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MISCELLANEOUS

Charles A. Wright, *Federal Practice and Procedure*, 1A §§ 142, 145 (3d ed. 2007)3, 5, 16

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES OF AMERICA)	
)	
)	
)	Criminal Number:
v.)	H-08-411
)	
MARK DAVID RADLEY,)	
JAMES WARREN SUMMERS,)	
CODY DEAN CLABORN)	
And)	Judge Gray H. Miller
CARRIE KIENENBERGER,)	
)	
Defendants.)	
)	

DEFENDANTS’ MOTION TO DISMISS AND TO COMPEL ELECTION OF COUNTS TWO THROUGH SEVENTEEN AND COUNTS EIGHTEEN AND NINETEEN OF THE SUPERSEDING INDICTMENT AND MEMORANDUM IN SUPPORT OF MOTION

Defendants Mark David Radley, James Warren Summers, Cody Dean Claborn, and Carrie Kienenberger submit this Motion to Dismiss and to Compel Election of Counts Two through Seventeen and Eighteen and Nineteen of the Superseding Indictment and Memorandum in Support.

I. INTRODUCTION

A. Statement of Nature and Stage of Proceeding.

On October 25, 2007, a grand jury in the Northern District of Illinois returned a twenty count Indictment (“First Indictment”) against defendants. Defendants filed the initial Motion to

Dismiss and Compel Election of Counts Two through Thirteen of the First Indictment on November 14, 2008, arguing: (1) the “unit of prosecution” for both manipulation and cornering was the cumulative conduct, not any individual transaction; and (2) the counts were multiplicitous because the government could not charge twelve separate market manipulations and market corners in individual counts based on transactions that were interdependent and in furtherance of cumulative transactional conduct. *See* Docket Entry 190 (“initial Motion”). The initial Motion also argued that Counts Two through Thirteen of the First Indictment were duplicitous because manipulation and cornering are separate offenses with different elements and the government may not charge them both in the same counts. *Id.* at p. 15-18.

Although the government sought additional time to respond to the initial Motion and to defendants’ other motions to dismiss, the government did not respond to any of these motions. Rather, a Superseding Indictment, which added five more counts of manipulation, dropped one transactional manipulation count, and added two counts of cornering, was filed on January 29, 2009. *See* Docket Entry 219. The trial is scheduled to begin on October 5, 2009.

B. Statement of the Issues and Standard of Review.

The issues presented in this Motion are whether Counts Two through Seventeen of the Superseding Indictment, all of which allege commodity price manipulation, are multiplicitous, and whether Counts Eighteen and Nineteen of the Superseding Indictment, both of which allege cornering, are also multiplicitous.

To cure the multiplicity defects that remain in the Superseding Indictment, the Court should order the government to elect the count and offense pursuant to which it will proceed and dismiss the multiplicitous counts. The Court has the discretion to order such election and

dismissal. Charles A. Wright, *Federal Practice and Procedure*, 1A §145 (3d ed.); *see also United States v. Smith*, 591 F.2d 1105, 1108 (5th Cir. 1979) (*citing* Wright).

C. Summary of Argument.

Despite the government's efforts to address the pleading defects raised in the First Indictment, Counts Two through Seventeen of the Superseding Indictment remain defectively multiplicitous. Counts Two through Twelve allege commodity price manipulation based on individual transaction counts that the government acknowledges "are very similar to the eleven CEA counts in the original indictment relating to defendants' sales and purchases of TET propane that allegedly caused artificial prices to be published to other market participants." *See* February 10, 2009 letter from U.S. Department of Justice to the Court, p. 2, attached at Exhibit 1. Instead of consolidating its multiplicitous manipulation counts, the government *added* five counts, alleging commodity price manipulation and attempted price manipulation based on the Oil Price Information Service ("OPIS") average. *See* Counts Thirteen through Seventeen, Superseding Indictment at 20-21, ¶¶ 72 – 73.

The government cannot charge sixteen separate manipulations and two separate corners based on individual transactions that were interdependent and in furtherance of the described cumulative transactional conduct. The prevailing case law, including relevant CFTC civil cases involving manipulation and cornering, demonstrates that the "unit of prosecution" for both manipulation and cornering is the cumulative offense, not allegations based on individual transactions. Allowing multiple counts for cumulative conduct presents significant constitutional issues, including giving the jury an opportunity for a compromise verdict that would severely impact the defendants' ability to secure a fair trial.

II. FACTUAL BACKGROUND

The allegations in this case concern defendants' transactions in February 2004 TET propane. These transactions took place when defendants worked for the natural gas liquids trading bench at BP America Production Company, an indirect subsidiary of BP America, Inc. ("BP").

Counts One and Counts Twenty through Twenty-six are not subject to this Motion but are dependent on a finding of violation of the Commodity Exchange Act ("CEA"). Count One alleges that from February 5, 2004 to March 29, 2004 defendants engaged in a conspiracy to: (1) manipulate and corner the market in TET propane in violation of 7 U.S.C. §13(a)(2) ("Section 13(a)(2)"); and (2) defraud participants in the TET propane market through the use of wire communications in violation of 18 U.S.C. §1343. Superseding Indictment at 1-18, ¶¶ 1-69. Counts Twenty through Twenty-Six allege wire fraud violations claiming defendants caused counterparties to send wire transfer payments to BP in payment for TET propane transactions occurring as a result of defendants' alleged fraud. Superseding Indictment at 22-25, ¶¶ 78-80.

This Motion addresses Counts Two through Nineteen of the Superseding Indictment. Counts Two through Twelve allege eleven separate violations of Section 13(a)(2) based on actual and attempted manipulation of the February 2004 TET propane market. *Id.* at 19-20, ¶ 71. These counts allege that defendants caused eleven separate artificial prices in February 2004 TET propane beginning at 2:28 p.m. on February 24, 2004 and ending at 1:48 p.m. on February 27, 2004. *Id.* Counts Thirteen through Seventeen allege five separate manipulation offenses based on the claim that defendants caused the OPIS average price for February TET propane to be artificial and inflated for five days beginning on February 23, 2004 and ending on the last trading day of the month, February 27, 2004. *Id.* at 20, ¶ 73.

Count Eighteen alleges that on February 24, 2004, defendants cornered the February 2004 TET propane market. *Id.* at 21, ¶ 75. Count Nineteen alleges that on February 27, 2004, defendants again cornered the February 2004 TET propane market. *Id.*

III. ARGUMENT

A. The Sixteen Counts of Violating Section 13(a)(2) Are Multiplicitous.

1. The Multiplicity Doctrine Precludes Charging a Single Offense in Multiple Counts.

Multiplicity is the improper charging of a single offense in multiple counts. *United States v. Lemons*, 941 F.2d 309, 317 (5th Cir. 1991). The multiplicity doctrine protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *United States v. Podell*, 869 F.2d 328, 330 (7th Cir. 1989). Multiplicity also prejudices defendants by creating the false impression that multiple crimes were committed rather than one, presenting the likelihood of a compromise verdict: “[c]ompromise verdicts or assumptions that, with so many charges pending the defendant must be guilty on at least some of them, pose significant threats to the proper functioning of the jury system.” *United States v. Clarridge*, 811 F. Supp. 697, 702 (D.D.C. 1992); *see also United States v. Smith*, 591 F.2d 1105, 1108 (5th Cir. 1979) (“[w]e recognize that a second danger arises [with a multiplicitous indictment]; namely, an adverse psychological effect on the jury from the suggestion that several crimes have been committed”); Charles Wright, *Federal Practice and Procedure* 1A, §142 (3d ed. 2007) (“prolix pleading may have some psychological effect on the jury by suggesting to it that defendant has committed not one but several crimes.”).

Multiplicity requires analysis of the “unit of prosecution” of the statute. *Bell v. United States*, 349 U.S. 81, 83-84 (1955); *see also Blockburger v. United States*, 284 U.S. 299, 302 (1932) (“the test is whether the individual acts are prohibited, or the course of action which they

constitute. In the former, then each act is punishable separately . . . If the latter, there can be but one penalty.”). The “unit of prosecution” is the aspect of criminal activity that Congress intended to punish. *United States v. Chipps*, 410 F.3d 438, 447 (8th Cir. 2005); *see also Sanabria v. United States*, 437 U.S. 54, 70 n. 24 (1978) (“[i]t is Congress, and not the prosecution, which establishes and defines offenses. . . . Whether a particular course of conduct involves one or more distinct ‘offenses’ under the statute depends on this Congressional choice.”). When Congress fails to establish the unit of prosecution “clearly and without ambiguity,” doubt as to Congressional intent is resolved in favor of lenity for the defendant. *Bell*, 349 U.S. at 83-84.

2. Criminal and Civil Precedent Charge Manipulation as a Cumulative Offense.

Judicial precedent confirms that the applicable unit of prosecution in a CEA case is the totality of the alleged transactional conduct. This is true for both the only other litigated criminal manipulation case and all reported civil cases that have included allegations of manipulation.

In *United States v. Reliant Energy Servs., Inc.*, the only other litigated case to charge criminal market manipulation, the indictment included a single count of criminal market manipulation rather than multiple counts for the underlying acts in furtherance of the alleged manipulation. *See United States v. Reliant Energy Servs., Inc.*, 420 F. Supp. 2d 1043 (N.D. Cal. 2006), Third Superseding Indictment, Count Six. *See Exhibit 2.* The *Reliant* court’s ruling on the defendants’ motion to dismiss stressed the cumulative nature of the offense:

[t]he indictment alleges that artificial prices were effected through the illusion of a supply shortage, which was created by the interplay between Defendants' supply and bidding practices and the false and misleading rumors and information they allegedly disseminated into the market. The jury could find that Defendants' conduct *taken as a whole constituted commodities price manipulation*.

Reliant Energy Servs., Inc., 420 F. Supp. 2d at 1068. (emphasis added). *Reliant* also held that criminal manipulation is "concerned less with the price itself than it is with *the process by which the price is set*." *Id.* at 1057 (emphasis added). Thus, it is the alleged transactional conduct taken as a whole and an analysis of the overall process rather than the individual acts that establishes the unit of prosecution in this case.

CFTC civil cases alleging violations of the CEA uniformly allege manipulation as a single and cumulative offense rather than in multiple counts. Indeed, in the CFTC civil complaint filed against BP in the Northern District of Illinois, the CFTC alleged one count of manipulation, one count of cornering, and one count of attempted manipulation regarding the February 2004 conduct rather than multiple counts based on specific individual transactions. *See CFTC v. BP Products North America, Inc.*, 06-CV-3503 (N.D. Ill. 2006), Complaint, Exhibit 3, Counts One through Three, p. 37-39. Additionally, unlike how the government has pled this case, a recent CFTC case charged only one count of manipulation for transactional conduct that occurred during each month in which an offense was alleged rather than alleging separate counts for each transaction in furtherance of the manipulations. *In re Diplacido*, No. 01-23, 2008 WL 4831204, *2-3, *29-31 (CFTC Nov. 5, 2008) (ordering civil penalties for the four separate occasions of manipulation, not for the individual transactions that comprised the manipulations); *see also CFTC v. Reed*, 481 F. Supp. 2d 1190, 1200 (N.D. Colo. 2007) (complaint alleged a single scheme that from May 2000 to the summer of 2002, Reed provided market information

concerning multiple natural gas physical trades to various reporting firms “in an attempt to manipulate the price of natural gas”); *CFTC v. Delay*, No. 7:05-CV-5026 2006, U.S. Dist. LEXIS 85068 (D. Neb. Nov. 17, 2006) (CFTC alleged one count of manipulation and one count of attempted manipulation based on a “series of sham transactions in the cash feeder cattle market” rather than one count for each specific transaction); *CFTC v. Atha*, 420 F. Supp. 2d 1373, 1381 (N.D. Ga. 2006) (citing the single scheme alleged in the complaint involving multiple fabricated price and volume reports and stating that: “[t]he *totality of the circumstances* illustrated by the activities discussed in the complaint shows that Plaintiff has sufficiently alleged specific intent to affect market price”) (emphasis added); *CFTC v. Johnson*, 408 F. Supp. 2d 259, 268 (S.D. Tex. 2005) (complaint alleged conduct occurring over several months involving multiple instances of false price reporting that was alleged as a single scheme to attempt to manipulate the market price for natural gas).

3. Other Similarly-Constructed Statutes Demonstrate the Appropriate Unit of Prosecution in This Case as a Cumulative Offense.

Section 9(a)(2) of the Securities Exchange Act of 1934, entitled “manipulation of securities prices,” defines manipulation in a cumulative fashion: “it is unlawful to ‘effect, alone or with one or more other persons, *a series of transactions* in any security . . . with respect to such security creating actual or apparent active trading in such security, or raising the price of such security, for the purpose of inducing the purchase or sale of such security by others.’” 15 U.S.C. §78i(a)(2)(2007) (emphasis added); *see also In re Richard D. Chema*, Admin. Proc. File No. 3-8508, 1995 SEC LEXIS 2184 *27-28 (SEC Aug. 24, 1995) (the respondent violated Section 9(a)(2) when he “repeatedly engaged in a pattern of activity to mark-the-close” and also engaged in a “pattern of placing wash trades and matched orders”).

In *Chema*, the Securities and Exchange Commission stated that:

Proof of a manipulation is generally not based on a single activity, but rather on a course of conduct showing an intentional interference with the normal functioning of the market for a security. Indeed, *manipulation is usually the result of acts, practices, and courses of conduct that deceive the marketplace.*

Id. at 32 (emphasis added). Similarly, in *In re Pagel, Inc.*, the SEC found that a single manipulation of a security occurred based on the culmination of eight days of aftermarket trading as well as trading in a specific month, rather than any individual transaction. *In re Pagel, Inc.*, Admin Proc. File No. 3-6142, 1985 SEC LEXIS 988, *7 (SEC Aug. 1, 1985), *affirmed* 803 F.2d 942 (8th Cir. 1986). The SEC held that the proof for the manipulation charge was based on:

[I]nferences drawn from a mass of factual data. Findings must be gleaned from *patterns of behavior*, from apparent irregularities, and from trading data. When all of these are considered together, they can emerge as *ingredients in a manipulative scheme* designed to tamper with free market forces.

Id. at *7 (emphasis added).

Bank fraud prosecutions brought pursuant to 18 U.S.C. §1344 are also instructive. The bank fraud statute prohibits whoever “knowingly *executes*” a scheme or artifice to defraud a financial institution or obtain money or other property of the financial institution by false or fraudulent pretenses or representations. 18 U.S.C. §1344 (2008) (emphasis added).¹ Consistent with this language, the Fifth Circuit does not permit predicate bank fraud acts to be charged

¹ The statutory language in 18 U.S.C. §1344 is different from the language in the mail and wire fraud statutes (18 U.S.C. §§1341/1343) in that both the mail and wire fraud statutes prohibit actions that are “for the purpose of executing [a] . . . scheme or artifice” rather than the execution of the scheme. *Lemons*, 941 F.2d at 318, n.5 (5th Cir. 1991) (“we find a clear difference between the mail and wire fraud statutes on the one hand and the bank fraud statute on the other as to liability *vel non* for acts in furtherance of the scheme.” . . . “In short, the mail and wire fraud statutes punish each act in furtherance, or execution of the scheme; but the bank fraud statute imposes punishment only for each execution of the scheme.”).

individually. See *United States v. Heath*, 970 F.2d 1397 (5th Cir. 1992); *Lemons*, 941 F.2d at 309.

In *Heath*, defendants were convicted of two counts of bank fraud based on procuring two separate loans from a bank regarding a specific property transaction. *Heath*, 970 F.2d at 1401. The *Heath* court held that the counts were multiplicitous, stating that “[t]he two loans, however, were integrally related; one could not have succeeded without the other.” *Id.* at 1402. This court further held that “it is the execution of the scheme itself that subjects a Defendant to criminal liability,” not the “execution of each step or transaction in furtherance of the scheme.” *Id.*

In *Lemons*, defendants were convicted of nine counts of bank fraud in connection with a \$46 million real estate project. *Lemons*, 941 F.2d at 311. The individual bank fraud counts were all components of the overall scheme, including an assignment fee, the bank’s initial funding of the loan, and several payments (including a forgiveness of a note on a car given to the defendant) made to the defendant from proceeds of the loan. *Id.* at 313. *Lemons* held that “there was but one scheme and one execution,” and “[t]he movement of the benefit to Lemons, although in separate stages or acts, was only part of but one performance, one completion, *one execution of that scheme.*” *Id.* at 318 (emphasis added). To hold otherwise based on the conduct in *Lemons* “renders the reach of §1344 potentially boundless.” *Id.*

Other federal circuits relied on *Heath* and *Lemons* in holding that an overall scheme should be charged as one offense rather than multiple counts based on the predicate acts. See *United States v. Colton*, 231 F.3d 890, 909-910 (4th Cir. 2000) (citing extensively to *Heath* and *Lemons* in holding that the acts in the indictment were “planned and contemplated together” as “[e]ach part of this scheme was carefully crafted and performed in a particular sequence in order to divert a single payment to Colton . . .” and were multiplicitous); *United States v. Lilly*, 983

F.2d 300, 304 (1st Cir. 1992) (noting that *Heath* and *Lemons* are “particularly instructive” in holding that a twenty-nine count indictment for individual mortgages related to a single scheme at an apartment complex was multiplicitous); *see also United States v. De La Mata*, 266 F.3d 1275, 1288 (11th Cir. 2001) (stating that “[u]ltimately, the decision of whether a particular transaction is an ‘execution’ of the scheme or merely a component of the scheme will depend on several factors including the ultimate goal of the scheme, the nature of the scheme, the benefits intended, the interdependence of the acts, and the number of parties involved”).

Finally, the offense of structuring is charged as one cumulative offense rather than a series of individual transactions. *See United States v. Davenport*, 929 F.2d 1169, 1171 (7th Cir. 1991) (Posner, J.). Structuring is when a deposit of money is broken into several smaller transactions of less than \$10,000 each to evade reporting requirements. In *Davenport*, defendants received \$100,000 in cash from an unknown source. *Id.* To avoid the requirement that banks report certain cash transactions, defendants split up the money into smaller bundles and made ten deposits of less than \$10,000. *Id.* The *Davenport* defendants were charged with ten counts of structuring transactions to avoid reporting requirements, in violation of 31 U.S.C. § 5324(a)(3), one for each deposit. *Id.* The Seventh Circuit vacated those counts of the indictment stating: “[t]he statute does not forbid the making of deposits. It forbids the structuring of a transaction.” *Id.* Thus, the *Davenport* court held that the “*structuring itself, and not the individual deposit, is the unit of the crime.*” *Id.* at 1172. (emphasis added). Moreover, *Davenport* noted the defect of criminalizing each deposit by stating that a defendant who structured a transaction with more deposits cannot be more culpable than an individual who completes the crime with fewer deposits. *Id.* at 1171 (“the government’s position leads to the

weird result that if a Defendant receives \$100,000 and splits it up into 100 deposits he is ten times guiltier than a Defendant who splits up the same amount into ten deposits”).

Other courts have also held that separate charges for each transaction in a structuring scheme were multiplicitous because “[e]ach and every structuring offense, by nature, entails multiple transfers of funds in amounts small enough to avoid detection. Accordingly, the number of structuring offenses (i.e. “units of prosecution”) is not determined by the number of fractional, sub-liminal transactions made for concealment.” *United States v. Handakas*, 286 F.3d 92, 98-99 (2d Cir. 2002), *overruled on other grounds*, *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003); *United States v. Nall*, 949 F.2d 301, 308 (10th Cir. 1991) (the proper unit of prosecution was one structuring rather than multiple counts charging each of three bank deposits made over the course of nine days); *United States v. Dashney*, 937 F.2d 532 (10th Cir. 1991) (one structuring offense for the purchase of just under \$100,000 in cashier’s checks at ten banks rather than ten individual offenses); *United States v. Catherman*, No. 4:07-CR-00106, 2007 U.S. Dist. LEXIS 70708, *16-17 (S.D. Iowa Sept. 24, 2007) (four counts of structuring held to be multiplicitous and government ordered to either elect between the four counts or consolidate them into one structuring count).²

² Other crimes as varied as embezzlement, gambling operations, violation of the Fair Labor Standards Act, armed bank robbery, the Mann Act (interstate prostitution) and tampering with a vehicle also provide additional examples of indictments that violate the multiplicity doctrine similar to the instant case. See *Sanabria*, 437 U.S. at 70 (the unit of prosecution was an “illegal gambling business,” and the indictment contained only one count alleging such a business as the statute “did not define discrete acts of gambling as [an] independent federal offense”); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224 (1952) (holding that the offense made punishable by the Fair Labor Standards Act is a course of conduct as “[s]uch a reading of the statute compendiously treats as one offense all violations that arise from that singleness of thought, purpose or action, which may be deemed a single ‘impulse.’”); *Bell*, 349 U.S. at 83 (the “unit of prosecution” for a Mann Act violation is the act of transporting women across state lines for prostitution, not the number of women in the vehicle when the arrest was made); *Podell*, 869 F.2d at 332 (the unit of prosecution in a tampering with a vehicle offense is the vehicle – “a series of acts directed at a single vehicle may only be punished once”); *United States v. Caldwell*, 543 F.2d 1333,

4. Counts Two through Seventeen are Multiplicitous Because Market Manipulation is a Cumulative Offense Based on Multiple Transactions, Not Individual Acts.

Counts Two through Seventeen are multiplicitous because they seek to criminalize individual acts that only become criminal based on their alleged cumulative impact. Section 13(a)(2) makes it a felony to “manipulate or attempt to manipulate the price of any commodity in interstate commerce, . . . or to corner or attempt to corner any such commodity.” 7 U.S.C. §13(a)(2). Although the conduct made criminal by this statute is unclear,³ the one aspect of the offense that is established is that it is a cumulative offense, not an offense segmented into individual transactions.

The Superseding Indictment appears to allege that during February 2004, defendants “acquired control” and had “control of almost the entire supply” of February 2004 TET propane. Superseding Indictment ¶¶ 2, 37, 75, 77. “February 2004 TET Propane” is defined in the Superseding Indictment as “the supply of propane stored and transported in the TEPPCO system in February 2004.” Superseding Indictment at ¶ 2. This describes a cumulative offense because defendants could not have “accumulated” propane to “obtain” or “achieve” their alleged goal to manipulate the 2004 TET propane market except through multiple transactions that achieved a cumulative effect.

Notwithstanding that the Superseding Indictment describes a cumulative offense, the individual acts that comprise the alleged scheme are charged as if each accomplished the alleged goal of market manipulation separately and individually. The Superseding Indictment ignores

1367 n. 180 (D.C. Cir. 1975) (impermissibly multiplicitous to charge separate counts of bank robbery as to each individual teller in the bank).

³ A full discussion regarding the scope and limitations of Section 13(a)(2) is presented in the motions to dismiss filed this date based on the exclusion provided for in Section 2(g) of the CEA and failure to provide fair notice.

prevailing case law which allege manipulation based on the cumulative effect of the transactions engaged in rather than an analysis of each independent transaction. Thus, the “unit of prosecution” in this case must be a cumulative offense, not its individual components.

5. The Government’s Assertion of an Artificial OPIS Price Cannot Form the Basis of Multiple Manipulation Counts.

Counts Thirteen through Seventeen (“the OPIS average counts”) appear to allege that the OPIS average price became artificial beginning on February 23, 2004 when the average price was \$0.746875 and that the OPIS average price remained artificial for the remainder of the trading days in February 2004. The government alleges a separate and independent manipulation for each of these five days. *Id.* at 20-21.⁴

The OPIS average counts, like the counts related to individual transactions, are also insufficient to stand as individual counts because they represent the daily culmination of a series of individual transactions. The counts alleging that defendants manipulated the OPIS average price allege merely an additional alleged price impact from the cumulative effects of defendants’ individual transactions, that is their effect on the OPIS average.

Furthermore, it would appear that the OPIS average counts for the five days that comprise Counts Thirteen to Seventeen must involve at least some of the same transactions that

⁴ Counts Two through Twelve of the Superseding Indictment seem to allege that the price of February 2004 TET propane became artificial on February 24, 2004 at 2:28 p.m. when it was sold for \$0.84. See Superseding Indictment at 19, ¶71. The government also alleges that the price remained artificial for the next three business days during which time it ranged from \$0.84 on February 24, 2004 and February 26, 2004 to \$0.94 on February 27, 2004. *Id.* at 19-20. The Superseding Indictment does not explain why 2:28 p.m. on February 24, 2004 was selected as the exact moment that the price of February TET propane became artificial. Furthermore, additional purchases from February 25 to February 27, 2004 are categorized as “*Additional Accumulation to Increase Price, Prevent Price Drop, and Reacquire Control.*” Superseding Indictment at 16-17, ¶ 60. (emphasis added). The government appears to have arbitrarily selected a date and time to allege when the artificiality began.

form the basis of Counts Two through Twelve. For example, the following OPIS average counts appear to include individual transaction counts:

- Count Fourteen comprises the transactional conduct of Counts Two through Six;
- Count Fifteen comprises the transactional conduct of Counts Seven and Eight;
- Count Sixteen comprises the transactional conduct of Count Nine, which is noted in the Superseding Indictment as the OPIS “daily high,” and thus significant for calculating the OPIS average for that day,⁵ and
- Count Seventeen comprises the transactional conduct of Counts Ten through Twelve, with Count Twelve as the OPIS “daily high” for that day.

Superseding Indictment, at 19-21, ¶¶71-73.

Thus, the Superseding Indictment charges the defendants with engaging in individual transactions, including the daily high for at least two specific trading days, and charges them again for the inclusion of those transaction in an OPIS price average. This manner of pleading directly implicates one of the principal dangers of a multiplicity – subjecting a defendant to double jeopardy. Thus, consolidation is required to remove the constitutional infirmities from the Superseding Indictment and provide the defendants with a fair trial. *See* Section IV(A)(1), *supra*.

Counts Two through Seventeen are inappropriately multiplicitous and should not be presented to the jury. If these sixteen counts remain in the Superseding Indictment, the jury is impermissibly given multiple chances to determine when they believe the price became artificial based on how the government has alleged the offense. Thus, to avoid an unconstitutional result, the manipulation charges in this case must be considered as one cumulative unit. That is, Counts

⁵ The OPIS average is not a weighted average, but the midpoint between the high and the low transactions for that day. Superseding Indictment at 6, ¶22.

Two through Seventeen should be dismissed unless the government elects a single count to pursue.

B. The Two Counts of Cornering Are Also Multiplicitous.

The cornering counts are multiplicitous because they charge the same offense in two different counts. Specifically, Count Eighteen alleges that on February 24, 2004, defendants cornered the market for February 2004 TET propane. Superseding Indictment at 21, ¶ 75. Count Nineteen alleges that on February 27, 2004, defendants again cornered this market. *Id.* at 22, ¶ 77. Despite these allegations, all references to a corner in the Superseding Indictment allege only one corner, not multiple corners. *See e.g.*, Superseding Indictment at 2, ¶ 2; 7, ¶ 25(b); 8, ¶ 26 (“to acquire control of all or a dominant portion of February 2004 TET propane”); 9, ¶ 37 (“after achieving control of almost the entire supply of February 2004 TET propane”). Furthermore, although the conspiracy count categorizes transactions from February 25, 2004 to February 27, 2004 as transactions to, in part, “*reacquire* control,” the text of the paragraph that corresponds to these transactions does not allege that control was lost (or how it was lost) , and only states that the transactions were for the purpose of “acquiring control of the supply,” not for any alleged “reacquiring.” Superseding Indictment at 16, ¶ 60 (emphasis added).

Traditionally, a corner requires two things: (1) a dominant long position in contracts for future delivery; and (2) control of the physical supply of the commodity sufficient to frustrate delivery of the physical supply. *See Volkart Bros. v. Freeman*, 311 F.2d 52, 59 (5th Cir. 1962); *Zimmerman v. Chicago Bd. of Trade*, 360 F.3d 612, 616 (7th Cir. 2004) (“A corner occurs when a trader secretly acquires a long futures position, very large relative to the physical supply that is available to be delivered, and simultaneously acquires the means, by ownership or otherwise, to prevent delivery at reasonable prices of the physical commodity, thereby ‘squeezing’ the shorts

that must make delivery.”). Additionally, as noted above, in the CFTC Complaint filed against BP relating to the same conduct at issue here, cornering is alleged as one count rather than two separate corners on February 24, 2004 and February 27, 2004. See Exhibit 3, p. 31 (“[b]y at least February 27, 2004, BP cornered the February 2004 TET propane market”); p. 38-39 (Count Two alleging one count of cornering).

The Superseding Indictment appears to allege that defendants were able to obtain a corner on February 24, 2004, and then somehow establish another corner on February 27, 2004. The Superseding Indictment does not explain how multiple corners were committed on the same market in the same month within days of each other. Without that clarity, there is a danger of a jury convicting defendants of a corner on February 24th and 27th, when, in fact, the jury may have only concluded that there was one corner that lasted the entire period. Thus, counts Eighteen and Nineteen must be dismissed and consolidated into one count of cornering for the defendants to secure a fair trial.

C. The Appropriate Remedy for Multiplicitous Counts in This Case is Dismissal and Election.

Prior to trial, the Court’s primary remedy to cure a multiplicitous indictment is to order the government to elect one count in which to proceed and to dismiss the multiplicitous counts. See generally Charles A. Wright, *Federal Practice and Procedure*, 1A §145 (3d ed.); see also *United States v. Robinson*, 651 F.2d 1188, 1194 (6th Cir. 1981) (holding that “defendant’s remedy [for a multiplicitous and duplicitous indictment] is to move to require the prosecution to elect either the count or the charge within the count upon which it will rely”); *United States v. Reed*, 639 F.2d 896, 905, n.6 (2nd Cir. 1981) (citing *Federal Practice and Procedure* and stating that “[t]he defendant may move to have the prosecution elect among the multiplicitous counts, with all but the one elected dismissed. This is a matter of trial court discretion, and is most

appropriate when the mere making of the charges would prejudice the defendant with the jury.”); *Smith*, 591 F.2d at 1108; *United States v. Wilder*, No. 08-CR-35, 2008 U.S. Dist. LEXIS 37745, *5 (E.D.Wisc. May 8, 2008); *United States v. Phillips*, 962 F. Supp. 200, 202 (D.D.C. 1997).

This is not a case in which a curative jury instruction rather than election would likely suffice. The multiplicitous indictment may not be curable by instructions in this case because of the serious potential for prejudice against the defendants by allowing the multiplicitous counts to be presented to the jury. *Phillips*, 962 F.Supp. at 202 (stating that a limiting instruction was an insufficient remedy for a multiplicitous indictment based on the potential prejudice of “letting multiplicitous counts go to the jury in the first place”). This case is, as the government acknowledged, a complex case, and only the second time a criminal case like this has been brought under Section 13(a)(2). It is likely that there will be many jury instructions and extensive efforts made to assure that the jury understands the case. Under these circumstances, a jury instruction will likely be insufficient to remedy the prejudice of presenting sixteen multiplicitous manipulation counts and two multiplicitous cornering counts to the jury. Furthermore, the government will not be hindered in presentation of its case to the jury because it will be able to introduce evidence of the transactions that are currently comprised in the subject counts – however, this presentation will be in the proper legal and factual context as part of the alleged overall transactional conduct. Thus, the appropriate remedy is to require the government to elect which count in which it will proceed and dismiss the multiplicitous counts.

IV. CONCLUSION

The Superseding Indictment remains multiplicitous regarding the sixteen manipulation counts and is now multiplicitous regarding the two additional cornering counts. This Court should order the government to elect the counts in which it will proceed and dismiss the multiplicitous counts.

Dated: March 6, 2008

Respectfully submitted,

MARK D. RADLEY

/s/ Barry M. Hartman

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Certificate of Service

I, Barry M. Hartman, hereby certify that on this 6th day of March, 2009, a true and correct copy of the foregoing document was served on all counsel of record in the above matter via the Court's electronic filing system.

/s/ Barry M. Hartman _____

EXHIBIT 1



U.S. Department of Justice

Criminal Division, Fraud Section

Washington, D.C. 20530

February 10, 2009

Via Electronic Mail and Facsimile

The Honorable Gray H. Miller
United States District Court
for the Southern District of Texas
Chambers 9136
515 Rusk Avenue
Houston, Texas 77002

Re: United States v. Radley, et al., No. H-08-411

Dear Judge Miller:

We write in response to Ms. Rhonda Moore-Konieczny's request that the government provide the Court with a brief overview of the differences between the superseding indictment, returned on January 29, 2009, and the original indictment.

The superseding indictment is substantially similar to the original indictment. It adds no new defendants, and the several new counts charge violations of the same statutes that were charged in the original indictment. The new counts also arise from the same facts and circumstances that formed the basis of the counts in the first indictment. The superseding indictment will not require any additional discovery.

The superseding indictment does contain a number of alterations to its predecessor, which are summarized below:

i) The superseding indictment incorporates certain changes to reflect venue in the Southern District of Texas rather than the Northern District of Illinois, and includes minor additional changes in the background section.

ii) The superseding indictment alleges additional factual detail in the conspiracy count, consistent with the allegations in the original indictment. For example, the superseding indictment more clearly defines some of the bidding tactics defendants allegedly used to defraud BP's counterparties that purchased TET propane based on the industry benchmark index price.

iii) The superseding indictment charges defendants, in counts two through thirteen, with commodity price manipulation and attempted manipulation, in violation of 7 U.S.C. § 13(a)(2) (Commodity Exchange Act, or "CEA"). These charges are very similar to the eleven CEA counts in the original indictment relating to defendants' sales and purchases of TET propane that allegedly caused artificial prices to be published to other market participants. The superseding indictment refines these allegations as to time, price, and manner of communication. The additional details alleged in the superseding indictment are consistent with those in the original indictment.

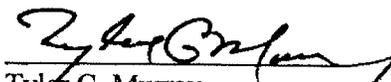
iv) The superseding indictment adds five counts of commodity price manipulation and attempted manipulation under the CEA. Specifically, counts thirteen through seventeen charge defendants with causing the industry benchmark index price for TET propane to be artificial and inflated during the last five trading days of February 2004. While these are new counts, they arise from the same conduct alleged in the original indictment.

v) The superseding indictment consolidates eleven counts of corner and attempted corner into two discrete counts of corner and attempted corner, in violation of the CEA. Counts eighteen and nineteen charge that defendants committed two separate offenses of corner when they obtained control over the supply of TET propane on February 24 and February 27, 2004, respectively. These counts are consistent with the charges in the original indictment.

vi) Finally, the superseding indictment, like the original indictment, charges six counts of wire fraud, in violation of 18 U.S.C. § 1343. Counts twenty through twenty-six are nearly identical to the wire fraud counts in the original indictment.

Overall, the superseding indictment, while adding or modifying several counts, remains consistent with the facts and law charged in the original indictment.

Sincerely,



Tyler C. Murray
Jerrob Duffy
Joseph Konizeski
U.S. Department of Justice

cc: All Defense Counsel

EXHIBIT 2

United States District Court

FOR THE
NORTHERN DISTRICT OF CALIFORNIA
CRIMINAL DIVISION

VENUE: SAN FRANCISCO

FILED
95 OCT 25 PM 2:05
FEDERAL BUREAU OF INVESTIGATION

UNITED STATES OF AMERICA,

v.

Reliant Energy Services, Inc.,
Jackie R. Thomas,
V. Reginald Howard II,
Lisa L. Flowers, and
J. Kevin Frankeny,

CR04-025 VRW

DEFENDANT.

INDICTMENT

Title 18, United States Code, Section 371 -- Conspiracy (1 Count)
Title 18, United States Code, Sections 1343 and 2 -- Wire Fraud (4 Counts)
Title 7, United States Code, Section 13(a)(2) and Title 18, United States Code,
Section 2 -- Commodities Manipulation (1 Count)

A true bill.

Kevin Spher
Foreman

Filed in open court this 25th day of
OCTOBER 2005.

Wanda H
Clerk

Bail \$ NO PROCEEDS
Sam

702

1 KEVIN V. RYAN (CSBN 118321)
United States Attorney

FILED
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U.S. DISTRICT COURT
SAN FRANCISCO, CALIF.

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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12
13 UNITED STATES OF AMERICA,)

14 Plaintiff,)

15 v.)

16 RELIANT ENERGY SERVICES, INC.,)
17 JACKIE R. THOMAS,)
18 V. REGINALD HOWARD II,)
LISA L. FLOWERS, and)
J. KEVIN FRANKENY,)

19 Defendants.)
20

No. CR 04-0125 VRW

VIOLATIONS: 18 U.S.C. § 371 –
Conspiracy to Commit Wire Fraud and
Commit Commodities Manipulation;
18 U.S.C. § 1343 – Wire Fraud; 7 U.S.C.
§ 13(a)(2) – Commodities Manipulation;
18 U.S.C. § 2 – Aiding and Abetting

SAN FRANCISCO VENUE

21 THIRD SUPERSEDING INDICTMENT

22 The Grand Jury charges:

23 A. The Defendants

24 1. At all times relevant, Reliant Energy, Inc. was a publicly-traded Texas
25 corporation with its headquarters in Houston, Texas. Through its subsidiaries, Reliant
26 Energy, Inc. provided electricity and energy services to wholesale and retail customers
27 throughout the United States. In 1997 and 1998, it purchased five electric power
28 generation plants in the State of California: Coolwater, Ellwood, Etiwanda, Mandalay,

2008

1 and Ormond Beach. The operation of the California plants and the marketing (or buying
2 and selling) of its energy was directed by its wholly-owned subsidiary, defendant
3 RELIANT ENERGY SERVICES, INC. ("RELIANT"), a Delaware corporation with its
4 headquarters in Houston, Texas.

5 2. Defendant JACKIE R. THOMAS was the Vice President of Power Trading
6 for defendant RELIANT. He supervised its nationwide electricity trading business,
7 including its activities in California. Defendant THOMAS reported to defendant
8 RELIANT's President.

9 3. Defendant V. REGINALD HOWARD II was the Director of defendant
10 RELIANT's West Power Trading Division. He managed all electricity trading for the
11 California markets and the five California power plants. Defendant HOWARD reported
12 to defendant THOMAS.

13 4. Defendant LISA L. FLOWERS was the only "term" trader at defendant
14 RELIANT's West Power Trading Division. As a term trader, she bought and sold
15 electricity contracts for profit in markets in and around California. Defendant FLOWERS
16 reported to defendant HOWARD.

17 5. Defendant J. KEVIN FRANKENY was the Manager of defendant
18 RELIANT's Western Operations and directed the operation of the California plants.
19 Defendant FRANKENY also reported to defendant HOWARD.

20 B. The California Electricity Markets

21 6. Prior to 1996, the California electricity industry was organized around three
22 regulated utilities: Pacific Gas & Electric Co., Southern California Edison Co., and San
23 Diego Gas & Electric Co. The utilities provided electricity to retail customers, managed
24 system reliability, and operated power plants. At this time, the price of electricity was set
25 by the California Public Utilities Commission.

26 7. In 1996, California enacted legislation to fundamentally restructure its
27 wholesale electricity market, with the intent to facilitate competition in the generation and
28 sale of energy. While the utilities remained responsible for serving the needs of their

1 retail customers, they were forced to divest a number of their power plants to private
2 firms. Between 1997 and 1999, the utilities sold all of their natural gas-fired plants in
3 California to five different companies, including Reliant Energy, Inc., at that time known
4 as Houston Industries Power Generation, Inc. Through these sales, each of the five
5 companies assumed control of approximately 20% of all gas-fired power generation in the
6 State of California.

7 8. The California legislature also created two new institutions, the California
8 Power Exchange ("PX") and the California Independent System Operator ("ISO"). The
9 PX acted as the primary marketplace for wholesale electricity in California. The ISO
10 managed the State's electricity grid by maintaining a balanced energy market, controlling
11 the transmission of electricity, and purchasing certain energy services in order to ensure
12 system reliability.

13 9. In 2000, the PX operated the "day-ahead" market for energy delivery the
14 following day. Through this market, purchasers (such as the utilities) submitted bids to
15 buy electricity, and suppliers (such as defendant RELIANT) submitted offers to sell
16 electricity. After examining these bids and offers to determine the demand for and supply
17 of electricity, the PX calculated the "market clearing price" for all energy deliveries the
18 next day.

19 10. The ISO operated the "real-time" market, where it bought and sold power to
20 account for and correct any imbalances between supply and demand during each
21 operating hour. In this market, energy suppliers submitted bids to sell real-time electricity
22 at a predetermined price. The ISO then "stacked" the bids, ordering them from the least-
23 expensive to the most-expensive bid. Depending on the amount of electricity needed for
24 the hour, the ISO would move up the bid stack until it had accepted enough bids to supply
25 the requisite amount of real-time electricity. The last (and most expensive) bid taken by
26 the ISO set the market clearing price for all purchases and sales of real-time energy for
27 that hour.

28 //

1 11. The ISO also operated a market for energy services to support and maintain
2 system reliability. These services consisted of different types of stand-by power
3 generation capacity that the ISO could call upon in the event of a supply shortage. One
4 type of stand-by power was "replacement reserves," which the ISO needed when it
5 expected a heightened demand for real-time electricity. Generally, a high demand for
6 real-time energy translated into a high price for replacement reserves.

7 12. In times of a perceived supply shortage (or when suppliers failed to submit
8 sufficient offers to sell electricity to the market), the ISO was forced to purchase
9 additional electricity "out-of-market." Out-of-market electricity was critical to grid
10 reliability. If the ISO could not procure enough energy out-of-market to meet consumer
11 demand for a given operating hour, then it risked the possibility of rolling blackouts and
12 even a system failure. All out-of-market sales from in-state generators (including from
13 defendant RELIANT) were subject to a federally-approved price cap. In June 2000, the
14 price cap was \$750 per megawatt hour.

15 13. The PX and ISO markets described above were often referred to as the
16 "spot" markets for electricity in California.

17 14. Outside of the PX and ISO markets, California electricity was also traded in
18 "term" markets. Through these markets, traders bought and sold standardized contracts
19 which called for the delivery of electricity at a particular location beyond the then-current
20 month. If a trader expected the price of electricity to increase at some point in the future,
21 he/she would purchase an electricity term contract and go "long." If a trader expected the
22 price to fall, he/she would sell an electricity term contract and go "short." Prior to the
23 date of actual delivery, speculative trades could be extinguished by an opposite and
24 offsetting trade. Depending on the buy and sell price, the trades could produce a net
25 profit (buy low, sell high) or a net loss (buy high, sell low).

26 15. Electricity was a commodity that traveled in interstate commerce through a
27 vast network of power lines in and out of the State of California and elsewhere.

28 \\\

1 C. Defendants' Conspiracy and Scheme to Defraud

2 16. In approximately June 2000, defendant FLOWERS acquired a long trading
3 position for electricity delivery at the Palo Verde, Arizona trading hub, near the
4 California-Arizona border. Over a period of weeks, she had bought electricity term
5 contracts for delivery at Palo Verde in the third quarter of 2000 and the third quarter of
6 2001, expecting that prices would increase. On Monday morning, June 19, 2000,
7 however, the California spot and term prices unexpectedly fell. Based on defendant
8 FLOWERS' trading position and then-current market prices, defendant RELIANT
9 determined that it was facing a multi-million dollar loss.

10 17. Beginning on or about June 19, 2000, and continuing through on or about
11 August 31, 2000, in the Northern District of California and elsewhere, defendants
12 RELIANT, THOMAS, HOWARD, FLOWERS and FRANKENY, and others: (a)
13 conspired to and did knowingly devise a scheme and artifice to defraud as to a material
14 matter and to obtain money by means of materially false and fraudulent pretenses,
15 representations, and promises from electricity purchasers in California and other
16 participants in the California spot and term electricity markets; and (b) conspired to
17 manipulate and attempt to manipulate the price of electricity in the California spot and
18 term electricity markets.

19 18. The object and purpose of the conspiracy was to increase the price of
20 electricity in the spot and term markets and to reverse the defendants' losing financial
21 position so that defendant RELIANT could enrich itself following any increase in prices
22 in those markets caused by the defendants' fraudulent and manipulative conduct.

23 19. It was part of the conspiracy that defendants RELIANT, THOMAS,
24 HOWARD, FLOWERS, and FRANKENY, and others, agreed to and did, directly and
25 indirectly, engage in conduct that was designed to create and did create the false and
26 misleading appearance of an electricity supply shortage to the market and its participants
27 for the purpose of fraudulently increasing and artificially inflating the spot and term
28 prices of California electricity. In furtherance of the conspiracy, the defendants and

1 others did knowingly and intentionally commit, and cause to be committed, among other
2 things, the following:

- 3 a. the shut down of certain of defendant RELIANT's power plants in
4 California;
- 5 b. the physical and economic withholding of electricity from the
6 California spot markets, by declining to submit supply bids and by
7 submitting false and misleading supply bids at prices designed to
8 ensure that the bids were not accepted;
- 9 c. the exacerbation of the supply shortage through the purchase of
10 additional electricity from the PX and other markets to cover
11 RELIANT's pre-existing delivery commitments; and
- 12 d. the dissemination of false and misleading rumors and information to
13 the ISO, brokers, and other traders regarding the availability and
14 maintenance status of, and environmental limitations on, defendant
15 RELIANT's power plants.

16 20. It was an important part of the scheme to defraud that any increase in spot
17 electricity prices in California influenced by the defendants' conduct would be
18 incorporated into the prices published by the PX and the ISO throughout the State of
19 California, and would be accessed by market participants located throughout California
20 (including within the Northern District of California) and elsewhere. It was further an
21 important part of the scheme to defraud that any increase in spot electricity prices
22 influenced by the defendants' conduct would result in the PX and ISO paying net
23 suppliers (including out-of-state generators and defendant RELIANT) higher prices, and
24 charging net purchasers higher prices, for day-ahead, real-time, and out-of-market
25 electricity, and ancillary services, including replacement reserves. Finally, it was
26 reasonably foreseeable that in the ordinary course of business these payments would be
27 processed and sent via wire transmission.

28 21. It was further an important part of the scheme to defraud that purchasers of
California electricity, to include Pacific Gas & Electric Co. ("PG&E"), would submit
demand bids that were higher than they would have been if not for the defendants'
conduct, and pay prices for California spot electricity and ancillary services that were
higher than they would have been if not for the defendants' conduct. It was reasonably

1 foreseeable that in the ordinary course of business such payments would be processed and
2 sent via wire transmission.

3
4 COUNT ONE: (18 U.S.C. § 371 – Conspiracy to Commit Wire Fraud and to Commit
Commodities Manipulation)

5 22. Paragraphs 1 through 21 of this Indictment are realleged and incorporated
6 as if fully set forth here.

7 23. Beginning on or about June 19, 2000, and continuing through on or about
8 August 31, 2000, within the Northern District of California and elsewhere, the defendants

9 RELIANT ENERGY SERVICES, INC.,
10 JACKIE R. THOMAS,
V. REGINALD HOWARD II,
11 LISA L. FLOWERS, and
J. KEVIN FRANKENY,

12 and others known and unknown to the Grand Jury, knowingly and wilfully conspired to
13 commit offenses against the United States, namely: (a) wire fraud, in violation of Title
14 18, United States Code, Section 1343; and (b) manipulation and attempted manipulation
15 of the price of electricity, a commodity in interstate commerce, in violation of Title 7,
16 United States Code, Section 13(a)(2).

17 24. Among the means and methods by which the defendants would and did
18 carry out the conspiracy were those described in Paragraph 19 of this Indictment, as well
19 as others.

20 25. In furtherance of the conspiracy and to effect the objects thereof, the
21 defendants committed the following overt acts, as well as others, in the Northern District
22 of California and elsewhere:

- 23 a. Telephone call between defendant THOMAS and defendant
24 HOWARD on June 20, 2000 at 06:30:42 (CST);
25 b. Telephone call between defendant HOWARD and a Reliant manager
26 on June 21, 2000 at 15:29:48 (CST);
27 c. Telephone call between defendant FLOWERS and an electricity
28 broker on June 20, 2000 at 06:56:44 (CST); and
d. Telephone call between defendant FRANKENY and a Reliant plant
operator on June 20, 2000 at 08:25:33 (CST).

1 26. In furtherance of the conspiracy and to effect the objects thereof, the
2 defendants caused to be committed the following overt acts, as well as others, in the
3 Northern District of California and elsewhere:

- 4 a. Publication by the PX on June 20, 2000 of spot prices that were
5 higher than they would have been absent the defendants' conduct;
6 b. Publication by the PX on June 21, 2000 of spot prices that were
7 higher than they would have been absent the defendants' conduct;
8 c. Publication by the PX on June 22, 2000 of spot prices that were
9 higher than they would have been absent the defendants' conduct;
10 d. Publication by the PX on June 23, 2000 of spot prices that were
11 higher than they would have been absent the defendants' conduct;
12 e. Submission by PG&E on June 21, 2000 of demand bids that were
13 higher than they would have been absent the defendants' conduct;
14 f. Submission by PG&E on June 22, 2000 of demand bids that were
15 higher than they would have been absent the defendants' conduct;
16 g. Submission by PG&E on June 23, 2000 of demand bids that were
17 higher than they would have been absent the defendants' conduct;
18 h. Payment by PG&E to the PX on July 17, 2000;
19 i. Payment by PG&E to the PX on August 30, 2000;
20 j. Payment by the PX to defendant RELIANT on July 19, 2000; and
21 k. Payment by the ISO to defendant RELIANT on August 31, 2000.

22 All in violation of Title 18, United States Code, Section 371.

23 COUNTS TWO THROUGH FIVE: (18 U.S.C. §§ 1343 and 2 – Wire Fraud)

24 27. Paragraphs 1 through 26 of this Indictment are realleged and incorporated as
25 if fully set forth here.

26 28. On or about the dates identified below, within the Northern District of
27 California and elsewhere, the defendants

28 RELIANT ENERGY SERVICES, INC.,
 JACKIE R. THOMAS,
 V. REGINALD HOWARD II,
 LISA L. FLOWERS, and
 J. KEVIN FRANKENY,

 and others, did knowingly and intentionally devise a scheme and artifice to defraud as to a

1 material matter and to obtain money by materially false and fraudulent pretenses,
2 representations, and promises, and for the purpose of executing such scheme and artifice,
3 did transmit and cause to be transmitted by means of wire communication in interstate
4 commerce the following:

Count:	Date:	Wire Communication:	From:	To:
TWO	7/17/00	Wire transfer of \$144,216,133.06 from PG&E to PX	Boston Safe Deposit and Trust Co. (Massachusetts)	Bank of America (Northern District of California)
THREE	8/30/00	Wire transfer of \$417,948,860.52 from PG&E to PX	Boston Safe Deposit and Trust Co. (Massachusetts)	Bank of America (Northern District of California)
FOUR	7/19/00	Wire transfer of \$59,924,410.14 from PX to Reliant	Bank of America (Northern District of California)	Wells Fargo Bank (Northern District of California)
FIVE	8/31/00	Wire transfer of \$93,734,372.16 from ISO to Reliant	Bank of America (Northern District of California)	Chase Bank of Texas (Texas)

14 All in violation of Title 18, United States Code, Sections 1343 and 2.

15
16 COUNT SIX (7 U.S.C. § 13(a)(2); 18 U.S.C. § 2 – Commodities Manipulation)

17 29. Paragraphs 1 though 26 of this Indictment are realleged and incorporated as
18 if fully set forth here.

19 30. Beginning on or about June 19, 2000, and continuing through on or about
20 August 31, 2000, within the Northern District of California and elsewhere, the defendants

21 RELIANT ENERGY SERVICES, INC.,
22 JACKIE R. THOMAS,
23 V. REGINALD HOWARD II,
LISA L. FLOWERS, and
J. KEVIN FRANKENY,

24 and others, did knowingly and intentionally manipulate and attempt to manipulate the
25 price of electricity, a commodity in interstate commerce.

26 //

27 //

28 //

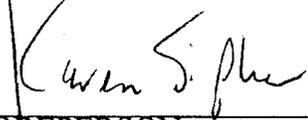
1 31. As a result of the defendants' manipulation, California electricity
2 purchasers overpaid by as much as \$32 million for day-ahead, real-time, and out-of-
3 market electricity and energy services, in addition to overpayments by participants in the
4 California term markets caused by the defendants' artificial inflation of prices.

5 All in violation of Title 7, United States Code, Section 13(a)(2), and Title 18,
6 United States Code, Section 2.

7
8 DATED:

9 10-25-05

A TRUE BILL.


FOREPERSON

10
11
12 KEVIN V. RYAN
United States Attorney

13
14 

15 EUMI L. CHOI
Chief, Criminal Division

16 (Approved as to form: 
17 AUSA Gilliam

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EXHIBIT 3

JUDGE CASTILLO
MAG. MASON

FILED

JUN 28 2006

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. COMMODITY FUTURES)
TRADING COMMISSION,)
)
Plaintiff,)
)
v.)
)
BP PRODUCTS NORTH AMERICA, INC,)
)
Defendant.)

CIVIL ACTION NO.
Complaint for Injunctive and
Other Equitable Relief and
Civil Monetary Penalties
Under the Commodities Exchange
Act

The United States Commodity Futures Trading Commission ("Commission" or "CFTC"),
by its attorneys alleges as follows:

L. SUMMARY

1. As is more fully alleged below, Defendant BP Products North America, Inc. ("BP" or "Defendant"), by and through its employees, including but not limited to, Donald Cameron Byers ("Byers"), Martin Marz ("Marz"), James Summers ("Summers"), Mark Radley ("Radley"), Dennis Abbott ("Abbott") and Cody Claborn ("Claborn") among others, has engaged in acts and practices that constitute violations of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. §§ 1 *et seq.* (2002). In short, BP unlawfully attempted to manipulate and did manipulate the price of February 2004 TET physical propane by cornering the market for February 2004 TET physical propane. Further, BP also attempted to manipulate the price of April 2003 TET physical propane, again by seeking to corner the April 2003 TET physical propane market.

2. A “corner” is where an entity seeks to, and holds, a dominant or controlling position in a commodity market for the purpose of being able to command or dictate the price at which it will sell the commodity.¹

3. Radley, while employed by BP, developed and directed the execution of a speculative trading strategy in which BP cornered the February 2004 “TET” physical propane market. See Attachment 1, *Glossary*. Radley accomplished this by directing other BP employees to establish a dominant and controlling long position in February 2004 TET physical propane by purchasing an overwhelming amount of physical propane that required delivery of TET physical propane by the end of February 2004. Radley directed other BP employees to establish a position in February 2004 TET physical propane which exceeded all available inventory of TET propane. BP employees followed Radley’s instructions. As a result, BP cornered the February 2004 TET propane market.

4. After acquiring this dominant and controlling position in the February 2004 TET physical propane market, Radley directed other BP employees to sell a portion of the February 2004 TET propane BP acquired to market participants who were “short” to the market at prices dictated by BP. Because BP possessed a dominant and controlling position in February 2004 TET propane, many of the “shorts” on at least February 27, 2004 had no choice but to buy February 2004 TET propane from BP. Because BP possessed a dominant and controlling position in February 2004 TET physical propane, BP, by and through its employees, was able to dictate the price at which BP would sell the February 2004 TET propane to the shorts on at least February 27, 2004.

¹ Individuals, including BP employees discussed in this complaint, sometimes use the term “squeeze” as a synonym for a “corner.”

5. Radley executed BP's manipulation and corner of the February 2004 TET physical propane market with the knowledge, advice, and consent of Byers, Marz, and Summers, all of whom had direct or indirect control over Radley and other BP employees. *See* Exhibit A.

6. February 2004 was not the first time that BP and Radley engaged in an effort to corner the TET physical propane market. BP and Radley attempted to manipulate the price of TET physical propane in April 2003 through a similar strategy of taking a dominant and controlling long position in April 2003 TET physical propane. Indeed, Radley described the April 2003 TET propane trading strategy as a "trial run" of the February 2004 TET trading strategy.

7. As more fully described below, the actions of Radley and other BP employees acting at his direction in the TET physical propane market between March 2003 and July 2004 ("relevant period") violated Sections 6(c), 6(d), and 9(a)(2) of the Act, 7 U.S.C. §§ 6(c), 6(d), 13(a)(2). Byers, Marz and Summers had control over the activities of Radley and other BP employees in February 2004. Because Radley and other BP employees acting at his direction violated the Act by engaging in conduct that was within the scope of their employment at BP, BP is vicariously liable for all violations pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2002).

8. Accordingly, pursuant to Section 6c of the Act, 7 U.S.C. §13a-1, the Commission brings this action to enjoin such acts and practices, and compel compliance with the Act. In addition, the Commission seeks civil penalties and such other ancillary relief as the Court deems necessary or appropriate under the circumstances, including, but not limited to, disgorgement of unlawful profits, restitution and damages.

9. Unless restrained and enjoined by this Court, there is a reasonable likelihood that Defendant will continue to engage in the acts and practices alleged in this Complaint or in similar acts and practices, as more fully described below.

II. JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, which authorizes the Commission to seek injunctive relief against any person, or, to enforce compliance with the Act, whenever it shall appear to the Commission that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation or order thereunder.

11. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e), in that Defendant is found in, inhabits and transacts business in this District, and the acts and practices in violation of the Act have occurred, are occurring, or are about to occur within this District.

III. THE PARTIES

12. Plaintiff **Commodity Futures Trading Commission** is an independent federal regulatory agency that is charged with the responsibility for administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 *et seq.*, and the regulations promulgated thereunder, 17 C.F.R. §§ 1 *et seq.* One of its core responsibilities is to protect the public interest by deterring and preventing price manipulations of the commodity markets or futures markets, or other disruptions to market integrity. 7 U.S.C. § 3 (2002).

13. Defendant **BP PRODUCTS NORTH AMERICA, INC.** ("BP") is a wholly owned subsidiary of BP plc, one of the largest energy companies in the world. BP is also the largest supplier of natural gas liquids, including propane, in North America. BP's North

American Headquarters are located at 28100 Torch Parkway, Warrenville, Illinois. One of BP's business units is BP's North America Gas and Power business unit ("NAGP").

IV. RELEVANT INDIVIDUALS

14. Donald Cameron Byers ("Byers") was the Chief Operating Officer for BP in February 2004 and April 2003 and is currently the President and CEO of BP's NAGP.

15. Martin Marz ("Marz") was the Compliance Manager for BP's NAGP during the relevant period.

16. James Summers ("Summers") was the Vice President of Natural Gas Liquids Trading for BP in February 2004 and reported directly to Byers.

17. Mark Radley ("Radley") was the Trading Manager of Natural Gas Liquids Trading for BP in February 2004 and April 2003 and reported directly to Summers.

18. Dennis Abbott ("Abbott") was the self-described "second-in-command" on the natural gas liquids ("NGL") Trading Bench in February 2004, and was perceived as the trading bench leader in Radley's absence. Abbott traded all Natural Gas Liquids ("NGLs"), and participated in the execution of BP's February 2004 TET propane strategy. Abbott was placed on paid administrative leave during the Division's investigation in this matter, and was recently fired by BP for his actions in connection with BP's February 2004 TET propane trading strategy.

19. Cody Claborn ("Claborn") was the primary trader for TET propane in February 2004 and participated in the execution of BP's February 2004 TET propane strategy. Claborn was placed on paid administrative leave during the Division's investigation in this matter, and was recently fired for his actions in connection with BP's February 2004 TET propane trading strategy.

V. FACTS

A. The TET Propane Market and Other Propane Markets

20. Propane is a by-product of natural gas processing and petroleum refining.

Because propane is a by-product of these two processes, the volume of propane available from these sources will not necessarily immediately adjust to changes in the supply and demand of propane.

21. The term "TET" is an acronym for Texas Eastern Transmission Corporation. The phrase "TET propane" refers to propane that is deliverable at the TEPPCO storage facility in Mont Belvieu, Texas or anywhere within the TEPPCO system. "TEPPCO" is an acronym for Texas Eastern Products Pipeline Co, LLC. The TEPPCO storage facility is the primary source for propane used in residential, commercial, and agricultural heating in the northeastern United States via the TEPPCO pipeline.

22. The TEPPCO pipeline runs from Mont Belvieu, Texas up through Ohio, into New York, Pennsylvania and Illinois. The TEPPCO pipeline is the only pipeline that transports propane from Mont Belvieu to the Northeast and Midwest regions of the United States. Only propane within the TEPPCO system (comprised of its storage cavern and its pipeline) is TET propane. At any given time, the total TEPPCO system inventory of propane represents the total available supply of TET propane.

23. The TEPPCO pipeline is unidirectional, meaning that the TEPPCO pipeline only flows in a single direction, *i.e.*, it transports propane out of Mont Belvieu, Texas. Once propane has left the TEPPCO storage facility and enters the pipeline, the propane cannot be moved back into the TEPPCO storage facility via the pipeline. Prices of TET propane affect the price of

propane purchased by consumers, including residential consumers in Illinois, at locations along the TEPPCO pipeline

24. Inventories in TET propane are generally built up during the spring and summer months and typically peak by the end of September. During the winter heating season, TET propane inventory withdrawals occur. TET propane inventories are typically lowest at the end of the home heating season in February and March.

25. TET propane is a type of propane recognized as being distinct from other types of propane by the propane industry. The market for TET propane is distinct from markets for other types of propane. The propane industry recognizes that TET propane has its own market price distinct from the prices for other types of propane. TET propane is a commodity in interstate commerce.

26. Aside from TEPPCO, Mont Belvieu has other individual, privately owned storage caverns. Also located in Mont Belvieu are storage facilities owned and operated by Enterprise Products Partners, LP and during the relevant period Dynegy Liquids Marketing and Trading, LP. As noted above, propane in the TEPPCO storage facility is identified as "TET" propane by the propane industry. By comparison, propane in other storage facilities at Mont Belvieu is designated as "non-TET" propane by the propane industry.

27. The United States is a net importer of propane. Imports provide an important source of supply when consumption exceeds available supplies of propane from domestic production and inventories.

28. Propane demand in the United States comes from several different sectors, but the largest sectors are the residential/commercial heating sector and petrochemical industry which uses propane in the manufacturing of plastics.

29. Residential/commercial demand for propane constitutes approximately 43% of domestic demand for propane. Because the majority of this usage is for heating, the demand from this sector is highly seasonal and dependent on weather. Residential and commercial consumption of propane for heating is most prevalent in the Northeast and upper Midwest parts of the United States. Propane is the fourth most important source of residential heating in the United States. As of 1996, approximately 8.1 million households depended on propane for one use or another (excluding propane gas grills), and by 2003 approximately 6.88 million households used propane as their primary heating fuel. Propane is most commonly used to provide energy in areas not serviced by natural gas distribution systems, *i.e.*, propane is commonly used in rural regions.

30. As noted above, the primary source of propane for residential heating in the Northeast United States is the TEPPCO system. Because it is a heating fuel, demand from the residential and commercial markets tends to be inelastic, or price insensitive. When prices for propane increase quickly, consumers of propane in the residential/commercial sector are generally unable to switch to other fuel sources for heating and, therefore, must either pay the price being offered to them by propane merchants, or forego using propane as a source of heating.

B. Propane Trading

31. Producers, marketers and consumers of propane trade propane contracts in a variety of ways, including propane futures contracts on the New York Mercantile Exchange (“NYMEX”) and other types of contracts in the over-the-counter (“OTC”) market.

32. In the OTC market, propane is traded through direct, bilateral transactions between counterparties, through voicebrokers, and on an electronic facility known as

“Chalkboard.” Voicebrokers generally do not take title to propane and serve primarily to negotiate and execute deals between willing buyers and willing sellers. Similarly, Chalkboard allows parties to post bids and offers and then execute transactions in propane. Chalkboard also does not take title to propane.

33. Prices of TET propane affect the price of the NYMEX futures contract for propane, in part, because the NYMEX propane contract provides for delivery of propane at TEPPCO.

34. In the OTC market, propane trades are generally in lots of 1000 barrels (“bbls”). Each barrel is the equivalent of 42 gallons of propane. Prices for propane trades or contracts are quoted, negotiated and executed in 1/8th cent per gallon (“cpg”) increments.

35. The Oil Price Information Service (“OPIS”) publishes a daily newsletter which includes, among other things, market commentary and a daily index of prices for both TET propane and non-TET propane. The prices published by OPIS include a daily low, a daily high and a simple average of these two prices which is known as the “OPIS average.” The propane industry uses OPIS as a source for determining the price at which they buy and sell TET propane.

36. In the OTC market, propane trades may either be settled through physical delivery or settled financially, i.e., money is exchanged between the parties.

37. Propane trades in the OTC market may also be designated as “any” or “wet.” A transaction involving “any” propane calls for delivery of the propane at any time during the contract month up until the last day of the contract month.

38. A transaction involving “wet” propane requires delivery of the propane on a specific date within the contract month.

C. BP's Corporate Structure and Business in Propane

39. BP is a producer, marketer and consumer of commercial propane in the United States. BP's production, transportation and retail sales of commercial propane are handled by BP's Natural Gas Liquids Business Unit ("NGLBU").

40. According to BP's website, it is the "#1 supplier of NGLs in North America, marketing over 500,000 barrels per day of liquids including propane and butane." BP's trading of propane is handled by BP's NAGP. During the relevant period, all relevant individuals were employed with the BP's NAGP.

41. Within the NAGP, BP's trading of propane throughout North America was handled by the Natural Gas Liquids Trading Bench ("Trading Bench"). The Trading Bench bought and sold propane in the name of BP.

42. Consistent with industry practice, during the relevant period, BP recorded the Trading Bench members' telephonic communications. BP traders are aware that their conversations are recorded.

43. On or about February 2004, Summers was the Vice President of Natural Gas Liquids Trading and Marketing. As Vice President, Summers had supervisory responsibility for the trading activities of the Trading Bench. Summers directly or indirectly controlled Radley's conduct described in this complaint.

44. During the relevant period Radley was the Trading Bench Manager. As the Trading Bench Manager, Radley was responsible for the management of "all aspects of the day-to-day trading activities" of the Trading Bench. Radley was also responsible for monitoring and enforcing "compliance with all internal assurance and controls, as well as external regulations and securities laws."

45. During the relevant period, employees Abbott, Claborn, Carrie Kienenberger (“Kienenberger”) and Tim Morby (“Morby”) traded TET propane on behalf of BP and at Radley’s direction.

46. During the relevant period, Marz was the Compliance Manager for the NAGP. Marz was responsible for ensuring that the NAGP was complying with all appropriate rules and regulations, including laws, trading ethics, and company policies regarding the manipulation of prices.

47. During the relevant period, Byers was the Chief Operating Officer of the NAGP. Byers was responsible for, among other things, the development, implementation, and execution of trading and marketing strategies. Byers was also responsible for the oversight for the NAGP’s risk management and for ensuring that appropriate trading processes, systems and controls were in place.

D. BP Corporate Policies on Market Manipulation

48. At all times relevant to this lawsuit, BP maintained a company policy entitled “Guidelines for Conduct by BP’s Energy Market Participants.” Incorporated in that policy is a section on “Price Manipulation or Market Abuse.” This section specifically prohibits manipulation of prices.

E. BP’s February 2004 TET Propane Trading Strategy – Development and Description

49. Throughout the month of January 2004, BP began building a sizable “long” position in physical February 2004 TET physical propane. A company is “long” if its overall obligation to buy and receive propane is greater than its obligation to sell and deliver propane.

50. In the month of January 2004, Radley made several statements indicating that he perceived that the propane market was vulnerable to a manipulation. For example, on January 8,

2004, in an audiotaped conversation with other BP employees, Radley stated that the propane market was "vulnerable to a squeeze." On January 13, 2004, in a conversation with another BP employee, Radley stated that the propane market was "tight enough that if someone wanted to play games with it, potentially they could."

51. However, during January 2004, there were also forecasts for substantial imports of propane, due to arrive in the Gulf Coast and at import terminals located along the East Coast to supplement what BP's employees identified as a "tight" market. For example, on January 28, 2004, BP received a published report from Commercial Services Company, Ltd. which forecasted approximately 3.5 million barrels of propane destined for the United States in February 2004.

52. Throughout the month of January 2004, BP increased its position in February 2004 TET propane. As a result, at the beginning of February 2004, BP held a significant long position in February 2004 TET propane. According to Summers, "Entering Feb[ruary] NAGP owned nearly 50% of available physical propane bbls [barrels] at the TET location." Additionally, BP had a significant position in financial transactions which were valued based on the price of February 2004 TET propane. Thus, coupled with its long position in physical February TET propane, BP had a financial interest in higher prices of February 2004 TET propane.

53. While BP increased its position of February 2004 TET physical propane during the month of January 2004, the market price of February 2004 TET propane declined.

54. On January 9, 2004, the OPIS Average price for February 2004 TET propane was 74.5 cpg. However, by February 4, 2004, the OPIS Average price for February 2004 TET propane had fallen to 63.5625 cpg. In light of the price decline, on February 3, 2004, Radley observed that "propane prices have been dropping like a stone." He further noted that BP was "hurting" because of the price decline. Similarly, on February 4, 2004, Radley sent out, via e-

mail, a market assessment of the propane market at that time. Among other statements about the propane market, Radley wrote:

Despite plenty of support from below normal temperatures in the key US demand centres the trade appears to have determined that the supply side of the ledger is adequate to see us through the winter. . . . Although we have seen heavy selling pressure all week the Feb/Mar spread has held relatively firm at 6 - 6.5 cpg backward still reflecting the current tightness in gulf coast supplies. Additionally, values haven't breached any obvious supports down the curve suggesting further weakness is possible. . . .

□

Overall, US demand is good but international supply is better ...

55. On or about February 5, 2004, the members of BP's NGL Trading Bench began to take steps to avoid losses resulting from their position in February 2004 TET propane and, at Radley's direction, developed a trading strategy. Specifically, BP's trading strategy for February 2004 TET propane was to control market prices in the February 2004 TET propane market by establishing a dominant and controlling position in the market. Further, Radley anticipated that after BP cornered the February 2004 TET propane market, BP could force those who were short February 2004 TET propane to buy that propane from BP at high prices dictated by BP and Radley.

56. On February 5, 2004, the initial planning of BP's manipulative scheme was captured in a taped conversation. In this recorded conversation, Radley called Abbott to discuss obtaining management approval for the execution of the February 2004 TET propane trading strategy. A true and accurate copy of that recording is attached hereto as Exhibit "B". In the recording Radley describes the benefits of executing the February 2004 TET propane trading strategy as follows:

Radley: Two things I thought of. One, in terms of whether we should do this or not, in terms of talking to Jim [Summers], what we stand to gain, is not just we'd make money out of it, **but we would know**

from thereafter that we can control the market at will. If we never break the threshold, we'll never know what the answer is, you know what I mean?

Abbott: Yeah, if you go for it, you'll know okay, wait a minute this market is way too big and we could never ever do this.

(emphasis added).

Their conversation then continued:

Radley: The second point is, that I would imagine that **the minimum operating level at the end of Feb. is higher than it is at the end of March or April** because I think the wholesalers have to hold barrels.

Abbott: have to have something on hand, in order to pump the first day. That's right.

Radley: So I think the minimum level might be a little higher than we're assuming based on what we experienced in April. **When we squeezed the April May.**

Abbott: **Right, which was one of the reasons why it was harder to own all that April.** That's why we had to take on a little bit more than we thought we had to take on, in April. And that's why I think that 2 mm, 2.1 mm bbls as that min in Feb., I think that's real, man, I think that is, **that's the bottom at TET.**

(emphasis added). The remark "When we squeezed the April May," refers to BP's attempted manipulation of the April 2003 TET propane price through an attempted corner of the market. The remarks concerning the "minimum operating level" refer to the minimum level of propane TEPPCO was believed to hold in storage to operate the TEPPCO system. Radley went on to describe the February 2004 TET propane trading strategy to Summers. Summers understood and approved BP's February 2004 TET propane trading strategy.

57. According to internal BP documents, BP's February 2004 TET propane trading strategy developed by the BP traders was described this way:

In February, 2004 the NGLs trading bench entered into a strategy to create a long February – March spread. . . . **The bench planned on holding a large portion of existing TET Mont Belvieu propane inventory. It was believed that the resulting lack of supply at TET would drive up prompt prices, further widening the spread. The bench would then liquidate its inventory at higher prompt prices before the end of the February.** It was expected that only a small portion of inventory would be rolled into March resulting in a minimal loss against a substantial gain.

(emphasis supplied). This description of the trading strategy was shared with senior BP management, including Byers. No one at BP questioned the accuracy of this description of the BP February 2004 TET propane strategy until after the Commission commenced its investigation into BP's activities in the February 2004 TET propane market

58. A similar description of the strategy exists in a March 2, 2004 email sent from Summers to Byers, which was a few days after BP cornered the February 2004 TET propane market, yet failed to generate the anticipated profit from the corner. That email states as follows:

Cameron,

As Mark [Radley] said, it is now apparent that once the dust settles we will be taking a significant loss on our P&L. Let me expand a bit on what Mark said. The value expectation of the trade was based on building a sizeable February position, and then **selling a portion of that position at the end of February at a premium**, with the remaining unsold BBL's rolling into March at a loss. **Of the 5 million BBL's of length we had in February, we expected to sell and/or cash out with the shorts, apx. 2 million BBL's at a 25 cent gain** (a conservative estimate based on the \$1.00+ spread that was experienced this time last year), **while rolling the remaining 3 million BBL's into March at a 6 cents loss.** At the time we put the trade on, 2 million BBL's seemed like a conservative estimate given what we knew (or thought we knew) about the current supply/demand picture and the ability of the market shorts to cover. **Assuming we could have sold 2 million Feb BBL's, the profit on the trade would have been around + \$20 million, with potential for upside from there.** While we called the upward price movement correctly (the Feb-Mar spread peaked at 34 cents/gal), the amount of volume we were able to move was significantly less than we predicted. All-in-all, we sold around 700,000 BBL's and rolled 4.6 million BBL's into March.

(emphasis added). Byers received and reviewed this email, but did not reply to this email.

59. Prior to executing BP's February 2004 TET propane strategy, Radley and Summers met with Marz to obtain approval for the execution of this trading strategy. Marz approved the Trading Bench's February 2004 TET propane trading strategy. Marz cautioned the Trading Bench to refrain from using certain words in conjunction with the February 2004 TET trading strategy, including the word "squeeze."

60. Radley directed BP employees Abbott, Claborn, Kienenberger and Morby to commence the execution of the February 2004 TET propane strategy on or about February 9, 2004. BP employees followed Radley's directions and began to buy aggressively February 2004 TET propane. Indeed, according to BP's trading records, on February 9, 2004, BP purchased approximately 825,000 barrels of February 2004 TET propane. Each bid, offer, transaction, phone call, e-mail, facsimile, communication or other act by BP employees for February 2004 TET propane pursuant to Radley's directions was an act in furtherance of BP's manipulation of the price of February 2004 TET propane by means of a "corner."

F. BP's February 2004 TET Propane Trading Strategy – Execution, February 9 to 13

61. At approximately 4:45 p.m. CST, on February 9, 2004, Radley, who was not in the office that day and was on vacation, called Claborn to get an update regarding the execution of the February 2004 TET propane trading strategy. Abbott joined the conversation. A true and accurate copy of the recording of this conversation is attached as Exhibit "C." In the course of this conversation, Radley, Claborn, and Abbott made the following statements:

Radley: What's been going on?
Claborn: How much we got on? I was just looking at that . . . you wanna guess?
3.1
Radley: Has it been busy today?
Claborn: Oh yeah. Did it very quietly. 10 lots, 5 lots, 10 lots, 15 here, 5 here. The biggest lot I think I bought was 75.

Radley: Off who?
Claborn: [Counterparty 1]. Right out of the chute we bought the 150s off [Counterparty 2] at 5 7/8, so we dropped that, and then it was just a bunch of little ones. Little guys. [Voicebroker 1] did 100 and, probably 150, 175 smoothly. I mean there were no big lots, like 15 here, 10 here, 10 here, 15 there. I did two Chalkboard deals all day.
Radley: Where was the spread at the end of the day?
Claborn: Uh, I wanna say conservatively probably around 6 1/4.
Abbott: 6 1/2, 6 1/4
Claborn: Something like that. Dennis is on now. . . .

Radley: Did you feel good about it?
Abbott: I kinda characterize it as . . . I characterize it as **I was kinda surprised we were able to get 300 from the marketplace, basically, maybe 3-400 from the marketplace, without moving it that much. I mean we definitely were moving it at the end of the day, it was definitely firming up at the end of the day. And it feels like the market could have been anywhere. Like sellers were at 65 cents or 62 cents depending on where the market was, right? So it's kinda, . . . it seems like something that will just kinda move fairly easily.** There's one more seller out there that's [Counterparty 3], I think [Counterparty 3] has one chunk they can do, and that's about it.

Abbott: I mean tomorrow, tomorrow if we are able to buy another 4-500 thousand barrels tomorrow from the marketplace, I would be genuinely shocked. I mean, really shocked so . . . that's it. Then I think . . . we'll just have to play a waiting game and see, you know, how it's gonna shape up.
Radley: (chuckling) It uh, still remains to be seen, doesn't it. **Still need to see some of these shorts come in. . . .** Were we the only buyer today?
Claborn: Pretty much
Abbott: Pretty much.
Claborn: There's a few other deals done besides us, but not many at all. Just a few. I'd say you could put them all on one hand that wasn't us.
Radley: What about the surrounding news? What were the draws like over the weekend?
Abbott: We had 150 draw on Friday and then we had the slower draws maybe we only drew like 50 over the weekend.
Radley: [unintelligible].
Abbott: Yeah, that butane slug. Plus when you look back at the data market the draws always slow down on Saturday and Sunday, 'cause the truck liftings. The truckers go home and sleep with their women and stuff.

Radley: What about the weather outlook?
Claborn: It's still good.
Abbott: Yeah, the weather, is still cold in the Northeast. The parts of the Midwest are now just kinda just normal, normal temps is what they're forecasting, but the Northeast is still cold. Still below and much belows. **The other thing, when you think about it, . . . we're not going to take delivery of this stuff until February 29th, right, 27th, 28th. I mean, the shippers who are going to be required to ship, they're not going to feel, people aren't going to feel concerned until it's time.**
Radley: **Exactly.**
Abbott: I mean this could be the last week.
Radley: **That's absolutely right. There's no doubt about that.**

Radley: At the moment, don't forget, that at the moment, even though we're 3.1 million long, we haven't got 3.1 million in physical, yet right?
Claborn: No we got 2.4 million right now, it'll go down to 2.1 after it all priced from this point forward. . . .
Abbott: It could get pretty exciting. If we go off 3 mm long, it will be exciting.

Radley: Good. Good. Sounds pretty good. **Well something's got to give. . . . Half of me is saying look, the fact that nothing's really moved in terms of the spread yet is good, because people aren't looking for ways out... or alternative feeds, or backing out demand, so that's kind of a good thing. The down side is of course, if it all happens at the last minute, it gets a bit messy. People start cheating, not delivering, and may start to look a little bit funny as well that the spread, you know, just erupts at the last minute.**
Claborn: And we don't get the price out on all this paper.
Abbott: Well that's a different thing, if we don't get a price out on all this paper,
Radley: **The advantage of paper, is that we're selling at an index price there's no complaints. If we squeeze it in the last four or five days of the month, ahh, forgive my French, but ah, you know, it's going to be hard to say what's the fair price of the market at the time.**

(emphasis added).

62. In the conversation between Radley, Abbott, and Claborn, of which excerpts are set forth above in paragraph 61 of the Complaint, they discuss BP's execution of the February 2004 TET propane strategy. They remark on the fact that:

- a. BP purchased substantial quantities of TET propane that day "very quietly;"
- b. BP's purchase of 300,000 to 400,000 barrels of February 2004 TET propane from the "market" on that day moved the price of February 2004 TET propane;
- c. BP would seek to purchase another 400,000 to 500,000 barrels of February 2004 TET propane from the market and expected that such a purchase would place BP in a position of owning the entire available supply of February 2004 TET propane;
- d. BP would then have to play a "waiting game" with the shorts, waiting for the shorts to come to BP to purchase February 2004 TET propane from BP;
- e. by holding such a large position in TET propane, BP could "squeeze" the price of February TET propane in the last four to five days of the month, making it difficult to determine what constitutes a fair price;
- f. however, by "squeezing" the price, those who are "squeezed" might complain;
- g. it was "good" for BP that the spread between February TET propane and March TET propane had not really moved at this point in time because "people aren't looking for ways out," or seeking "alternative feeds, or backing out demand," i.e., it was good for BP because, they believed, that if the shorts in the market were unconcerned about covering their positions, they would remain short and eventually they would have to purchase February TET propane from BP; and
- h. it would be "bad" for BP if the spread between the price of February 2004 TET propane and the price of March 2004 TET propane widened "at the last minute," because, among other reasons, it would "look a little bit funny" if the "spread, you know, erupts at the last minute."

63. As captured in that same tape recorded conversation described above, when Radley remarked "excuse my French" he was not, in fact, conversing in the French language. Rather, Radley's remark signifies that he recognized that he used the term "squeeze" on an audiotaped phone line. Accordingly, when Radley returned from vacation, he brought this conversation to the attention of Summers, due to his use of the word "squeeze" in describing the February 2004 TET propane trading strategy.

64. Summers testified under oath that he brought Radley's description of the February 2004 TET propane strategy as a "squeeze" to the attention of Byers and Marz. He further testified that all three individuals - Summers, Byers, and Marz - reviewed the audiotape. Byers testified that Tim Bullock, the president of BP NAGP at that time, also became aware of Radley's description of BP's February 2004 TET propane strategy as a "squeeze."

65. Beginning on February 9, 2004, BP, by and through its employees and pursuant to directions given by Radley, began purchasing aggressively February 2004 TET propane "any" contracts. Between the morning of February 9, 2004 and the close of business on February 13, 2004, BP purchased over 1.4 million barrels of February 2004 TET propane. BP's position in February 2004 TET propane by the close of business on February 13, 2004 exceeded 3.2 million barrels of propane.

66. The total TEPPCO system propane inventory fell slightly between February 9, 2004 and February 13, 2004, decreasing from just over 3.2 million barrels on February 9, 2004 to just over 3.1 million barrels on February 13, 2004. Therefore, as early as February 13, 2004, BP's position in February 2004 TET physical propane exceeded the entire TEPPCO system propane inventory. Radley and the Trading Bench knew that BP's position exceeded the entire TEPPCO system propane inventory.

67. As BP built its long position in February 2004 TET propane, the price of February 2004 TET propane rose steadily between February 9, 2004 and February 13, 2004.

G. BP's February 2004 TET Propane Trading Strategy - Execution, February 14th to the 20th

68. On February 15, 2004, there was a rupture in the TEPPCO pipeline near Coshocton, Ohio. TEPPCO issued a press release which advised that operations of all terminals, including propane terminals, east of Todhunter, Ohio, with the exception of Eagle, Pennsylvania,

would be suspended until the pipeline could be repaired. Since the TEPPCO pipeline is unidirectional, the pipeline rupture had the effect of increasing the amount of TET propane available at the TEPPCO storage facility and reducing the amount of propane that could be delivered from the pipeline. By February 16, 2004, the total TEPPCO system inventory increased to just over 3.3 million barrels.

69. In testimony, Summers acknowledged that even though at the time the pipeline ruptured BP's position in February 2004 TET propane was much greater than the demand initially anticipated by the Trading Bench, the increased supply resulting from the pipeline rupture compelled BP, pursuant to Radley's strategy, to increase its already substantial position. He stated that if:

[BP] hadn't purchased that volume, then the short positions would be buying that volume from the marketplace, so we wouldn't be in a position to meet that demand...If we had chosen not to buy it or in fact sell our position, **then the shorts could have covered a large portion of their positions at that time.**

(emphasis added). Because BP's February 2004 TET propane strategy was to corner the shorts, i.e., force them to buy February 2004 TET propane only from BP at high prices dictated by BP, BP had to purchase the additional supply of TET propane that resulted from the pipeline rupture to ensure that the shorts could not obtain TET propane "from the marketplace."

70. In addition to the increased supply of TET propane as a result of the TEPPCO pipeline rupture on February 15, 2004, weather forecasts around that time period indicated warmer weather in the Northeast United States. In fact, there was a strong warming trend in the Northeast United States in the last two weeks of February 2004. This had the effect of reducing demand for TET propane from the residential/commercial sector.

71. During this same time period, there continued to be forecasts of substantial imports of propane being delivered into the Gulf Coast and East Coast of the United States. For example, on February 17, 2004, BP received a published report from Commercial Services Company, Ltd. which forecast approximately 4.2 million barrels of propane destined for the United States in February 2004. This report also forecast that an additional 1.1 million barrels of propane would be imported into the United States in March 2004. This represented a significant increase in the amount of propane being imported into the United States for comparable time periods.

72. On February 16, 2004, in a taped conversation, Claborn made the following statement describing the manner in which BP was to accumulate its dominant long position: “. . . he talked to Cameron, told him what we were doing, Cameron said just don't try to bring any extra attention. . . .” The only person with supervisory authority over the NGL Trading Bench that went by the name of “Cameron” at the time was Byers.

73. BP continued its aggressive purchasing campaign of February 2004 TET propane between February 17, 2004 and February 20, 2004. During that week, BP - by and through its employees and consistent with directions given to them by Radley - purchased at least an additional 1.4 million “any” barrels of February 2004 TET propane. BP's position in February 2004 TET propane increased to just under 4.7 million barrels by the close of business on February 20, 2004. As of that date - February 20, 2004 - Byers, Marz, Summers, Radley and other members of the Trading Bench knew that BP's position exceeded the entire TEPPCO system propane inventory.

74. As BP and Radley continued to build BP's position in February 2004 TET propane, the price of February 2004 TET propane increased throughout that week, although it dropped initially as a result of the pipeline rupture and weather forecasts.

75. The total TEPPCO system propane inventory steadily increased between February 17, 2004 and February 20, 2004. The total TEPPCO system propane inventory on February 17, 2004 was just over 3.4 million barrels, and increased to just over 3.6 million barrels on February 20, 2004. Throughout this week, BP's position in February 2004 TET propane exceeded the entire TEPPCO system propane inventory, sometimes by as much as 1 million barrels. Some TET market participants recognized BP's trading behavior. For example, in a taped conversation between Abbott and another market participant on February 18, 2004, the following exchange occurred:

participant: Jeez what is y'all's appetite for propane? I mean, it's just like feeding an elephant. You guys aren't really short though, are you? You just got stuff pricing out? You're short pricing or what?

Abbott: Um, yeah, we just like it.

participant: You dig it, huh?

Abbott: I'd call, ... I'd call it insatiable right now.

In another taped conversation between Claborn and another market participant, the following conversation took place on February 19, 2004:

participant: Cody Hunt?

Claborn: huh?

participant: Cody Hunt? Is that who this is?

///

Claborn: What are you talking about, man?

participant: Someone told me you that guys were trying to corner the TET market so I figured you were one of the Hunt Brothers.

Claborn: I think you are badly mistaken. Who told you that?

participant: Huh? Oh man, that's all over the place. Come on, you've heard that....

76. On February 19, 2004, at approximately 9:30 a.m., Byers, Marz, Summers and Radley met in Byers's office to discuss the Trading Bench's activities with respect to February 2004 TET propane. In that meeting, Radley informed Marz and Byers that BP's position in February 2004 TET propane "exceeded the availability of barrels in the marketplace at that time." Marz acknowledges that during that meeting they discussed the fact that BP's TET position on that date was around 5.1 million barrels and that the total available supply in TET storage was around 3 million barrels. In the course of that meeting, Byers took handwritten notes regarding BP's February 2004 TET propane trading strategy. Those notes read:

- Bulk Mt. Belvue [*sic*]
- People reducing inventory
- Unregulated – OTC + Chalkboard
- 25 – 35 shorts to us
- Heavily backwardated

Radley informed Byers and Marz that the Trading Bench could unwind the large position it had built in February 2004 TET propane if that was Byers's and Marz's decision. Following the February 19, 2004 meeting the Trading Bench did **not** unwind BP's February 2004 TET position. Rather, the Trading Bench actually increased BP's position in February 2004 TET propane after February 19, 2004.

77. During the course of the February 19, 2004 meeting, Byers, Marz, Summers and Radley also discussed the fact that the Trading Bench had exceeded a position limit imposed by BP policy. Specifically, the position limit was a calendar spread position limit. Pursuant to BP policy, the Trading Bench was required to obtain Byers' approval if the calendar spread position

limit was to be exceeded. Following the February 19, 2004 meeting, the Trading Bench continued to exceed their calendar spread position limit.

78. Following the February 19, 2004 meeting, Marz met with Radley to discuss BP's February 2004 TET propane trading strategy on several occasions.

79. On February 19, 2004, Gasteam USA, a voicebroker, sent out its Daily Gasteam Report to, among other recipients, BP employees. That report included the following statement in the section identified as "NGL COMMENT":

WITH SOME LARGE PLAYERS CONTINUING TO BUY
FRONT - MONTH TET PROPANE IN THE HOPES OF
PUTTING ON A SQUEEZE, FEBRUARY LEAPT FROM 68.25
C.P.G. TO 70.00 C.P.G. ON VERY SMALL VOLUMES.

This was one of the first of a number of published statements in industry newsletters regarding allegations of market manipulation of TET propane during February 2004 which were received by BP employees.

H. BP's February 2004 TET Propane Trading Strategy - Execution, February 21st to 29th

80. Over the weekend of February 20 through February 22, 2004, the TEPPCO system propane inventory continued to increase, adding as much as 450,000 barrels of propane. Despite this increased supply, BP's position in TET propane continued to exceed the TEPPCO system propane inventory.

81. On February 23, 2004, BP - by and through its employees and pursuant to directions given to them by Radley - increased its long position in February 2004 TET propane. On that date, BP purchased February 2004 TET "any" propane at prices between 73.5 cpq and 75.125 cpq, and sold February 2004 TET "any" propane at the OPIS average price for the

remainder of the month of February which was calculated by using each subsequent day's OPIS average price. These trades indicate that Radley believed that the OPIS average price for the remainder of the month would exceed the approximate 75 cpg that they were paying for the February 2004 TET "any" propane.

82. The OPIS average price for February 2004 TET propane on February 23, 2004 increased to 74.6875 cpg, an increase of 3.5625 cpg over the OPIS average for February 2004 TET propane on February 20, 2004. Some TET propane market participants suspected BP was affecting the price of February TET propane. For example, in an instant message between two market participants, the following conversation occurred:

participant A: is this just an amazing short squeeze for feb TET? last kick at the TET cat combined with shorts.....or is something else miraculous going on?

participant B: it's bp - trying to squeeze - but the weather is not cooperating - not going to be like last year - and they have a huge position in a market that is .16-.17 backward

participant B: tet inventories built almost 500mb from firday [sic] thry [sic] sunday

participant A: very nice! thnx

participant B: you doing well?

participant A: then the rascals use the hi TET numbers to try supporting pricing increases in Michigan and other places!

participant B: exactly

participant A: tell you whatif they push it up over here, Exxon and Kinetic will jettison (even more) their own product and BP will have lots of product to get next year's prebuy programs off to a start

participant A: a high priced startthey'll have to pull out the old "you should pay a premo price because of BP's exceptional service and reliability" cards.

83. The total TEPPCO system propane inventory increased during the week of February 21, 2004 to February 29, 2004 by approximately one million barrels. Nonetheless, BP's position in February 2004 TET propane continued to exceed the entire TEPPCO system propane inventory during that entire week. Radley knew that BP's position exceeded the entire TEPPCO system propane inventory.

84. In or about the morning of February 24, 2004, BP - by and through its employees who acted pursuant to directions given to them by Radley - continued to purchase aggressively February 2004 TET propane, buying more than 250,000 barrels at prices between 74.25 cpg and 78.25 cpg.

85. Due to the fact that BP was holding such a dominant and controlling position in February 2004 TET propane, there were few other market participants that could offer February 2004 TET propane to market participants in significant quantities. For example, on February 24, 2004, between 12:33 p.m. and 4:35 p.m., there were no offers - other than those offers made by BP - to sell February 2004 TET propane in volumes greater than 10,000 barrels on Chalkboard.

86. On February 24, 2004, after 11:00 a.m., BP employees, acting pursuant to directions given to them by Radley, sold over 500,000 barrels of February 2004 TET propane at steadily increasing prices between 79 cpg and 88.25 cpg. BP employees, acting pursuant to directions given to them by Radley, caused the price of February 2004 TET propane to increase on February 24, 2004. Radley intended to affect the price of February 2004 TET propane.

87. The OPIS average price for February 2004 TET propane on February 24, 2004 increased to 81.125 cpg, an increase of 6.4375 cpg over the same OPIS average price on February 23, 2004. The TEPPCO system propane inventory also increased on February 24,

2004. On February 24, 2004, BP's position in February 2004 TET propane exceeded the amount of propane in the TEPPCO system propane inventory. Radley knew that BP's position exceeded the entire TEPPCO system propane inventory.

88. On February 24, 2004, BP employees executed an internal transaction "re-designating" three million barrels of February 2004 TET propane as March 2004 TET propane "wet" barrels. Abbott executed this internal transaction at the direction of management, noting:

Rolling feb[ruary] length to WET March market. we will be carrying bbls [barrels] over to march [sic]

At the time, three million barrels of TET propane represented approximately 75% of the entire TEPPCO system propane inventory. Prior to this transaction, the NGL Bench had never executed an intra-month roll-over of one month's NGL barrels into a subsequent month.

89. On February 24, 2004, Gasteam USA sent out its Daily Gasteam Report to, among other recipients, BP employees. That report included the following statement in the section identified as "NGL COMMENT":

GAS LIQUIDS PRICES HAD A SLOW START, BEFORE, ONCE AGAIN, LEAPING HIGHER ON AGGRESSIVE BUYERS WHILE THE MERC SCREEN SHOWED ONLY A MODEST CHANGE IN ITS STANCE. THE MONT BELVIEU MARKET CONTINUES TO TAKE ITS PRICING DIRECTION FROM A FEW PLAYERS THAT ARE SQUEEZING THE SHORTS IN THE PROPANE MARKET.

90. Similarly, OPIS published a newsletter on February 24, 2004 which was sent to, among others, BP employees. That newsletter contained the following statements:

IN SPOT TRADING . . .

The talk in the propane markets is that one or more firms may be involved in a short squeeze in the TET propane market. Traders speculate that those firms own a hefty proportion of the inventories

in TET storage and they are making sellers pay up for the right to cover.

"Somebody got to be getting killed," said one trader. "I hope it's nobody that owes me money."

Traders marveled at the fact that TET propane opened at 74cts/gal and ended the session at 88.25cts/gal. But, as traders said, none of the other propane markets seem to be touched by the rally. March TET barrels, in contrast, showed a 59-59.75cts/gal range of deals. Non-TET anys were done from 68-73.5cts/gal, with March barrels sold from 58.5-59.25cts/gal.

91. On February 25, 2004, BP employees, acting pursuant to directions given to them by Radley, purchased aggressively February 2004 TET propane, as new sellers of February 2004 TET propane entered the market seeking to take advantage of the higher prices BP and Radley caused through BP's trading activities. On February 25, 2004, BP employees, acting pursuant to directions given to them by Radley, purchased more than 600,000 barrels of February 2004 TET propane at prices between 85.25 cpg and 91.25 cpg. The OPIS average price for February 2004 TET propane increased to 89.25 cpg on February 25, an increase of 8.125 cpg over the same OPIS average price on February 24, 2004.

92. BP's position in February 2004 TET propane increased to just over 4.9 million barrels on February 25, 2004. The total TEPPCO system propane inventory on February 25, 2004 increased to just over 4.1 million barrels. Radley knew that BP's position exceeded the entire TEPPCO system propane inventory.

93. On February 26, 2004, BP employees, acting pursuant to directions given to them by Radley, continued purchasing aggressively February 2004 TET propane. Despite the fact that BP held an enormous position in February 2004 TET propane, on February 26, 2004, BP employees, acting pursuant to directions given to them by Radley, **refused to sell** any February 2004 TET propane to the market. In fact, BP employees, acting pursuant to directions given to them by Radley, made no offers to sell February 2004 TET propane on February 26, 2004.

94. Instead, on February 26, 2004, BP employees, acting pursuant to directions given to them by Radley, continued to purchase February 2004 TET propane, buying over 250,000 more barrels of February 2004 TET propane at prices between 79.5 cpg and 84 cpg. The OPIS average price for February 2004 TET propane decreased to 80.875 cpg on February 26, 2004, a decrease of 8.375 cpg lower than the same OPIS average price on February 25, 2004.

95. On February 26, 2004, BP employees, acting pursuant to directions given to them by Radley, executed a second internal transaction "re-designating" 800,000 bbls of February 2004 TET propane as March 2004 "wet" barrels. Employee Kienenberger executed this internal transaction at the direction of management.

96. On February 26, 2004, the total TEPPCO system inventory increased to just over 4.3 million barrels of propane, while BP's position in February 2004 TET propane increased to over 5.1 million barrels.

97. Early Friday, February 27, 2004, BP employees, acting pursuant to directions given to them by Radley, continued their aggressive purchasing of February 2004 TET propane, buying almost 50,000 bbls before 9:00 a.m.

98. By 10:00 a.m., February 27, 2004, BP was the primary seller of February 2004 TET propane for any significant volume and BP employees, including Claborn, at the direction of Radley began dictating the price of February 2004 TET propane to shorts who sought to purchase February 2004 TET propane. For example, in a taped conversation between Claborn and a voicebroker, the following statements were made:

Voicebroker: Hey. Where's your next one?

Claborn: Confirm, [Company A] buys 25,000 physical TET Feb. at .8850

Voicebroker: Correct. . . .

Claborn: Next one is .89,89.

Voicebroker: .89?

Claborn: Yep.
Voicebroker: [Talking on other line]...89. [To Claborn] Just one second.
[On other line] You got one shot at it. [To Claborn]
I'm telling people they got one shot.
Claborn: That's it.
Voicebroker: How's your day going, man? You're done by the way with
[Company B].
Claborn: [Company B] buys 25,000 at .89
Voicebroker: 89. Where's your next? 89 and a half?
Claborn: 89 and a half.
Voicebroker: Alright. [On other line] .89 and a half, next [to
Claborn]... Are you just walking them up a half step?
Claborn: Now
Voicebroker: For now, you are
Claborn: ...yes.
Voicebroker: [on other line]...89 and a half is next, his next offer
comes in a penny higher.

This recorded conversation demonstrates that BP did not negotiate on the price of February 2004 TET propane, rather, through the voicebroker, it dictated the price to the buyer who needed to cover its short position. Claborn acted pursuant to directions given to him by Radley. A true and correct copy of the full recording is attached hereto as Exhibit "D."

99. By at least February 27, 2004, BP cornered the February 2004 TET propane market by establishing a dominant long position and dictating to the shorts the prices they had to pay to offset their position. During the month of February 2004, BP and Radley purchased February 2004 TET propane with the purpose of intentionally acquiring control or market dominance over the February 2004 TET propane market, and with the intent to dictate - to those who were short February 2004 TET propane - prices that would not otherwise have been reached under the normal pressures of supply and demand. By at least February 27, 2004, the price of February 2004 TET propane was artificial. BP employees, acting pursuant to directions given to them by Radley, caused the market price of February 2004 TET propane to increase, with certain

prices reaching as high as 94 cpg. The price of February 2004 TET propane also affected the price of the NYMEX March propane futures contract.

100. As a result of the execution of the February 2004 TET propane trading strategy, BP owned, at the end of February 2004, over 88% of all propane in the TEPPCO system.

101. The total TEPPCO system propane inventory at the end of February 2004 exceeded the five year average system propane inventory by approximately 65%.

102. On February 26, 2004, Butane-Propane News, Inc. published its Weekly Propane Newsletter dated March 1, 2004, Volume 34, Number 9. The lead story in that newsletter was titled "TEPPCO Propane Trading at Significant Premium." The first two paragraphs reported:

Last week saw a large jump in pricing for TEPPCO propane spots at Mont Belvieu, and even though the market made a sharp correction as the week progressed, it remains about a dime over non-TEPPCO propane. Traders tell the *NEWSLETTER* that a number of players got caught short and had to step in to cover their positions as trading for February wound down.

Although this spike in prices was fairly well limited to the TEPPCO market, it did impact propane postings along the TEPPCO system, which spiked as much as 19 cents and peaked over 100.00 cents/gal. for some wholesalers at various terminals.

(emphasis in original). "Propane postings" refer to prices charged for propane sold to wholesalers at various locations.

103. Byers, Marz and Summers were each aware of the February 2004 TET propane strategy prior to February 27, 2004. Specifically, each was aware that BP's February 2004 TET propane strategy sought to corner the February TET propane market. Byers, Marz and Summers met to discuss the strategy at least as early as February 19, 2004. Byers, Marz, and Summers learned at that meeting that BP's position in February 2004 TET propane exceeded the amount

of propane in the entire TEPPCO system. Byers, Marz and Summers each were aware that Radley had characterized the BP's February 2004 TET propane strategy as a "squeeze." Summers, Marz, and Byers approved the BP February 2004 TET propane strategy. Summers allowed Radley to execute the February 2004 TET propane strategy. Marz allowed Radley to execute the February 2004 TET propane strategy. Byers allowed Radley to execute the February 2004 TET propane strategy. Neither Radley, nor anyone else on the Trading Bench, ever received instructions or guidance from BP management to refrain from cornering the February 2004 TET propane market and executing BP's February 2004 TET propane trading strategy.

I. BP's Subsequent Actions

104. On March 1, 2004, the price of TET propane fell precipitously. The OPIS average price on Monday, March 1, 2004 was 61.75 cpg, falling almost 25 cpg from the OPIS average published price on February 27, 2004. The price for March 2004 TET propane continued to fall for the remainder of that week. By March 10, 2004, the price of March 2004 TET propane fell to 56.125 cpg.

105. Certain counterparties failed to deliver TET propane to BP in satisfaction of their obligations. BP employees, pursuant to directions given to them by Radley, refused to accept late delivery, and instead dictated that each counterparty that failed to deliver TET propane pay 94 cpg to satisfy the obligation. BP employees, pursuant to directions given to them by Radley, refused to negotiate on this price.

106. While BP employees, acting pursuant to directions given to them by Radley, were successful in manipulating the price of February 2004 TET propane and cornering the February 2004 TET market, they failed to make the anticipated profit because the costs associated with

acquiring the dominant and controlling position in February TET propane were greater than the profits they extracted from the shorts whom they cornered.

107. In response to the unprofitable trading strategy, BP management began a non-privileged business review of the February 2004 TET propane trading strategy.

108. One of the objectives of the business review was to determine how the strategy could be made profitable in the future. One aspect of BP's non-privileged business review of the February 2004 TET propane trading strategy involved a "peer review" of the trading strategy and development of a list of "lessons learned" from the trading strategy. Radley, at the direction of Summers and Byers, developed a powerpoint presentation and a list of items which, in Radley's words, would provide direction to other BP traders **"if there's any applicable opportunities in some of the other markets"**

109. Prior to the formal peer review meeting which occurred on March 26, 2004, Radley sent an article from OPIS which described certain market conditions during February 2004 to, among others, Summers, who forwarded the article to Byers and Marz. The article, published on March 17, 2004, was titled "FEBRUARY PROPANE RALLY PAINFUL FOR SOME" and the article began with the statement "When TET propane prices broke from the rest of the U.S. market and rallied sharply in late February, few traders were shy about pointing fingers at companies and uttering the words 'short squeeze.'"

110. Among the powerpoint slides used in the peer review was a slide entitled "2004 Position Summary v. TEPPCO Inventory v. C3 Price." A copy of that slide is reproduced as Exhibit "E," attached to this Complaint. Summers and Marz, among other BP employees attended the peer review.

111. Thus, according to this slide, marked as Exhibit "E", BP's position in February 2004 TET propane exceeded all TEPPCO system propane inventory early in the month, and the most dramatic price increases in February 2004 TET propane occurred when BP's position was at its largest. This slide was reproduced in powerpoint presentations given to senior BP management both in the United States, including Summers, Byers and Marz, as well as BP management in the United Kingdom, including John Mogford and Tony Fountain. A copy of a draft powerpoint presentation (including this slide) entitled "Feb Lessons Learned.ppt" which was sent to Byers is attached as Exhibit "F."

112. Despite this information, as well as other information, including the information relayed in the February 19, 2004 meeting, the published article regarding a "short squeeze" in the February 2004 TET propane market, and knowledge of Radley's taped description of the February 2004 TET propane trading strategy as a "squeeze", neither Summers, Byers, nor Marz rebuked, censured or otherwise disciplined any employee on the Trading Bench for the February 2004 TET propane trading strategy until after the Commission began its investigation. In fact, Summers and Byers authorized bonuses for Radley and other members of the Trading Bench for their 2004 trading activities.

J. BP's April 2003 TET Propane Trading Strategy

113. In April 2003, BP employees, pursuant to directions given to them by Radley, engaged in a trading strategy similar to the BP February 2004 TET propane trading strategy. BP employees, pursuant to directions given to them by Radley, built a long position in April 2003 TET propane for the purpose of attempting to corner the April 2003 TET propane market, and to also affect the price of April 2003 TET propane. Each bid and offer made by BP employees for April 2003 TET propane pursuant to Radley's directions was an act in furtherance of BP's

attempted manipulation of the price for April 2003 TET propane. Radley intended to corner the April 2003 TET propane market and thereby intended to affect the price of April 2003 TET propane.

114. Going into the month of April 2003, BP had established a significant long position in April 2003 TET propane. On April 2, 2003, in a taped conversation, Abbott called Claborn. Radley joined the conversation, and the following statements were made:

Abbott: How does it feel taking on the whole market, man?

Claborn: Whew. It's pretty big man.

Abbott: Dude, you're the entire [expletive deleted] propane market.

///

Radley: Don't worry about it, it's the first two days of the month. Plenty of lead time for people to think that barrels will emerge and take a short position.

///

Abbott: No, I mean, it's cool, 100% of the open interest in propane probably, and, uh 3% of the open interest in nat gas. . . . I dig it, it just, sometimes its hard, it just feels hard to take on the whole market sometimes

///

Radley: Here's my one fear, and its a significant fear. Everybody waits until the last [expletive deleted] day to cover, and then we get wound up in a [expletive deleted] bunch of legal disputes. That's my fear.

Abbott: Yeah.

Radley: That's my fear. People don't cover, don't cover, then the last day they either default or come to us to get them out of it and then we have to try and basically set a price that seems fair

A true and correct copy of this tape is attached hereto as Exhibit "G."

115. Despite their statements that they were "the entire propane market" and "100% of the open interest in propane" on April 2, 2003, BP employees, acting pursuant to Radley's

instructions, continued to purchase April 2003 TET propane in significant quantities throughout the month of April 2003. BP employees, acting pursuant to Radley's instructions, continued to purchase April 2003 TET propane throughout the month in an effort to corner the April 2003 TET propane market. Radley anticipated that after BP cornered the April 2003 TET propane market, BP could force those who were short April 2003 TET propane to buy April 2003 TET propane from BP at high prices dictated by BP.

VI. VIOLATIONS OF THE COMMODITY EXCHANGE ACT

COUNT 1: MANIPULATION OF THE PRICE OF TET PROPANE IN FEBRUARY 2004

116. Paragraphs 1 through 115 are realleged and incorporated herein by reference.

117. Sections 6(c) and 6(d) and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13b, and 13(a)(2), make it unlawful for any person 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, including any contract market.

118. Radley and other BP employees intended to affect the price of February 2004 TET propane. Radley, in conjunction with other BP employees, possessed the ability to cause and did cause the price of February 2004 TET propane to be artificial on at least February 27, 2004. Accordingly, Radley violated Sections 6(c), 6(d), and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13b and 13(a)(2) (2002).

119. Each and every overt action in furtherance of the intent to affect the price of February 2004 TET propane, coupled with that intent, including but not limited to every purchase, sale, bid, offer, telephone call, e-mail and instant message, is alleged herein as a separate and distinct violation of Sections 6(c) and 6(d) and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13b, and 13(a)(2).

120. Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B), provides that the act, omission or failure of any official, agent, or other person acting for any corporation within the scope of his employment shall be deemed the act of the corporation. Because Radley and others were employees or agents of BP and their actions that violated Sections 6(c), 6(d), and 9(a)(2) of the Act were within the scope of their employment, BP is liable for those violations pursuant to Section 2(a)(1)(B) of the Act.

COUNT 2: CORNERING THE MARKET IN TET PROPANE IN FEBRUARY 2004

121. Paragraphs 1 through 115 are realleged and incorporated herein by reference.

122. Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2), makes it unlawful for any person to corner any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, including any contract market.

123. Radley and other BP employees intended to corner the February 2004 TET propane market. Radley, in conjunction with other BP employees, cornered the February 2004 TET propane market by formulating and executing BP's February 2004 TET propane strategy. Accordingly, Radley violated Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2) (2002).

124. Each and every day Radley cornered the February 2004 TET propane market is alleged herein as a separate and distinct violation of Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2) (2002).

125. Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B), provides that the act, omission or failure of any official, agent, or other person acting for any corporation within the scope of his employment shall be deemed the act of the corporation. Because Radley and others were employees or agents of BP and their actions that violated Section 9(a)(2) of the Act were

within the scope of their employment, BP is liable for those violations pursuant to Section 2(a)(1)(B) of the Act.

COUNT 3: ATTEMPTING TO MANIPULATE THE PRICE OF TET PROPANE IN FEBRUARY 2004

126. Paragraphs 1 through 115 are realleged and incorporated herein by reference.

127. Sections 6(c) and 6(d) and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13b, and 13(a)(2), make it illegal for any person to 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, including any contract market.

128. Radley, Abbott, Claborn, Summers, Marz, and Byers intended to affect the price of February 2004 TET propane. Radley, Abbott, Claborn, Summers, Marz, and Byers engaged in overt actions in furtherance of their intent to affect the price of February 2004 TET propane.

129. Each and every overt action in furtherance of the intent to affect the price of February 2004 TET propane, coupled with that intent, including but not limited to every purchase, sale, bid, offer, telephone call, e-mail and instant message, is alleged herein as a separate and distinct violation of Sections 6(c) and 6(d) and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13b, and 13(a)(2).

130. Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B), provides that the act, omission or failure of any official, agent, or other person acting for any corporation within the scope of his employment shall be deemed the act of the corporation. Because Radley, Abbott, Claborn, Summers, Marz, and Byers were employees or agents of BP and their actions that violated Sections 6(c), 6(d), and 9(a)(2) of the Act were within the scope of their employment, BP is liable for those violations pursuant to Section 2(a)(1)(B) of the Act.

COUNT 4: ATTEMPTING TO MANIPULATE THE PRICE OF TET PROPANE IN APRIL 2003

131. Paragraphs 1 through 115 are realleged and incorporated herein by reference.

132. Sections 6(c) and 6(d) and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13b, and 13(a)(2), make it illegal for any person to 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, including any contract market.

133. Radley and other BP employees intended to affect the price of April 2003 TET propane. Radley caused members of the Trading Bench to engage in overt actions in furtherance of their intent to affect the price of April 2003 TET propane.

134. Each and every overt action in furtherance of Radley's intent to affect the price of April 2003 TET propane, including but not limited to every purchase, sale, bid, offer, telephone call, e-mail and instant message, coupled with that intent, is alleged herein as a separate and distinct violation of Sections 6(c) and 6(d) and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13b, and 13(a)(2).

135. Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B), provides that the act, omission or failure of any official, agent, or other person acting for any corporation within the scope of his employment shall be deemed the act of the corporation. Because Radley and others were employees or agents of BP and their actions that violated Sections 9(c), 6(d), and 9(a)(2) of the Act were within the scope of their employment, BP is liable for those violations pursuant to Section 2(a)(1)(B) of the Act.

VII. RELIEF REQUESTED

WHEREFORE, the Commission respectfully requests that this Court, as authorized by Section 6c of the Act, 7 U.S.C. § 13a-1, and pursuant to its own equitable powers:

A. Find Defendant liable for violating Sections 6(c) and 6(d) and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13b, and 13(a)(2) (2002);

B. Enter an order of permanent injunction restraining and enjoining Defendant and any of its affiliates, agents, servants, employees, successors, assigns, attorneys, and persons in active concert with them who receive actual notice of such order by personal service or otherwise, from directly or indirectly violating Sections 6(c), 6(d) and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13b and 13(a)(2) (2002);

C. Enter an order directing Defendant to pay civil monetary penalties, to be assessed by the Court, in an amount not to exceed \$120,000 or triple the monetary gain to it for each violation of the Act, as described herein; and,

D. Enter an order providing for such other and further remedial and ancillary relief, including, but not limited to restitution, disgorgement and damages to all persons affected by Defendant's actions, as this Court may deem necessary and appropriate; and,

E. Enter an order requiring Defendant to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2).

Dated: June 28, 2006

Respectfully Submitted,

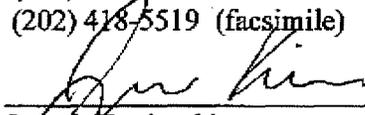


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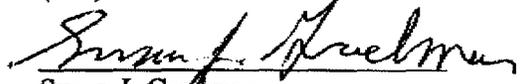
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ATTACHMENT 1

GLOSSARY

Dennis Abbott (“**Abbott**”) was the “second-in-command” on BP’s NGL Trading Bench in February 2004.

“Any” or “Any barrel.” A contract for an “any” barrel of propane for a particular month may be delivered at any time, with agreement of the buyer and the seller, during the month up to the last calendar day.

BP Products North America (“BPNA” or “BP”) is a wholly owned subsidiary of BP p.l.c., the second largest energy company in the world. In 2004, BP was one of the largest Natural Gas Liquids (“NGLs”) marketers and producers in the United States. BP also consumes propane in connection with its chemical manufacturing business.

BP North American Gas and Power (“NAGP”) is the trading arm of BP in North America and the “face to the market” for trading NGLs, and specifically TET propane.

BP Natural Gas Liquids Business Unit (“NGLBU”) handles the production, wholesale marketing and transportation of NGLs in North America, including propane.

Donald Cameron Byers (“Byers”) is currently the CEO and President of NAGP and, in February 2004, was the Chief Operating Officer of NAGP.

“Chalkboard” is an electronic bulletin board that provides a means for propane traders to engage in bilateral negotiations. Chalkboard allows parties to post bids and offers and negotiate transactions in propane but Chalkboard does not take title to propane.

Cody Claborn (“Claborn”) was the primary trader for TET propane in February 2004 and participated in the execution of BP’s February 2004 TET propane strategy. Claborn was placed on paid administrative leave during the Division’s investigation in this matter, and was recently fired for his actions in connection with BP’s February 2004 TET propane trading strategy.

Dynegy Liquids Marketing (“Dynegy”) owned and operated a propane storage facility also located in Mont Belvieu Texas during the relevant period. Propane stored at that facility and deliverable to that location is referred to as “non-TET” propane by the propane industry.

Enterprise Products Partners, LP (“Enterprise”) owns and operates a natural gas liquids storage facility also located in Mont Belvieu Texas. Propane stored at that facility and deliverable to that location is referred to as “non-TET” propane by the propane industry.

Martin Marz (“Marz”) was the Compliance Manager for NAGP in February 2004. He has recently been removed from that position and is currently a Regulatory Affairs Consultant for BPNA with no responsibility for supervising trading on behalf of BP.

Mark Radley ("**Radley**") was the Bench Leader for the NGL Trading Bench for NAGP from approximately December 2002 through April 2005. Radley was placed on paid administrative leave during the Division's investigation in this matter, and was recently fired by BP for his actions in connection with BP's February 2004 TET propane trading strategy.

"**NGL**" is an acronym for natural gas liquids.

"**NGL Bench**" refers to BPNA's group of traders that trade natural gas liquids.

Oil Price Information Service ("**OPIS**"), is a private price reporting service, which conducts daily surveys of traders and provides a daily midpoint, or "**OPIS Average**," for the propane commodity market based on the simple average of the highest and lowest observed prices.¹ The OPIS Average is also used in the propane markets to settle financial swaps and options. The OPIS publishes prices for spot and forward months in both TET and non-TET propane, as well as for Conway, Kansas propane. It also publishes prices for each of these propane products in outlying quarters.

"**Physical propane**" or "**Physical propane contract**" refers to a contract that provides the purchase or sale of actual propane. Physical propane is traded either as "wet" barrels or as "any" barrels for purposes of delivery. Physical propane is traded in the cash markets using largely standardized contracts traded in volumes denominated in barrels of liquified propane ("bbls"). Each barrel holds 42 gallons of propane. Propane prices are quoted in cents per gallon ("cpg") at increments of 1/8th of a cent. Physical propane may be traded either at a "fixed" price or an "index" price. The index is published on a daily basis by OPIS. The delivery location of the propane is a function of the propane product being traded, *i.e.*, the delivery location for TET propane is the TEPPCO storage facility, and the delivery location for non-TET propane is either Dynegy or Enterprise.

"**Propane.**" Propane is one of the five primary natural gas liquids (NGLs). Propane is a by-product created during the processing and separating of natural gas liquids from natural gas to meet pipeline standards, or during the crude oil refining process.

James Summers ("**Summers**") was the Vice President of NGL Trading for NAGP in February 2004.

"**TET**" is an acronym for Texas Eastern Transmission Corporation. The phrase "TET propane" refers to propane that is deliverable at the TEPPCO storage facility in Mont Belvieu, Texas or any where within the TEPPCO system.

"**TEPPCO**" is an acronym for Texas Eastern Products Pipeline Co, LLC. The TEPPCO storage facility is located in Mont Belvieu Texas. The TEPPCO storage facility is also the delivery location for the New York Mercantile Exchange's ("**NYMEX**") propane contract. TEPPCO is the largest single storage facility for physical propane in the world is owned and operated by

¹ The "OPIS Average" is not weighted according to volume.

TEPPCO Partners, L.P. in Mont Belvieu, Texas (“TEPPCO storage facility”). The TEPPCO storage facility is the primary source for propane used in residential, commercial and agricultural heating in the northeastern United States via the TEPPCO pipeline, which runs from Mont Belvieu, Texas north through Ohio, into New York, Pennsylvania and Illinois.

“Voicebrokers” are individuals that broker transactions between propane traders through telephonic as well as instant messaging and email.

“Wet” or “wet barrel” refers to a physical barrel of propane that has a specific delivery date within a particular month.

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES OF AMERICA

v.

**MARK DAVID RADLEY,
JAMES WARREN SUMMERS,
CODY DEAN CLABORN**

And

CARRIE KIENENBERGER,

Defendants.

**Criminal Number:
H-08-411**

Judge Gray H. Miller

ORDER

Based on the Defendants' Motion to Dismiss and to Compel Election of Counts Two through Seventeen and Counts Eighteen and Nineteen in the above captioned matter, it is this _____ day of _____, 200__, ORDERED

That the government must elect the count and offense in which it will proceed in Counts Two through Seventeen and Counts Eighteen and Nineteen, with the remaining Counts to be dismissed.

Dated: _____

Judge Gray H. Miller