

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of:

DUKE ENERGY TRADING AND
MARKETING, L.L.C.,

Respondent.

CFTC Docket No. 03-26

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 Duke Energy Trading and Marketing, L.L.C. ("DETM"), an affiliate of Duke Energy Corporation ("Duke Energy"), has 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, and 13(a)(2) (2001). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether DETM ("Respondent") 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 Respondent has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Without admitting or denying the findings of fact herein, the Respondent consents to the entry of this Order in full and final settlement of any alleged violations of the above referenced laws or regulations solely as they relate to the activities and conduct described in Section C below, 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"). Respondent consents to the use by the Commission of the findings herein in this proceeding brought by the Commission and in any other proceeding brought by the Commission or to which the Commission is a party.¹

¹ Respondent does not consent to the use of its 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. Respondent does 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 August 2002 (the "Relevant Period"), DETM's Houston offices reported false information, including price and volume information concerning natural gas cash transactions, to certain reporting firms. Price and volume information is used by reporting firms in calculating published indexes of natural gas prices for various pipeline hubs throughout the United States. During the relevant period, DETM's Houston offices knowingly reported trades that did not occur and reported certain trades at false prices and/or volumes in an attempt to skew the indexes to benefit the Respondent's trading positions.

The Commission recognizes the cooperation of the Respondent and Duke Energy during the Division of Enforcement's investigation of this matter.

B. RESPONDENT

Duke Energy Trading and Marketing, L.L.C. ("DETM") is a limited liability company organized and existing under the laws of the State of Delaware. DETM is approximately 60% owned by Duke Energy² and approximately 40% by another unrelated entity. DETM's principal place of business is 5400 Westheimer Court, Houston, Texas. During all times relevant herein, DETM marketed natural gas, electricity and other energy-related products to a wide range of customers across North America. Specifically, the Houston offices of DETM conducted natural gas marketing operations at eastern power and gas trading hubs for the region of the Eastern United States, which did not include the region of the Western Systems Coordinating Council.

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. Participants in the natural gas markets use these indexes to price and settle commodity transactions. Moreover, 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 either stronger demand or weakened

² Duke Energy is a corporation organized and existing under the laws of the State of North Carolina, and is headquartered in Charlotte, North Carolina. During all times relevant to this matter, Duke Energy's subsidiaries and affiliates provided energy and energy services and offered physical delivery and management of both electricity and natural gas throughout the U.S. and abroad. These and other services were provided through several business segments, including DETM.

supply, and futures traders take account of both price movements and changes in the supply/demand balance when conducting their futures trading.

2. DETM Reported False Market Information

From at least January 2000 through August 2002, the Respondent, specifically the Houston offices of DETM, delivered false reports to the reporting firms. The reports, submitted using telephones, faxes, and the Internet via electronic mail messages, contained nonexistent trades, as well as certain actual trades in which the price and/or volume was altered. Respondent's Houston offices knowingly delivered false trade information to reporting firms in an effort to skew the indexes to benefit the Respondent's trading positions.

D. LEGAL DISCUSSION

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

Section 9(a)(2) of the Act makes it unlawful 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[.]" 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).

Respondent violated Section 9(a)(2) of the Act when employees of DETM's Houston offices knowingly delivered false price and volume information to the reporting firms.³ 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, the Respondent violated Section 9(a)(2) of the Act.

2. By Attempting to Manipulate Prices, DETM 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

³ Under Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2001), and Section 1.2 of the Commission's Regulations, 17 C.F.R. § 1.2 (2003) 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)). Consequently, Respondent is liable for its employees' violations of the Act.

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 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 DETM “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.

Respondent specifically intended to report false or misleading or knowingly inaccurate market information concerning, among other things, trade prices and volume of trading in an attempt to manipulate the price of natural gas in interstate commerce. These actions constitute overt acts in furtherance of the attempted manipulation. By so doing, the Respondent’s conduct constitutes an attempted manipulation under Sections 6(c), 6(d), and 9(a)(2) of the Act, which, if successful, could have affected prices of NYMEX natural gas futures contracts.

IV.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that the Respondent violated Sections 6(c), 6(d), and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13b, 13(a)(2) and 15 (2001).

V.

OFFER OF SETTLEMENT

Respondent 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 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 any 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.

862-63 (1996), and Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1 *et seq.* (2003), 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, the Respondent and Duke Energy agree to entry of an Order, in which the Commission makes findings, including findings that the Respondent violated Sections 6(c), 6(d), and 9(a)(2) of the Act and orders that the Respondent cease and desist from violating the provisions of the Act that it has been found to have violated; and the Respondent will be liable for paying a total civil monetary penalty of Twenty-Eight Million Dollars (\$28,000,000); and, Respondent and Duke Energy comply with the conditions and undertakings as set forth in this Order.

VI.

Accordingly, IT IS HEREBY ORDERED THAT:

1. Respondent shall cease and desist from violating Sections 6(c), 6(d), and 9(a)(2) of the Act;
2. Respondent will be liable for paying a total civil monetary penalty of Twenty-Eight Million Dollars (\$28,000,000) within ten 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, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies the Respondent and the name and docket number of this proceeding. Copies of the cover letter and the form of payment shall be simultaneously transmitted to Vincent A. McGonagle, Senior Deputy Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581. If payment is not made in accordance with the requirements of this paragraph, Respondent shall be subject to further proceedings pursuant to Section 6(c) and Section 6(e)(2) of the Act, 7 U.S.C. §§ 9 and 9a(e)(2) (2001), for violating a Commission Order; and,
3. Respondent and Duke Energy shall comply with the following conditions and undertakings as specified:

(a) **Future Cooperation With the Government**

Respondent and Duke Energy shall continue to cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement ("Division"), and all other federal government agencies (hereafter collectively referred to as the "Government") in this proceeding, and in any investigation, civil litigation, or administrative matter related to the subject matter of this proceeding or any current or future Government investigation related thereto. Respondent and Duke Energy agree to

cooperate fully and expeditiously with the Government's ongoing efforts to discover documents and information related to reporting trade prices and/or volumes to energy reporting services and price indexes. As part of such cooperation, Respondent and Duke Energy agree to:

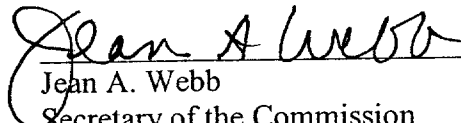
- (1) preserve all records relating to the subject matter of this proceeding, including, but not limited to audio files, e-mails, and trading records; and
- (2) comply fully, promptly, and truthfully with any inquiries or requests for information including but not limited to inquiries or requests:
 - (i) for authentication of documents;
 - (ii) for any documents within Respondent's and Duke Energy's possession, custody, or control, including inspection and copying of documents;
 - (iii) to produce any current (as of the time of the request) officer, director, employee, or agent of Respondent and Duke Energy, regardless of the employee's location and at such location that minimizes Commission travel resources, to provide assistance at any trial, proceeding, or Commission investigation related to the subject matter of this proceeding, including but not limited to, requests for testimony, depositions, and/or interviews, and to encourage them to testify completely and truthfully in any such proceeding, trial, or investigation; and
 - (iv) for assistance in locating and contacting any prior (as of the time of the request) officer, director, or employee of Respondent and Duke Energy.

Respondent and Duke Energy also agree that they will not undertake any act that would limit their ability to fully cooperate with the Commission. Respondent and Duke Energy designate Peter J. Kadzik of the Dickstein Shapiro Morin & Oshinsky LLP law firm to receive all requests for information pursuant to this undertaking. Should Respondent or Duke Energy 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, Respondent and Duke Energy agree that neither they nor any of Respondent's and Duke Energy's 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 Respondent's and Duke Energy's: (i) testimonial obligations; or (ii) right to take factual or legal positions in other proceedings to which the Commission is not a party. Respondent and Duke Energy 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
Commodity Futures Trading Commission

Dated: September 17, 2003