

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of:)
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Dynergy Marketing & Trade and)
West Coast Power LLC)
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Respondents.)
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_____)

CFTC Docket No.: 03-03

**ORDER INSTITUTING
PROCEEDINGS PURSUANT TO
SECTIONS 6(c) AND 6(d) OF THE
COMMODITY EXCHANGE ACT,
MAKING FINDINGS AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that Dynergy Marketing & Trade ("Dynergy Marketing & Trade") and West Coast Power LLC ("West Coast Power") have violated Sections 6(c), 6(d), and 9(a)(2) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. §§ 9, 13b, 13(a)(2) and 15 (2000). Further, the Commission has reason to believe that Dynergy Marketing & Trade has violated Commission Regulations 1.31, 1.35 and 1.40, 17 C.F.R. §§ 1.31, 1.35 and 1.40 (2002). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Dynergy Marketing & Trade and West Coast Power (collectively, "Respondents") 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, the Respondents have submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Without admitting or denying the findings of fact herein, the Respondents consent to the entry of this Order in full and final settlement of any alleged violations of the above referenced laws or regulations and acknowledge 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"). Respondents consent to the use by the Commission of the findings herein in the proceeding brought by the Commission and in any other proceeding brought by the Commission or to which the Commission is a party.¹

¹ Respondents do not consent to the use of their Offer or the findings in this Order as the sole basis for any other proceeding brought by the Commission, other than a proceeding brought to enforce the terms of this Order. Respondents do not consent to the use of the Offer or the findings in this Order by any other person or entity in this or any other proceeding. The findings made in this Order are not binding on any other person or entity, including, but not limited to, any person or entity named as a defendant or respondent in any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

From at least January 2000 through June 2002 (the "Relevant Period"), Respondents reported false natural gas trading information, including price and volume information, to certain reporting firms. Price and volume information is used by the reporting firms in calculating published surveys or indexes ("indexes") of natural gas prices for various hubs throughout the United States. Dynegy Marketing & Trade knowingly submitted the false information to the reporting firms in an attempt to skew those indexes to Dynegy Marketing & Trade's financial benefit. Natural gas futures traders refer to the published indexes for price discovery and for assessing price risks.

In an effort to ensure that its reported information would be used by the reporting firms, Dynegy Marketing & Trade caused Respondent West Coast Power to submit information misrepresenting that West Coast Power was a counterparty to the fictitious trades. In addition, Dynegy Marketing & Trade did not maintain required records concerning the information which it provided to the reporting firms or the true source of the information relayed to those firms as required by Commission Regulations. As a result of their actions, Respondents violated the Act.

Dynegy Marketing & Trade has cooperated in the Commission's investigation of this matter, including, among other things, by conducting an independent internal investigation and by providing the results of that investigation to Commission staff. The Commission has taken that cooperation into consideration in its decision to accept Respondents' Offer.

B. RESPONDENTS

Dynegy Marketing & Trade is a Colorado general partnership, the partners of which are DMT Holdings, L.P. and Dynegy GP Inc. Dynegy Marketing & Trade's headquarters are located at 1000 Louisiana Street, Suite 5800, Houston, Texas 77002. Dynegy Marketing & Trade was one of the largest natural gas marketers in the United States and in 2001, Dynegy Marketing & Trade's natural gas sales averaged 8.2 billion cubic feet (Bcf) per day. Dynegy Marketing & Trade maintained a large natural gas trading operation located on a single floor in its Houston offices that traded natural gas, including futures contracts on the New York Mercantile Exchange ("NYMEX"). Dynegy Marketing & Trade is a non-clearing member of the NYMEX. Dynegy Marketing & Trade has never been registered with the Commission in any capacity.

West Coast Power LLC, is a joint venture that was equally owned by an affiliate of Dynegy Marketing & Trade and another energy company. As part of the joint venture, Dynegy Marketing & Trade, among other things, handled all the administrative services and all commodity related concerns. To accomplish these services, Dynegy Marketing & Trade utilized

its own personnel who billed their time to West Coast Power, which itself did not have any employees.

C. FACTS

1. Gas Market Participants' Use of Information from Reporting Firms

During the Relevant Period, reporting firms compiled and published indexes of natural gas prices for natural gas hubs throughout the United States. The indexes were calculated based upon trading information, including volume and price information, collected by the reporting firms from market participants. Natural gas futures traders refer to the prices published by the reporting firms for price discovery and for assessing price risks. For instance, an increase in prices at a natural gas trading hub signals enhanced demand, and futures traders take account of both price movements and apparent demand when conducting their futures trading.

2. Respondents Report False Market Information

From at least January 2000 through June 2002, Respondents provided false reports to the reporting firms and failed to keep copies of required reports. The false reports included altering price and volume of actual trades and reporting nonexistent trades using the phones, faxes, and the Internet. Respondents continued to provide the false trade data because they believed that it benefited their trading positions or derivatives contracts.

Dynegy Marketing & Trade enlisted West Coast Power to give an appearance of propriety to the false data. During the relevant period for example, as relayed in a Dynegy Marketing & Trade e-mail, a Dynegy Marketing & Trade employee established the following procedure:

Enron owns the index. Unless we start increasing our volumes we are going to continue to take pain on the cash index. I will get you the contact for [the reporting firm]. I would suggest representing yourself as [W]est [C]oast [LLC] We can show offsetting transactions on our activity.

Respondents' dual submission of the false information to the reporting firms was designed to elude detection from the reporting firms by showing trades with an actual counterparty.

D. LEGAL DISCUSSION

1. By Reporting False Market Information, Respondents Violated Section 9(a)(2) of the Act

Section 9(a)(2) of the Act makes it a violation for any person "knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly

inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce[.]”² See, e.g., *United Egg Producers v. Bauer Int'l Corp.*, 311 F. Supp. 1375, 1383 (S.D.N.Y. 1970) (concluding that false press releases regarding egg importation “tended to affect the price of eggs in interstate commerce”); *In re Soybean Futures Litig.*, 892 F. Supp. 1025, 1046 (N.D. Ill. 1995) (concluding that false reports can influence prices and constitute part of a manipulation claim).

Respondents violated Section 9(a)(2) of the Act when they knowingly delivered false price and volume information, including fictitious trades, to the reporting firms. As discussed above, price and volume information affect or tend to affect the market price of natural gas, including futures prices as traded on the NYMEX. As such, Respondents violated Section 9(a)(2) of the Act.

2. By Attempting to Manipulate Prices, Respondents Violated Sections 6(c), 6(d) and 9(a)(2) of the Act

Sections 6(c) and 6(d) of the Act together authorize the Commission to serve a complaint and provide for the imposition of, among other things, civil monetary penalties and cease and desist orders 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 registered entity ... or otherwise is violating or has violated any of the provisions of [the] Act.” 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 registered entity, or to corner or attempt to corner any such commodity.”

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 Bros. Co.*, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,271 at 21,477 (CFTC Feb. 18, 1977). To prove the intent element of manipulation or attempted manipulation, it must be shown that Dynegy Marketing & Trade “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.” *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). “[I]ntent is the essence of manipulation.” *Id.* at 27,282.

Respondents specifically intended to report false or misleading or knowingly inaccurate market information concerning, among other things, trade prices and volumes, to manipulate the

² Under Section 2(a)(1)(B) of the Act and Section 1.2 of the Commission Regulations, the act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust. “[I]t does not matter if the principal participated in or even knew about the agent's acts; he is strictly liable for them.” *Stotler and Co. v. CFTC*, 855 F.2d 1288, 1292 (7th Cir. 1988) (citing *Cange v. Stotler*, 826 F.2d 581, 589 (7th Cir. 1987); *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966-67 (7th Cir. 1986)).

price of natural gas in interstate commerce. Respondents' provision of the false reports and their collusion, which was designed to thwart the reporting firms' detection of the false information, constitutes overt acts in furtherance of the attempted manipulation. By so doing, Respondents' conduct constitutes an attempted manipulation under Section 9(a)(2) of the Act, which, if successful, could have affected prices of NYMEX natural gas futures contracts.

3. Dynegy Marketing & Trade's Failure to Retain Trading Records Violated Commission Regulations 1.31, 1.35 and 1.40

Dynegy Marketing & Trade, a non-clearing NYMEX member, failed to keep records required of members of a contract market, including records of what Dynegy Marketing & Trade relayed to the reporting firms. Together, Commission Regulations 1.31, 1.35 and 1.40 required Dynegy Marketing & Trade to maintain and to produce upon request to the Commission certain records. Commission Regulations 1.31 and 1.35 required Dynegy Marketing & Trade to maintain and to produce "full, complete, and systematic records, together with all pertinent data and memoranda, of all transactions relating to its business of dealing in commodity futures, commodity options, and cash commodities." In addition, Regulation 1.40 further requires that: "[E]ach member of a contract market shall, upon request, furnish or cause to be furnished to the Commission a true copy of any letter, circular, telegram, or report published or given general circulation by such ... member which concerns crop or market information or conditions that affect or tend to affect the price of any commodity, and the true source of or authority for the information contained therein."

By failing to keep the required records, including records of what Dynegy Marketing & Trade relayed to the reporting firms, Dynegy Marketing & Trade violated Commission Regulations 1.31, 1.35 and 1.40. As discussed above, price and volume information affect or tend to affect the market price of natural gas, including futures prices as traded on the NYMEX.

IV.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Respondents violated Sections 6(c), 6(d), and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13b, 13(a)(2) and 15 (2000), and that Dynegy Marketing & Trade violated Commission Regulations 1.31, 1.35 and 1.40, 17 C.F.R. §§ 1.31, 1.35 and 1.40 (2002).

V.

OFFER OF SETTLEMENT

Respondents have 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 and filing 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 (1996), 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.* (2002), 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, Dynegy Marketing & Trade and West Coast Power agree to entry of an Order, in which the Commission makes findings, including findings that Dynegy Marketing & Trade and West Coast Power violated Sections 6(c), 6(d), and 9(a)(2) of the Act and that Dynegy Marketing & Trade has violated Commission Regulations 1.31, 1.35 and 1.40 and orders that Respondents cease and desist from violating the provisions of the Act and Commission Regulations they have been found to have violated, and agree to pay a civil monetary penalty of five million dollars (\$5,000,000) within five (5) business days of the entry of this Order, and that they comply with their undertakings as set forth in their Offer and this Order.

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Dynegy Marketing & Trade and West Coast Power shall cease and desist from violating Sections 6(c), 6(d), and 9(a)(2) of the Act and Dynegy Marketing & Trade shall cease and desist from violating Commission Regulations 1.31, 1.35 and 1.40;

2. Respondents, jointly and severally, shall pay a civil monetary penalty in the amount of five million dollars (\$5,000,000) within 5 (five) business days of the date of the entry of this Order, and make such payment by electronic funds transfer to the account of the Commission at the United States Treasury or by certified check or bank cashier's check made payable to the Commodity Futures Trading Commission and addressed to Dennese Posey, or her successor, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies the Respondents and the name and docket number of this proceeding. Copies of the cover letter and the form of payment shall be simultaneously transmitted to Gregory G. Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581, and to Stephen J. Obie, Regional Counsel, Division of Enforcement, Commodity Futures Trading Commission, 140 Broadway, New York, New York 10005. If payment is not made in accordance with the requirements of this paragraph, the Order shall be vacated and the proceedings reinstated;

3. Respondents shall comply with the following undertakings:

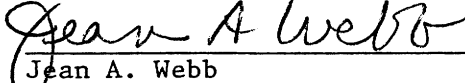
A. COOPERATION WITH THE COMMISSION

Respondents shall continue to cooperate fully and expeditiously with the Commission, and its staff, including the Division of Enforcement, in this proceeding and any investigation, civil litigation, or administrative matter related to the subject matter of this proceeding. Respondents agree that this undertaking includes the Respondents in this proceeding and any subsidiaries or affiliates within their control. As part of such cooperation, Respondents agree to comply fully, promptly, and truthfully to any inquiries or requests for information including but not limited to (1) requests for authentication of documents; (2) requests for any documents within Respondents' possession, custody, or control, including inspection and copying of documents; (3) requests for agents and employees of Respondents to testify completely and truthfully to the Division; (4) requests to produce any current (as of the time of the request) officer, director, or employee of Respondents, regardless of the employee's location, for interviews, depositions, or testimony, and to provide testimony or assistance at any trial related to the subject matter of this proceeding; and (5) requests for assistance in locating and contacting any prior (as of the time of the request) officer, director, or employee of Respondents. Respondents also agree that they will not undertake any act which would limit their ability to fully cooperate with the Commission. Respondents designate Kenneth M. Rosenzweig, Esq., of the Mayer Brown Rowe & Maw law firm to receive all requests for information pursuant to this undertaking. Should Respondents seek to change the designated person to receive such requests, notice shall be given to the Division of such intention 14 days before it occurs. Any person designated to receive such request shall be located in the United States.

B. PUBLIC STATEMENTS

By neither admitting nor denying the findings of fact, Respondents agree that neither they nor any of Respondents' agents or employees under their authority and control 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 factual or legal basis; provided, however, that nothing in this provision shall affect Respondents' (i) testimonial obligations; or (ii) right to take factual or legal positions in other proceedings to which the Commission is not a party. Respondents will undertake all steps necessary to assure that all of their agents, and employees under their authority and control understand and comply with this agreement.

By the Commission.



Jean A. Webb
Secretary of the Commission

Dated: December 18, 2002