

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

<p>In the Matter of:</p> <p> </p> <p>CINERGY MARKETING & TRADING, LP, and as successor in interest to CINERGY MARKETING & TRADING, LLC,</p> <p style="text-align: center;">Respondent.</p>	<p>CFTC Docket No. <u>05 - 03</u></p> <p>ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTIONS 6(c) AND 6(d) OF THE COMMODITY EXCHANGE ACT MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS</p>
---	---

**RECEIVED
C.F.T.C.**

2004 NOV 16 A 9:37

**OFFICE OF PROCEEDINGS
PROCEEDINGS CLERK**

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that Cinergy Marketing & Trading, LP, and as successor in interest to Cinergy Marketing & Trading, LLC, (“Respondent”), has violated Section 9(a)(2) of the Commodity Exchange Act, as amended (the “Act”), 7 U.S.C. § 13(a)(2) (2002). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondent engaged in the violations set forth herein, and to determine whether an order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of an administrative proceeding and prior to any adjudication of any issues of fact or law by the Commission, the Respondent has submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Without admitting or denying the findings of fact herein, the Respondent consents to the entry and acknowledges service of, this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions (“Order”). Respondent consents to the use by the Commission of the findings herein in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.¹

¹ Respondent does not consent to the use of its Offer or the findings in this Order as the sole basis for any other proceeding brought by the Commission, other than a proceeding in bankruptcy, or brought to enforce the terms of this Order. Respondent does not consent to the use of the Offer or the findings in this Order by any other person or entity in this or any other proceeding. The findings made in this Order are not binding

III.

A. SUMMARY

From at least August 2000 through July 2002 (the "Relevant Period"), Respondent reported false, misleading and knowingly inaccurate information, including price and volume information, concerning natural gas cash transactions to certain reporting firms. Price and volume information is used by reporting firms in calculating published indexes of natural gas prices for various pipeline hubs throughout the United States. During the Relevant Period, Respondent's traders knowingly reported to *Gas Daily* and *Inside FERC*, as Respondent trades, wholly fictitious trades, certain actual Respondent trades at false prices and/or volumes, and certain trades observed in the market.

The Commission recognizes the cooperation of Respondent during the Division of Enforcement's investigation of this matter. Respondent swiftly and aggressively responded to the Division's request for materials and provided the Division with substantial additional details after the Division's initial inquiry.

B. RESPONDENT

Respondent **Cinergy Marketing and Trading, LP ("LP")** is an indirect wholly owned subsidiary of **Cinergy Corp. ("Cinergy")**, is located in Houston, Texas, and is engaged as successor in interest to **Cinergy Marketing & Trading, LLC ("LLC")** in natural gas marketing throughout the United States. LLC conducted such operations prior to its dissolution in January 2002 and LP has carried on that business since such date. Cinergy is a Delaware corporation headquartered in Cincinnati, Ohio and is a publicly traded corporation listed on the New York Stock Exchange. Cinergy provides electricity to about 1.5 million customers in Ohio, Indiana, and Kentucky and natural gas to about 500,000 customers in those states.

C. FACTS

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

During the Relevant Period, reporting firms compiled and published indexes of natural gas prices for natural gas hubs throughout the United States. The reporting firms calculated the indexes based upon trading information, including volume and price information, collected from market participants. Participants in the natural gas markets use these indexes to price and settle commodity transactions. Moreover, natural gas futures traders refer to the prices published by the reporting firms for price discovery and for assessing price risks. For instance, an increase in prices at a natural gas trading hub

on any other person or entity, including, but not limited to, any person or entity named as a defendant or respondent in any other proceeding.

signals either stronger demand or weakened supply and futures traders take account of both price movements and changes in the supply/demand balance when conducting their futures trading.

2. Respondent Knowingly Reported False Market Information

From at least August 2000 through July 2002, two gas traders on Respondent's natural gas trading desks knowingly delivered false, misleading and knowingly inaccurate reports regarding natural gas transactions on a routine basis to *Gas Daily* and/or *Inside FERC*. These reports, submitted telephonically and via electronic mail, contained fictitious trades, certain actual Respondent trades in which the prices and/or volumes were altered, and/or select trades observed in the market, all of which were represented to be Respondent's actual trades.

D. LEGAL DISCUSSION

By Reporting False, Misleading or Knowingly Inaccurate Market Information, Respondent Violated Section 9(a)(2) of the Act

Section 9(a)(2) of the Act makes it unlawful for any person "knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce[.]"² Respondent violated Section 9(a)(2) of the Act when certain of its employees knowingly delivered false or misleading or knowingly inaccurate price and volume information to the reporting firms.³ As discussed above, price and volume information affect or tend to affect the market price of natural gas, including futures prices as traded on the New York Mercantile Exchange.

² See, e.g., *United Egg Producers v. Bauer Int'l Corp.*, 311 F. Supp. 1375, 1383 (S.D.N.Y. 1970) (concluding that false press releases regarding egg importation "tended to affect the price of eggs in interstate commerce"); *In re Soybean Futures Litig.*, 892 F. Supp. 1025, 1046 (N.D. Ill. 1995) (concluding that false reports can influence prices and constitute part of a manipulation claim); *CFTC v. Enron*, No. Civ. A. 03-909-H, 2004 WL 594752 (S.D. Tex. Mar. 10, 2004) (quoting *Cargill Inc v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971)); *Volkart Bros., Inc. v. Freeman*, 311 F.2d 52, 58 (5th Cir. 1962) (manipulation can be "any and every operation or transaction or practice...calculated to produce a price distortion of any kind in the market," the means of which "are limited only by the ingenuity of man.")

³ 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." *Stotler and Co. v. CFTC*, 855 F.2d 1288, 1292 (7th Cir. 1988) (citing *Cange v. Stotler*, 826 F. 2d 581, 589 (7th Cir. 1987); *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966-67 (7th Cir. 1986)). Consequently, Cinergy is liable for its employees' violations of the Act.

IV.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that from August 2000 through July 2002, Respondent violated the false reporting provision of Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2) (2002).

V.

OFFER OF SETTLEMENT

Respondent has submitted an Offer of Settlement in which, without admitting or denying the findings herein, it acknowledges service of the Order; admits jurisdiction of the Commission with respect to the matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based upon violations 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 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), 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, Respondent agrees to entry of an Order, in which the Commission makes findings, including findings that Respondent violated Section 9(a)(2) of the Act, and orders that Respondent cease and desist from violating the provision of the Act it has been found to have violated, pay a civil monetary penalty of Three Million Dollars (\$3,000,000), and comply with the conditions and undertakings as set forth in this Order.

VI.

Accordingly, IT IS HEREBY ORDERED THAT:

1. Respondent shall cease and desist from violating Section 9(a)(2) of the Act.
2. Respondent shall pay a civil monetary penalty of Three Million Dollars (\$3,000,000) within ten business days of the date of the entry of this Order, and make

such payment by electronic funds transfer to the account of the Commission at the United States Treasury or by certified check or bank cashier's check made payable to the Commodity Futures Trading Commission and addressed to Dennese Posey, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies the Respondent and the name and docket number of this proceeding. Copies of the cover letter and the form of payment shall be simultaneously transmitted to Gregory George Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581. If payment is not made in accordance with the requirements of this paragraph, Respondent shall be subject to further proceedings pursuant to Section 6(c) and Section 6(e)(2) of the Act, 7 U.S.C. § 9 and 9a(e)(2) (2002), for violating a Commission Order.

3. Respondent and Cinergy shall comply with the following conditions and undertakings as specified:

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

Respondent and Cinergy shall continue to cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement ("Division"), in any investigation, civil litigation, or administrative matter related to the subject matter of this proceeding or any current or future Commission investigation related thereto. Respondent and Cinergy agree to cooperate fully and expeditiously with the Commission's ongoing efforts to discover documents and information related to reporting trade prices and/or volumes to energy reporting services and price indexes. As part of such cooperation, Respondent and Cinergy 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; and

(2) comply fully, promptly, and truthfully to any inquires or requests for information from the Commission, including but not limited to:

- (i) requests for authentication of documents;
- (ii) requests for any documents within Respondent's and Cinergy's possession, custody, or control, including inspection and copying of documents;
- (iii) requests to produce any current (as of the time of the request) officer, director, employee, or agent of Respondent's or Cinergy's, regardless of the employee's location and at such location that minimizes Commission travel resources, to provide assistance at any trial, proceeding, or Commission investigation related to the subject matter of this proceeding, including but not limited to,

requests for testimony, depositions, and/or interviews, and to encourage them to testify completely and truthfully in any such proceeding, trial, or investigation; and


- (iv) requests for assistance in locating and contacting any prior (as of the time of the request) officer, director, or employee of Respondent's or Cinegy's.

Respondent and Cinegy also agree that they will not undertake any act that would limit their ability to fully cooperate with the Commission. Respondent designates Jerome S. Hirsch, Esq., of the Skadden, Arps, Slate, Meagher and Flom law firm, to receive all requests for information pursuant to this undertaking. Should Respondent seek to change the designated person to receive such requests, notice shall be given in writing to the Division of such intention 14 days before it occurs. Any person designated to receive such request shall be located in the United States.

(b) Public Statements

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

By the Commission.



Jean A. Webb

Secretary of the Commission
Commodity Futures Trading Commission

Dated: November 16, 2004