the manipulation provisions of the Act.

The test for attempted manipulation and manipulation is a flexible one. As the U.S. Court of Appeals for the Eighth Circuit has recognized, the means of “manipulation are limited only by the ingenuity of man”; thus, “the test of manipulation must largely be a practical one if the purposes of the Commodity Exchange Act are to be accomplished. . . . The aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand.” *Cargill v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972). Manipulation cases tend to be characterized by fact-specific, case-by-case analysis, which examines whether prices have been affected by factors other than the legitimate forces of supply and demand. *See Frey v. CFTC*, 931 F.2d 1171, 1175 (7th Cir. 1991). *Accord In re Indiana Farm Bureau Cooperative Association*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,796 at 27,281 (CFTC Dec. 17, 1982) (defining manipulation or attempted manipulation “has fallen to case-by-case judicial development”).

3. Avista Energy Had the Ability to Influence Prices

In *In re Henner*, 30 A.D. 1151, 1169 (1971), an administrative decision of the Commodity Exchange Authority, the Commission’s predecessor agency, a Judicial Officer, while acknowledging that Henner, a trader on the Chicago Mercantile Exchange, “was not in a position where he could exercise a squeeze or a corner on the market,” found Henner had manipulated shell egg futures prices by his purchases at the close of trading. Going into that day, Henner had established a large long position. In an apparent attempt to raise the settlement price, he engaged in a flurry of buying at the close and made a final bid eleven ticks higher than his previous purchase. The last bid was accepted and resulted in a limit-up-price.

The resulting closing price was much higher than those of previous days and that price level quickly fell the next day. The Judicial Officer concluded that the price was artificial primarily because Henner “paid more than he had to . . . for the purpose of causing the closing price to be at that high level.” *Id.* at 1194. He found no other factors besides Henner’s bidding that could account for the unusual and unsustainable price rise and held that Henner’s unusual and unnecessarily high last bid demonstrated Henner’s clear intent to create an artificial price, which, if sustained, would have benefited his previously established long position. *Id.* at 1157-75.

Here, during the Relevant Period, Avista Energy possessed the financial ability to place, and did place, large, market-moving orders during the Closes on Options Expiration Days in a low volume, illiquid market. The prices of the contracts were materially affected by the large orders that Avista Energy’s Traders placed during the Closes on Options Expiration Days. For instance, during the April Close, Avista Energy’s Traders noted that they succeeded in moving market prices down by approximately sixty cents as a result of Avista Energy’s orders. Avista Energy possessed the ability to and did, in fact, influence market prices.

4. Avista Energy Specifically Intended to Influence Market Prices

To prove the intent element of manipulation or attempted manipulation, it must be shown that Avista Energy “acted (or failed to act) with the purpose or conscious object of causing or

effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand.” *Indiana Farm Bureau*, ¶ 21,796 at 27,283. “[I]ntent is the essence of manipulation.” *Id.* at 27,282. Here, the evidence is overwhelming that Avista Energy intended to influence market prices. The findings above show that during the Relevant Period Avista Energy and Griswold repeatedly expressed the intent to affect settlement prices and employed a scheme to effectuate this intent.

Moreover, Avista Energy’s repeated trading with no need for NYMEX PV and COB positions, at prices worse than what was being bid or offered, had no apparent business or economic rationale but for an intent to affect the prices of the futures contracts and thus increase Avista Energy’s financial gain on its OTC derivatives contracts.

5. Artificial Prices Existed

Proof of a successful manipulation ordinarily requires a showing that prices became artificial. *Cox*, ¶ 23,786 at 34,061. An “artificial” (also termed a “distorted”) price is one “that does not reflect the market or economic forces of supply and demand.” *Id.* at 34,064. The Commission has further explained that:

[T]o determine whether an artificial price has occurred one must look at the aggregate forces of supply and demand and search for those factors which are extraneous to the pricing system, are not a legitimate part of the economic pricing system, are not a legitimate part of the economic pricing of the commodity, or are extrinsic to that commodity market. When the aggregate forces of supply and demand bearing on a particular market are all legitimate, it follows that the price will not be artificial. On the other hand, when a price is affected by a factor which is not legitimate, the resulting price is necessarily artificial. Thus, the focus should not be as much on the ultimate price, as on the nature of the factors causing it.

Id. (quoting *Indiana Farm Bureau*, ¶ 21,796 at 27,288 n.2).

In *Henner*, the Judicial Officer found that “[t]he inference is inescapable that [Henner] paid more than he had to ... for the purpose of causing the closing price to be at that high level. No further proof is needed to show” that the settlement price was artificial. *Henner*, 30 A.D. at 1194. As the Judicial Officer held, by paying more than he “would have had to pay,” Henner “succeeded in creating an artificially high closing price for November shell egg futures on the Exchange on June 25. Such action is ‘manipulation’ prohibited by the Commodity Exchange Act.” *Id.* at 1174-75.

Likewise, in the instant case, an artificial settlement price existed for the nearby NYMEX PV electricity futures contracts on the Options Expiration Days in April, May, July, and August 1998, and for the nearby NYMEX COB electricity futures contract on the Options Expiration Day in July 1998. The findings show that Avista Energy’s Traders engaged in a scheme to sell and did sell NYMEX PV electricity futures contracts for less than it could have on the Options Expiration Days in April and May 1998. Likewise, the evidence shows that Avista Energy’s

Traders purchased NYMEX Western U.S. electricity futures contracts and NYMEX PV electricity futures contracts for more than it had to pay on the Options Expiration Days in July and August 1998, respectively. As discussed above, this trading made no economic or business sense, but for an intent to manipulate the market to Avista Energy's advantage. Avista Energy thus acted as an illegitimate force in the market and the resulting futures prices were artificial.

6. Avista Energy Caused Artificial Prices

Causation of artificial prices is established when it is demonstrated that artificial market prices resulted from the conduct of a trader, or group of traders acting in concert, rather than the legitimate forces of supply and demand. See *Cargill*, 452 F.2d at 1170-72; *Indiana Farm Bureau*, ¶ 21,796 at 27,286. The manipulator's actions need not be the sole cause of the artificial price. "It is enough, for purposes of a finding of manipulation in violation of sections 6(b) and 9 of the [A]ct, that respondents' action contributed to the price [movement]." *In re Kosuga*, 19 A.D. 603, 624 (1960). See also *Cox*, ¶ 23,786 at 34,066 (recognizing there can be multiple causes of an artificial price and holding that a charge of manipulation can be sustained where respondents' acts are a proximate cause of the artificial price).

In that regard, Avista Energy's trading constituted at least 50 percent of the net trading activity on Avista Energy's side of the market (*i.e.*, selling during April and May and buying during July and August) during each of the Options Expirations Days in question.⁴ Moreover, Avista Energy expressly placed its orders for the purpose of influencing the price, and, by their actions, Avista Energy's Traders succeeded in creating artificial settlement prices. Further, as noted, Avista Energy, through its brokers, repeatedly violated bids and offers and executed transactions outside of the prevailing bid-ask spread. Avista Energy accordingly caused artificial prices to exist.

Therefore, as Avista Energy's conduct satisfies all of the requisite elements of market manipulation, as well as the elements for attempted market manipulation, Avista Energy has violated Sections 6(c), 6(d) and 9(a)(2) of the Act.

7. Aiding and Abetting Avista Energy's Manipulation of Settlement Prices

Pursuant to Section 13(a) of the Act, Griswold willfully aided and abetted Avista Energy's manipulation of settlement prices. To establish aiding and abetting liability, it must be shown that:

- (1) the Act was violated (the case law often refers to the violation as the "unlawful venture" that the alleged aider and abettor knowingly joins),
- (2) the named respondent had knowledge of the wrongdoing underlying the violation, and
- (3) the named respondent intentionally assisted the primary wrongdoer.

⁴ To determine "net" buying and selling, the net change in the futures position of each person who executed trades in the Close was calculated. For example, a broker who bought twenty contracts and sold ten contracts during the Close would be a net buyer of ten contracts.

In re Nikkhah, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,129 at 49,888 n.28 (CFTC May 12, 2000) citing *In re R&W Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 at 47,746 (CFTC Mar. 16, 1999), aff'd in part and rev'd and remanded in part as to sanctions, 205 F.3d 165 (5th Cir), *cert. denied*, 121 S. Ct. 54 (2000).

Through his actions, Griswold willfully aided and abetted Avista Energy's violations of the Act by devising the manipulative scheme with some of Avista Energy's Traders and, as part of the manipulative scheme, by trading in the OTC cash or forward market. As part of the manipulative scheme, Griswold's physical market trading was designed, on occasion, to create a false impression of Avista Energy's need for Western U.S. electricity and, on other occasions, to hedge positions in NYMEX Western U.S. electricity futures contracts that were entered into as a result of Avista Energy's manipulative scheme.

8. Non-competitive Trading

Section 4c(a)(A) of the Act prohibits accommodation trades or fictitious sales, and Section 4c(a)(B) of the Act prohibits any transaction that is used to cause any price to be recorded which is not a true and bona fide price. In addition, Commission Regulation Section 1.38(a) requires that all trades on a contract market, unless otherwise specified, shall be executed openly and competitively during regular trading hours.

Generally, fictitious sales include transactions that appear to have been submitted to the open market while negating the market risk or price competition inherent in competitive trading. *In re Three Eight Corp.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,749 at 40,444-45 (CFTC June 16, 1993). Noncompetitive trading consists of the use of trading techniques that negate risk or price competition that is incident to an open, competitive market. *In re Bear Stearns*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,662 (CFTC Jan. 25, 1991).

By engaging in a noncompetitive trade to raise the settlement price in the August 1998 NYMEX PV electricity futures contract, Avista Energy violated Sections 4c(a)(A) and (B) of the Act and Commission Regulation 1.38(a).

9. Recordkeeping Violations

Section 4i of the Act and Commission Regulation Section 18.05 imposes certain recordkeeping requirements on every trader who holds a reportable futures or options position. By failing to keep adequate records showing its cash and other positions, Avista Energy violated Section 4i of the Act and Commission Regulation Section 18.05.

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Avista Energy violated Sections 4c(a)(A) and (B), 4i, 6(c), 6(d), and 9(a)(2) of the Act, as amended, 7 U.S.C. §§ 6c(a)(A) and (B),

6i, 15, 13b, and 13(a)(2) (1994), and Commission Regulations Sections 1.38 and 18.05, 17 C.F.R. §§ 1.38 and 18.05 (2001). The Commission also finds that Griswold, pursuant to Section 13(a) of the Act, 7 U.S.C. § 13c(a) (1994), violated Sections 6(c), 6(d), and 9(a)(2) of the Act, 7 U.S.C. §§ 6c(a)(A) and (B), 6i, 15, 13b, and 13(a)(2) (1994).

V. OFFERS OF SETTLEMENT

1. Avista Energy's Offer of Settlement

Avista Energy has submitted an Offer of Settlement in which, without admitting or denying the allegations or the findings herein, it: 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 it 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. Pursuant to the Offer of Settlement herein Avista Energy agrees to entry of an Order, in which the Commission makes findings, including findings that Avista Energy violated Sections 4c(a)(A) and (B), 4i, 6(c), 6(d), and 9(a)(2) of the Act and Commission Regulations Sections 1.38 and 18.05 and orders that Avista Energy cease and desist from violating the provisions of the Act and Commission Regulations it has been found to have violated, and agrees to pay a civil monetary penalty of two million one hundred thousand dollars (\$2,100,000) within ten (10) business days of the entry of this Order, and that it comply with its undertakings.

2. Griswold's Offer of Settlement

Griswold 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 it 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 Griswold, pursuant to Section 13(a) 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 one hundred ten thousand dollars (\$110,000) within ten (10) business days of the entry of this Order, and that prohibits him, for a period of eighteen (18) 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 Griswold privileges thereon; and that he comply with his undertakings.

VI. ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Avista Energy shall cease and desist from violating Sections 4c(a)(A) and (B), 4i, 6(c), 6(d), and 9(a)(2) of the Act, and Sections 1.38 and 18.05 of the Regulations; and

2. Avista Energy shall pay a civil monetary penalty in the amount of two million one hundred thousand dollars (\$2,100,000.00) within ten (10) days of the date of the Order. Avista Energy 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 Avista Energy 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 Avista Energy fails to pay the full amount of this penalty within fifteen (15) days of the due date, it shall be automatically prohibited from the privileges of all registered entities until it 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; and

3. Avista Energy shall comply with the following undertakings:

A. neither it nor any of its agents or employees 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 herein affects Avista Energy's: (i) testimonial obligations; or (ii) right, to take legal positions in other proceedings to which the Commission is not a party; Avista Energy shall take all steps necessary to ensure that its agents or employees 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; and 3) testifying completely and truthfully.

4. Griswold shall cease and desist from violating Sections 6(c), 6(d), and 9(a) of the Act; and

5. Griswold shall pay a civil monetary penalty in the amount of one hundred ten thousand dollars (\$110,000.00) within ten (10) days of the date of the Order. Griswold 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 Griswold 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 Griswold 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;

6. Griswold shall be prohibited, for a period of eighteen (18) 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 Griswold privileges thereon; and

7. Griswold 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 Griswold's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party; Griswold 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