

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of:)

BP ENERGY COMPANY,)

Respondent.)

CFTC Docket No. 05-02

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

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that BP Energy Company (“BP Energy” or “Respondent”) has violated Section 4c(a)(A) and (B) of the Commodity Exchange Act, as amended (the “Act”), 7 U.S.C. § 6c(a)(A) and (B) (1994).¹ Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether BP Energy engaged in the violations set forth herein, and to determine whether any order shall be issued imposing remedial sanctions.

II.

In anticipation of the institution of an administrative proceeding, BP Energy has submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Without admitting or denying the findings of fact herein, BP Energy consents to the entry of this Order, and acknowledges service of this Order Instituting Proceedings Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions (“Order”). BP Energy consents to the use by the Commission of the findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.²

¹ The conduct at issue here predates the December 21, 2000 effective date of the Commodity Futures Modernization Act (“CFMA”).

² BP Energy does not consent to the use of the Offer or the findings in this Order as the sole basis for any other proceeding brought by the Commission, other than a proceeding in bankruptcy or to enforce the terms of this Order. Nor does BP Energy consent to the use of the Offer or this Order, or the findings consented to in the Offer or this Order by any party in any other proceeding. The findings made in this Order are not binding on any other person or entity named as a defendant or respondent in any other proceeding.

III.

A. SUMMARY

On at least six occasions between April and June 2000, a trader on BP Energy's west power trading desk executed non-competitive, prearranged wash sales during off-exchange trading of electricity contracts. The trades were for the same contract, delivery point, quantity and price, executed opposite the same counterparty company ("counterparty company") and counterparty trader ("counterparty trader"). The trades were prearranged and designed to produce a wash financial result, with neither party making nor taking, nor intending to make or take, delivery or a *bona fide* position in the market or market risk. The BP Energy trader and the counterparty trader agreed to execute a buy and a sell on an electronic trading platform ("Trading Platform"), and then to immediately reverse or offset the first trade by bilaterally executing over the telephone an equal and opposite buy or sell, in violation of Section 4c(a)(A) of the Act, which prohibits wash trading. These wash sales caused prices to be recorded on the Trading Platform that were not true and *bona fide*, in violation of Section 4c(a)(B) of the Act, 7 U.S.C. § 6c(a)(B) (1994).³ BP Energy's internal control culture and the specific internal control policies and procedures in place in 2000 when BP Energy began trading electricity contracts in the United States did not prevent the wash sales between the BP Energy trader and the counterparty trader. BP Energy represents it subsequently has enhanced and improved its policies and procedures.

The Commission acknowledges BP Energy's cooperation during the Division of Enforcement's investigation of this matter.

B. RESPONDENT

BP Energy Company is a corporation organized and existing under the laws of the State of Delaware. BP Energy is an indirect wholly-owned subsidiary of BP America Inc. ("BP America"). BP Energy's principal place of business is 501 WestLake Park Boulevard, Houston, Texas 77079. During all times relevant herein, BP Energy marketed natural gas, electricity and other energy-related products to a wide range of customers across North America. Specifically, BP Energy's Houston office traded off-exchange electricity products in the western United States.

C. FACTS

1. The Electronic Trading Platform

BP Energy, the counterparty company, and other market participants trade electricity through direct negotiations with counterparty traders (*i.e.*, bilaterally), through voice-brokers, or through electronic trading facilities. During the April through June 2000 time period, BP Energy Company and the counterparty company executed electricity trades through, among others, the Trading Platform. At all times relevant hereto, the Trading Platform permitted market

³ Pursuant to the CFMA, Sections 4c(a)(A) - (B) were amended and recodified as 4c(a)(1) - (2), 7 U.S.C. § 6c(a)(1) - (2) (2002).

participants using the Trading Platform to anonymously post bids and offers for various energy contracts in real time.

2. **BP Energy Executed Prearranged Roundtrip Trades, That Resulted In Wash Sales And The Reporting of Non-Bona Fide Prices, Utilizing the Trading Platform.**

On at least six occasions between April and June 2000, a trader on BP Energy's west power trading desk executed non-competitive, prearranged wash sales. In each instance, the BP Energy trader and the counterparty trader prearranged the wash sales over the telephone. They agreed to execute one buy or sell on the electronic Trading Platform and to execute the opposite buy or sell over the telephone. They agreed that BP Energy would purchase or sell an electricity contract, at a particular price and quantity and for a particular delivery point and delivery terms, from the counterparty company by accepting the counterparty company's supposedly anonymous bid or offer on the Trading Platform. They then agreed to execute immediately via the telephone an equal and opposite buy or sell from BP Energy back to the counterparty company, at the same price, for the same quantity, for the same delivery point and delivery terms, thus offsetting the initial trade on the Trading Platform.

D. LEGAL DISCUSSION

Respondent Engaged In Illegal Wash Sales And Caused Non Bona Fide Prices To Be Recorded On The Trading Platform In Violation of the Act.

Under Section 4(c)(a)(A) of the Act, it is unlawful for any person to enter into a transaction involving a commodity that may be used for hedging, determining the price basis of a transaction, or delivering a commodity, in interstate commerce, if the transaction is of the character of a "wash sale." A wash sale is a transaction in which trades are intentionally undertaken for the purpose of giving the appearance that the trades have been executed, without positions being taken in the market or any actual change in the account holder's market position. *See, e.g., In re Piasio, et al.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 at 50,686-88 (CFTC Sept. 29, 2000); *In re Bear Stearns, et al.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,665 (CFTC January 25, 1991); *In re Three Eight Corporation, et al.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,749 at 40,444-45 (CFTC June 16, 1993). In *Bear Stearns*, ¶ 24,994 at 37,663, the Commission explained:

In a wash sale, for example, a trader gives the appearance of making independent decisions to buy and then sell (or sell and then buy) one or more futures contracts. His actual intention at the time he initiates the transaction, however, is to both buy and sell the contract at the same or a similar price – in other words, to create a financial and position nullity

See also, Wilson v. CFTC, 322 F3d 555, 559-60 (8th Cir. 2003) (wash sales "are considered harmful because they create illusory price movements in the market."); *In re Piasio*, ¶ 28,276 at 50,691 (wash sales are "grave" violations, even in the absence of customer harm or appreciable

market effect, because “they undermine confidence in the market mechanism that underlies price discovery.”⁴

BP Energy’s six prearranged power transactions were noncompetitive trades and were engaged in to produce, and did produce, a financial nullity. Thus, the trades constituted illegal wash sales and BP Energy violated Section 4c(a)(A) of the Act.⁵ *Wilson*, 322 F.3d at 559-60 (8th Cir. 2003); *In re Mayer*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,259 at 46,134 (CFTC Feb. 3, 1998).

Section 4c(a)(B) of the Act makes it unlawful to confirm the execution of any commodity transaction “if such transaction is used to cause any price to be reported, registered or recorded which is not a true and bona fide price.” The wash sales executed by BP Energy caused prices to be recorded on the Trading Platform that were not true and *bona fide*. Accordingly, BP Energy violated Section 4c(a)(B) of the Act. *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC Jan. 25, 1991).

IV.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that BP Energy violated Section 4c(a)(A) and Section 4c(a)(B) of the Act, 7 U.S.C. § 6c(a)(A) and (B) (1994).

V.

OFFER OF SETTLEMENT

BP Energy has submitted an Offer of Settlement in which, without admitting or denying the findings herein, BP Energy acknowledges service of the Order; admits jurisdiction of the Commission with respect to the matters set forth in this Order and, for any action or proceeding brought or authorized by the Commission based upon violations of or for enforcement of the Order; waives service and filing of a complaint and notice of hearing, a hearing, all post-hearing procedures, judicial review by any court, any objection to the staff’s participation in the Commission’s consideration of the Offer, any claim of Double Jeopardy based on the institution

⁴ It is not an element of proof of wash sales that the Commission show such trades were executed for an illegitimate motive. “The statute prohibits ‘wash sales’[,] not ‘wash sales except those having a legitimate market purpose.’” *In re Harold Collins*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,982 at 31,899 (CFTC Apr. 4, 1986), *rev’d on other grounds sub nom.*, *Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987). Specifically, to establish its wash sales case, the Commission need not show that the subject trades were executed with an intent to manipulate or affect market prices.

⁵ Under Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B)(2002), and Section 1.2 of the Commission’s Regulations, 17 C.F.R. § 1.2 (2004) the act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation or trust. “[I]t does not matter if the principal participated in or even knew about the agent’s acts; he is strictly liable for them.” *Stoller and Co. v. CFTC*, 855 F.2d 1288, 1292 (7th Cir. 1988)(citing *Cange v. Stoller*, 826 F.2d 581, 589 (7th Cir. 1987)). Consequently, Respondent is liable for its employee’s violations of the Act.

of this proceeding or the entry of any order imposing a civil monetary penalty or other relief, and all claims which it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), as amended by Pub. L. No. 104-21, §§ 231-32, 110 Stat. 862-63 (1996), and Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1 *et seq.* (2004), relating to, or arising from, this action; stipulates that the record basis on which this Order is entered consists solely of this Order including the findings in this Order; and consents to the Commission's issuance of this Order. Pursuant to the Offer of Settlement herein, BP Energy and BP America agree to entry of an Order, in which the Commission makes findings, including findings that BP Energy violated Section 4c(a)(A) and (B) of the Act, and orders that BP Energy cease and desist from violating Section 4c(a)(A) and (B) of the Act; BP Energy pay a civil monetary penalty of One Hundred Thousand Dollars (\$100,000); and BP Energy and BP America shall comply with the undertakings set forth in this Order.

Upon consideration, the Commission has determined to accept the Offer.

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Respondent shall cease and desist from violating Section 4c(a)(A) and (B) of the Act, 7 U.S.C. § 6c(a)(A) and (B) (1994);
2. Respondent shall pay a civil monetary penalty of One Hundred Thousand Dollars (\$100,000) within ten (10) business days of the date of the Order. Respondent shall make payment by electronic funds transfer to the account of the Commission at the United States Treasury, or by certified check or bank cashier's check made payable to the Commodity Futures Trading Commission, and addressed to Dennese Posey, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581 under cover of a letter that identifies Respondent and the name and docket number of this proceeding. Respondent shall simultaneously transmit a copy of the cover letter and of the form of payment to Gregory G. Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581; and
3. Respondent and BP America shall comply with the following conditions and undertakings, as specified:

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

Respondent and BP America shall continue to cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement (the "Division") in this proceeding, and in any civil or criminal investigation, litigation, or

administrative matter related to the subject matter of this proceeding. As part of such cooperation with the Commission, Respondent and BP America agree to:

- (1) preserve all records relating to the subject matter of this proceeding, including but not limited to audio files, e-mails, and trading records for a period of five years from the date of this Order;
- (2) comply fully, promptly, completely, and truthfully with any inquiries or requests for information or documents;
- (3) provide authentication of documents and other evidentiary material;
- (4) produce any current (as of the time of the request) officer, director, employee, or agent of Respondent or BP America, regardless of the individual's location and at such location that minimizes Commission travel expenditures, to provide assistance at any trial, proceeding, or Commission investigation related to the subject matter of this proceeding, including but not limited to, requests for testimony, depositions, and/or interviews, and to encourage them to testify completely and truthfully in any such proceeding, trial, or investigation; and
- (5) for assistance in locating and contacting any prior (as of the time of the request) officer, director, or employee of Respondent or BP America.

Respondent and BP America shall not undertake any act that would limit their ability to fully cooperate with the Commission. Respondent and BP America designate Peter J. Romatowski of the law firm of Jones Day to receive all requests for information pursuant to this undertaking. Should Respondent or BP America seek to change the designated person to receive such requests, notice shall be given to the Division of such intention fourteen (14) days before it occurs. Any person designated to receive such request shall be located in the United States.

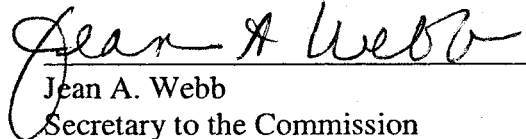
(b) Public Statements

By neither admitting nor denying the findings made in this Order, Respondent and BP America agree that neither they nor any of Respondent's or BP America's agents or employees under their authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order or creating, or tending to create, the impression that the Order is without factual or legal basis; provided, however, that nothing in this provision shall affect Respondent or BP America's (i) testimonial obligations; or (ii) right to take factual or legal positions in other proceedings to which the Commission is not a party. Respondent and BP America will undertake all steps necessary to assure that all of their agents and employees under their authority or control understand and comply with this agreement.

(c) Miscellaneous Provisions

- (1) This Order shall inure to the benefit of and be binding on the successors, assigns, beneficiaries and administrators of Respondent and BP America.
- (2) If Respondent or BP America fails to comply with any of the conditions or undertakings of this Order applicable to it, Respondent and BP America shall be subject to further proceedings pursuant to Section 6(c) and 6(e)(2) of the Act, 7 U.S.C. §§ 9 and 9(a)(2)(2002) for violating a Commission Order.

By the Commission.



Jean A. Webb
Secretary to the Commission
Commodity Futures Trading Commission

Dated: November 4, 2004