

123 FERC ¶ 61,136
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Energy Transfer Partners, L.P.

Docket No. IN06-3-003

Energy Transfer Company

ETC Marketing Ltd.

Houston Pipeline Company

Oasis Pipeline, L.P.

Oasis Pipeline Company Texas, L.P.

ETC Texas Pipeline Ltd., Oasis Division

ORDER GRANTING SUBPOENA IN PART AND DENYING
SUBPOENA IN PART

(Issued May 8, 2008)

1. This order addresses Energy Transfer Partners, L.P. (ETP) October 9, 2007 application for issuance of a subpoena to the McGraw-Hill Companies, Inc. (McGraw-Hill) to produce data and information related to the allegations asserted against ETP in the Commission's July 26, 2007 Show Cause Order.¹ On February 21, 2008, ETP renewed its application for issuance of a subpoena to McGraw-Hill with certain modifications. For the reasons discussed below, the Commission grants ETP's subpoena in part and denies ETP's subpoena in part.

¹ *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 (2007) (Show Cause Order), *order on reh'g*, 121 FERC ¶ 61,282 (2007).

Background

2. This case began on July 26, 2007, when the Commission issued an order directing ETP to show cause why it should not be found to have violated the code of conduct applicable to persons holding blanket marketing certificates² by allegedly manipulating wholesale gas prices at the Houston Ship Channel by suppressing them to benefit ETP's financial positions and other physical positions for the period from December 2003 through December 2005.³ On October 9, 2007, ETP filed its answer in opposition to the Show Cause Order. Also, on October 9, 2007, ETP filed the subject application for the issuance of a subpoena to McGraw-Hill. The subpoena request seeks data and information concerning the compilation of *Inside FERC*⁴ gas price indices, which ETP contends goes to the core of the allegations asserted against ETP in the Show Cause Order. The details of the subpoena will be discussed below.

3. On October 30, 2007, McGraw-Hill filed an answer in opposition to ETP's application for subpoena. McGraw-Hill argued that the subpoena request was premature until the Commission determines to refer the matter for a hearing before an Administrative Law Judge (ALJ) or for further briefing. McGraw-Hill also argued that the proposed subpoena seeks documents and information protected by the qualified newsgathering privilege recognized under the First Amendment, and ETP has not even attempted to make the required showing to overcome that privilege. On November 14, ETP filed an answer in opposition to the opposition of McGraw-Hill reiterating that the Commission should issue the requested subpoena. On December 11, 2007, McGraw-Hill filed a motion in response to ETP's November 14, 2007 pleading. McGraw-Hill asserted that ETP made arguments about the newsgathering privilege that were incorrect and requested that the Commission decline to issue the subpoena sought by ETP.

² 18 C.F.R. § 284.403(a) (2005).

³ *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 (2007). The Show Cause Order also directed Oasis Pipeline, L.P. (Oasis), one of ETP's affiliates to show cause why, among other things, it did not violate section 284.9(b) of the Commission's regulations by allegedly providing an undue preference for affiliated shippers and unduly discriminating against non-affiliated shippers in the provision of interstate interruptible service pursuant to section 311 of the Natural Gas Policy Act of 1978 (NGPA). Oasis' alleged violations will be addressed in a separate order and are not relevant to ETP's subpoena application here.

⁴ *Inside FERC's Gas Market Report (Inside FERC)* is a monthly publication containing indices for the market price of natural gas at various trading locations that is published by Platts, a division of McGraw-Hill.

4. On December 20, 2007, the Commission issued an order denying ETP's expedited request for rehearing and stay of the Show Cause Order, and addressed certain aspects of the Commission's civil penalty procedures that would apply in cases that apply penalties under the Natural Gas Act (NGA), Natural Gas Policy Act of 1978 (NGPA), and Federal Power Act (FPA).⁵ The order, among other things, directed certain personnel of the Commission's Enforcement Litigation Staff (Enforcement Litigation Staff) to file a brief, within 60 days of the date of the order, that (1) identifies specific issues, if any, it recommends the Commission set for a trial-type evidentiary hearing before an administrative law judge; (2) identifies specific issues, if any, it recommends the Commission resolve by order on the merits without a trial-type evidentiary hearing before an administrative law judge, and (3) contains a response to ETP's pending application for a subpoena. The order gave ETP an opportunity to file a response to Enforcement Litigation Staff's brief within 20 days of the date of such brief.

5. On February 11, 2008, the Commission issued an order adopting protective order.⁶ The protective order covers certain documents produced by McGraw-Hill in response to a September 28, 2007 subpoena issued by the Enforcement Litigation Staff. According to Enforcement Litigation Staff, the documents show specific information regarding sales and purchases at the Houston Ship Channel and that were reported to Platts by ETP and other market participants for the relevant months. Enforcement Litigation Staff states that the subject documents are relevant to the issue of whether ETP violated the code of conduct applicable to persons holding blanket marketing certificates. Enforcement Litigation Staff states that it provided to ETP the documents McGraw-Hill submitted pursuant to the September 28, 2007 subpoena.⁷

6. On February 14, 2008, Enforcement Litigation Staff filed its brief recommending next steps and opposition to ETP's request for summary disposition. The brief recommended that the Commission: (1) set disputed material market manipulation issues for a trial-type evidentiary hearing; (2) issue a penalty assessment order and direct other remedies against Oasis for violations of the NGPA and Commission regulations; and (3) grant in part and deny in part ETP's application for a subpoena to McGraw-Hill. In addition, the brief also stated that data provided by McGraw-Hill since the issuance of the Show Cause Order demonstrated a longer period of manipulations by ETP. Enforcement Litigation Staff also recommended that ETP be assessed additional penalties and be required to disgorge unjust profits based on the longer period of alleged market manipulation violations.

⁵ *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 (2007).

⁶ *Energy Transfer Partners, L.P.*, 122 FERC ¶ 61,122 (2008).

⁷ February 14, 2008 Enforcement Litigation Staff Brief at 51.

7. On February 21, 2008, ETP filed a renewed application for the issuance of a subpoena to McGraw-Hill. ETP's subpoena request has been modified slightly from its October 9, 2007 subpoena request. ETP withdrew Item 1.11, which requested the identities of market participants reporting to Platts at a variety of trading locations, while reserving that right to seek part or all of such information in the future. Item 1.12 seeks information provided by McGraw-Hill to the Commission. In its February 14, 2008 brief, Enforcement Litigation Staff stated that the information covered by Item 1.12 has been provided to ETP. ETP states that in order to confirm Enforcement Litigation Staff's representations, it will need to complete its initial review of the McGraw-Hill documents produced. ETP does not withdraw Item 1.12 but is holding its request in abeyance pending its review and discussion with Enforcement Litigation Staff.

8. On February 27, 2008, McGraw-Hill filed a pleading in opposition to ETP's renewed application for issuance of a subpoena to McGraw-Hill. McGraw-Hill asserts that the renewed application completely ignores the strong precedent establishing that the trade data McGraw-Hill collects in the course of preparing its natural gas indices is protected from compelled production by the qualified reporter's privilege as recognized under the First Amendment. Therefore, McGraw-Hill requests that the Commission decline to issue the subpoena sought by ETP.

Legal Standards for Granting the Subpoena

9. It is well settled that the Commission may issue a subpoena to compel a nonparty in a Commission proceeding to attend as a witness at a deposition or hearing or to produce documents. The authority for the Commission to issue a subpoena requested from a non-party is set forth in section 14(c) of the Natural Gas Act.⁸ Pursuant to section 14(c), the Commission is empowered to "require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant..." to the proceeding at hand. The Commission has issued subpoenas to compel both parties and nonparties to produce documents.⁹ When reviewing challenges to such subpoenas, the Commission focuses on issues of relevancy,

⁸ 15 U.S.C. §717m(c)(2006).

⁹See, e.g., *Transcontinental Gas Pipe Line Corp.*, 39 FERC ¶ 61,221 (1987); *El Paso Natural Gas Company; Tennessee Gas Pipeline Co.*, 23 FERC ¶ 61,216 (1983); *Northern Border Pipeline Co.*, 116 FERC ¶ 63,019 (2006); *Williams Natural Gas Co.*, 73 FERC ¶ 63,008 (1995); *Central Louisiana Electric Co., Inc.*, 64 FERC ¶ 63,020 (1993).

burden, the availability of the information from alternative sources, and the commercial sensitivity of the information.¹⁰

10. The Commission has the power to issue a subpoena if the inquiry is within the Commission's authority, the demand is not too indefinite, and the information sought is reasonably relevant to the Commission's inquiry.¹¹ The party seeking discovery has the initial burden of demonstrating the relevance of the requested information to the proceedings, or that the requested information will lead to the production of relevant information.¹² The relevance and materiality of the subpoena request is measured "against the scope and purpose of the Commission's investigation."¹³ The Commission has broad discretion in making determinations as to the reasonableness, propriety, or burden of the subpoena.¹⁴

11. However, a reporter may be protected from complying with a disclosure request where the disclosure would impair his ability to gather news thereby weakening "a vital source of public information."¹⁵ This protection has come to be known as the "reporter's privilege."¹⁶ McGraw-Hill has asserted that it is entitled to such protection. Therefore, it is necessary to examine the narrower standards set forth by the courts in determining

¹⁰ *Transcontinental Gas Pipe Line Corp.*, 39 FERC ¶ 61,221 (1987); *Sinclair Oil Corp. v. Rocky Mountain Pipeline System LLC, BP Pipelines (North America), Inc.*, 106 FERC ¶ 63,004 (2004); *Northern Border Pipeline Co.*, 116 FERC ¶ 63,019 (2006); *Williams Natural Gas Co.*, 73 FERC ¶ 63,008 (1995); *Central Louisiana Electric Co., Inc.*, 64 FERC ¶ 63,020 (1993).

¹¹ *Transcontinental Gas Pipe Line Corp.*, 39 FERC ¶ 61,221, at 61,783 (1987), citing, *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979); *Adams v. FTC*, 296 F.2d 861 (8th Cir. 1961), cert. denied, 369 U.S. 864 (1962).

¹² *Williams Natural Gas Co.*, 72 FERC ¶ 61,170 (1995); *Mojave Pipeline Co.*, 38 FERC ¶ 61,249 (1987).

¹³ *Colorado Interstate Gas Co.*, 11 FERC ¶ 61,178 (1980).

¹⁴ "The Commission has recognized that some burden on subpoenaed parties is necessary and is to be expected, and the Commission has broad discretion in passing upon this contention." *Amoco Production Co.*, 35 FERC ¶ 61,280, at n.6. (1986); *See TransAlaska Pipeline System*, 9 FERC ¶ 61,133, at n.30 (1979).

¹⁵ *See, e.g., Zerilli v. Smith*, 656 F. 2d 705, 711 n.39 (D.C. Cir. 1981).

¹⁶ *Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972)); *see also In re Behar*, 779 F. Supp. 273, 275 (S.D.N.Y. 1991).

when a reporter is protected from a request to disclose information. The reporter's privilege was recently addressed in *Commodity Futures Trading Commission v. The McGraw-Hill Companies, Inc.*¹⁷ In that case, the Commodity Futures Trading Commission (CFTC) sought from McGraw-Hill trade data and other information related to an unnamed energy company's manipulation and attempted manipulation of the price of natural gas at certain delivery locations in Texas. McGraw-Hill objected to the CFTC's request and asserted its reporter's privilege, and the CFTC filed a motion for enforcement of the subpoena in the United States District Court for the District of Columbia. On August 27, 2007, the court issued its opinion granting in part the CFTC's motion requiring compliance with its administrative subpoena.

12. In *CFTC v. McGraw-Hill*, the court described the legal standard for the reporter's privilege as follows:

Whether the privilege prevails in a given case is determined by a balancing test. (Citation omitted). The balancing test requires evaluation of two factors: (1) the need for the information and (2) whether the party seeking the information has exhausted all reasonably available alternative sources. *Zerilli*, 656 F.2d at 713-14. If the requested information is crucial to a party's case, the balance of interests favors disclosure. *Id.*; *Carey*, 492 F.2d at 637, 160 U.S. App. D.C. 365 (overriding the privilege when the information goes to "the heart of the matter"). But a party must produce more than "[m]ere speculation that information might be useful . . . [it] must describe the information [it] hope[s] to obtain and its importance to [its] case with a reasonable degree of specificity." *Black Panther Party v. Smith*, 213 U.S. App. D.C. 67, 661 F.2d 1243, 1268 (D.C. Cir. 1981), cert. granted and vacated as moot, 458 U.S. 1118, 102 S. Ct. 3505, 73 L. Ed. 2d 1381 (1982).¹⁸

Therefore, since McGraw-Hill has asserted the reporter's privilege with respect to certain of ETP's subpoena requests, we will analyze such requests under the preceding balancing test.

Discussion

13. As discussed above, ETP has withdrawn one of its requests for production, Item 1.11, and held another request for production, Item 1.12, in abeyance. Therefore, ETP has ten requests for production that remain from its October 9, 2007 subpoena request. In addition, ETP has received trade data and information with respect to the Houston Ship

¹⁷ 507 F. Supp. 2d 45 (D.D.C. 2007) (*CFTC v. McGraw-Hill*).

¹⁸ 507 F. Supp. 2d 45, 49 (D.D.C. 2007).

Channel pursuant to the February 11, 2008 protective order. The specific requests for production and the Commission's analysis under the reporter's privilege are discussed below.

ETP/McGraw-Hill 1.1, 1.3 and 1.8

14. ETP requests certain information for the following South Texas trading points: Houston Ship Channel; Natural Gas Pipeline Co.-South Texas (NGPL-STX); Tennessee Gas Pipeline Co.-Zone 0 (TGP Z0); Texas Eastern Transmission Corp.-South Texas (TETCO-STX); and Katy. In Item 1.1, ETP requests that McGraw-Hill produce all trade data reported to McGraw-Hill or Platts that were used to develop any index price as ultimately published in *Inside FERC* for the period from November 2003 through December 2005 (inclusive) for the South Texas trading points. In Item 1.3, ETP requests that McGraw-Hill produce all documents reflecting or related to any formulas or methodologies relied upon in developing the index prices (including all documents reflecting or related to any decision to exclude any data or information from consideration in developing the index prices) for the period from November 2003 through December 2005 (inclusive) for the South Texas trading points. In Item 1.8, ETP requests that McGraw-Hill produce all trade data reported to McGraw-Hill or Platts that were used to calculate the index price as ultimately published in *Inside FERC* for the period from December 2000 to November 2003 (inclusive) for the South Texas trading points.

15. The Show Cause order preliminarily finds, based on analysis of the relevant indices, that there is an historical relationship between prices at the Houston Ship Channel and nearby pricing points in South and East Texas¹⁹ and alleges that manipulative conduct by ETP caused the pricing relationship between the Houston Ship Channel and the other points to decouple during the periods at issue. ETP claims in its defense that the evidence demonstrating decoupling is not reliable to conclude gas prices were different at the Houston Ship Channel as compared to the other points.²⁰ ETP argues that there are other explanations for the decoupling including that the data comprising the index values were based on fixed price trades at the Houston Ship Channel but at the other points were primarily based not on fixed-price trades but on indexed trades.²¹ McGraw-Hill asserts that ETP has not demonstrated why the information from the four additional South Texas hubs is needed other than for purposes of a fishing expedition. McGraw-Hill asserts that ETP has not even engaged in trading

¹⁹ Show Cause Order at 58-62.

²⁰ Kalt/Morris Affidavit at ¶ 201, ETP's October 9, 2007 Answer.

²¹ Kalt/Morris Affidavit at ¶ 201-209. ETP also claims that there are other explanations for the decoupling including the effects of Hurricanes Katrina and Rita.

activity at these hubs.²² Enforcement Litigation Staff supports granting Items 1.1 and 1.3 because ETP may attempt to use the details of the individual transactions to argue that the other South Texas points are not comparable to the Houston Ship Channel and, therefore these items go to the “heart of the matter” as they pertain to index prices at points cited in the Show Cause Order. Enforcement Litigation Staff opposes Item 1.8 asserting that the information sought in Item 1.8 is not relevant because the trade data requested for December 2000 to November 2003 is prior to the time period for which ETP is alleged to have engaged in market manipulation and that ETP is able to analyze the historical index data without the underlying data reported to Platt’s.

16. The Commission will grant the subpoena for Items 1.1, 1.3, and 1.8. The Commission finds that ETP needs this information because it is crucial to ETP’s defense challenging the theory of the Show Cause Order that there was a long, stable historical relationship between the Houston Ship Channel gas prices and the prices at the other South Texas locations and that the decoupling of the Houston Ship Channel prices from the other South Texas points on September 28, 2005 is proof of manipulation. Thus, the Commission finds that the information requested in Items 1.1, 1.3 and 1.8 goes to the “heart of the matter” at issue in the proceeding. The Commission also finds that the information on the trade data and formulas would not be available from alternative sources. ETP needs the underlying data that Platts received in compiling the various South Texas indices in order to separate out fixed-price trades from physical basis trades and know the date of fixed-price trades to see if there were actual price differences. ETP states that while the Houston Ship Channel index price is based on fixed-price trades, the other locations are comprised mostly of physical basis trades indexed to the closing price of NYMEX. ETP submits that the price of a physical basis trade can go up by a dollar if the NYMEX price at Henry Hub closes up to a dollar after the trade is consummated. In what ETP describes as the “NYMEX effect,” ETP states that under such a scenario prices for a fixed-price trade in Texas have not decoupled from those at nearby South Texas trading points. Instead, the observed decoupling allegedly occurred because prices at Henry Hub, i.e., the NYMEX prices, changed, which changed the reported prices for other South Texas points that were indexed to the NYMEX. ETP states that, because the *Inside FERC* price at Houston Ship Channel did not include such price estimates linked to the NYMEX, the *Inside FERC* price at the Houston Ship Channel did not move with the Henry Hub prices, and thus decoupled from the IFERC prices for other South Texas points.²³ Providing ETP with the underlying data, which only Platts possesses, will enable ETP to confirm (or disprove) its assertion that the NYMEX effect skewed the prices at the other South Texas locations, thus undermining the Show Cause Order’s

²² February 27, 2008 Opposition at 4.

²³ See October 9, 2007 Answer, Kalt/Morris Affidavit at ¶ 200-203.

preliminary finding of the decoupling of the longstanding, stable relationship between the Houston Ship Channel and the other South Texas locations.

17. The Commission finds that ETP should receive the underlying South Texas point data for both the period of the allegations as well as the historical period covered in Item 1.8 because it goes to the heart of ETP assertion that the preliminary analysis in the Show Cause Order “failed to remove ‘physical basis’ sales from the index prices at other locations, and it made this error not just for the allegation months, but also in its ‘comparison’ of 2000-2002 prices.”²⁴ Finally, the Commission will permit McGraw-Hill to redact the names of the transacting parties in the trade data it is required to provide, except for ETP’s name, because the Commission finds that the names of the parties and counter-parties to a gas trade are not relevant for ETP’s analysis of the “decoupling argument.” ETP will be able to determine if the trade was a fixed-price trade or a physical basis trade without the names of the parties.

ETP/McGraw-Hill 1.2

18. ETP requests that McGraw-Hill produce all trade data reported to McGraw-Hill or Platts that were not used to develop any index price as ultimately published in *Inside FERC* for the period from November 2003 through December 2005 (inclusive) for the Houston Ship Channel, NGPL-STX, TGP Z0, TETCO-STX and Katy.

19. ETP asserts that it needs the requested information regardless of whether it was ultimately utilized in order to determine whether its own submissions virtually set the Houston Ship Channel index, as alleged, and whether any excluded data may support a theory of alternative causation. ETP contends that the information could reveal that McGraw-Hill’s exclusion of relevant trade data submitted by other companies placed undue weight on the data provided by ETP.²⁵ McGraw-Hill asserts that it has already complied with this request as to the Houston Ship Channel and the spreadsheets contain all trade data including trades determined to be “outliers.” McGraw-Hill asserts that “[g]iven that ETP has yet to make any showing of the criticality of stray data not reflected on the spreadsheets, McGraw-Hill should not be required to comply with this request.”²⁶ Enforcement Litigation Staff asserts that Item 1.2 should be granted in part. Enforcement Litigation Staff submits that production of outliers is justified but Platts should not be required to produce other data that it rejects for any reason.²⁷ Enforcement

²⁴ ETP February 21, 2008 Renewed Application for Subpoena at 9, n.10.

²⁵ ETP’s November 14, 2007 Answer at 27.

²⁶ McGraw-Hill February 27, 2008 Opposition at 5.

²⁷ February 14, 2008 Enforcement Litigation Staff Brief at 45.

Litigation Staff asserts that certain responsive data may not be retained on the spreadsheets Platts uses to compile indices. In its renewed application for subpoena at 6, ETP states it “is not ETP’s intent for McGraw-Hill to search its entire archives for stray information that may be responsive to this request. The term ‘all trade data,’ as defined in the subpoena, means the date and time of trade, volume of trade, price of trade, the number of trades, and the identity of transacting parties.”

20. The Commission denies ETP’s subpoena request with respect to Item 1.2 except with respect to the Houston Ship Channel. As discussed above, ETP already possesses outlier data for the Houston Ship Channel for the relevant period. The Commission finds that, based on the pleadings submitted thus far, ETP has not sufficiently demonstrated a need for information on the other South Texas points because as ETP itself states, “[t]he Commission theory of liability in this case centers on the assumption that ETP’s trades represented a majority of those used to compile the HSC *IFERC* Index at the relevant times in 2004 and 2005.”²⁸ If undue weight was placed on ETP’s trades at the Houston Ship Channel due to the exclusion of other trades, according to ETP, “such a discovery would completely undercut the Commission’s theory that ETP’s conduct ‘virtually set’ the *Inside FERC* HSC index.”²⁹ The Show Cause Order did not make any allegations that ETP dominated trading at any other South Texas point. Moreover, while certain trade data for the other South Texas points is relevant for ETP to test the Commission’s decoupling allegations, ETP has not made any arguments that outlier data for the other South Texas points is necessary to address the decoupling argument.

ETP/McGraw-Hill 1.4

21. ETP requests that McGraw-Hill produce all other trade data or information concerning prices, volumes, and dates or times of natural gas sales or unconsummated bids or offers for such sales, possessed by McGraw-Hill or Platts (whether or not such data actually was used to develop any index price as ultimately published in *Inside FERC*) for monthly October 2005 deliveries at Houston Ship Channel, NGPL-STX, TGP Z0, TETCO-STX, and Katy.

22. ETP asserts that Item 1.4 seeks additional McGraw-Hill information, if any exists, limited to the October 2005 flow month. ETP states that it is not ETP’s intent to subpoena McGraw-Hill’s notes or seek the identity of unnamed sources regarding a September 22, 2006 article in *Gas Daily* about ETP’s alleged trading activities at the Houston Ship Channel. In footnote 8 and Appendix B of its non-public renewed subpoena application, ETP referred to certain documents it received pursuant to the protective order in this proceeding indicating that Platts may have received information

²⁸ ETP November 14, 2007 Answer at 27.

²⁹ *Id.*

for this period that would not have been in accordance with its usual procedures. Enforcement Litigation Staff opposed this request because it believed ETP was seeking reporter's sources. McGraw-Hill states that while it is glad to know that this request is not aimed at information gathered during the preparation of a *Gas Daily* article regarding ETP's trading activity at Houston Ship Channel, "it is hard to imagine (1) what other information this request might possibly seek that is not already covered in ETP's first three requests . . . or (2) how to devise a search for such information. To the extent that this request seeks information other than reported data that may have been considered during the process of arriving at an index or an assessment for a Tier 3 pricing point,³⁰ the spreadsheet, again, is the logical place to look for such information."³¹

23. The Commission will grant ETP's request with respect to Item 1.4. The item is intended to cover information that would not be covered by the other requests concerning the South Texas trading points. ETP states in its renewed subpoena request at 6 that "[i]tem 1.4 seeks additional McGraw-Hill information, if any exists, limited to the October 2005 flow month – the principal target of the Show Cause Order." Based on the Commission's review of non-public information submitted in this proceeding, it appears that Platts may have received information for this period that would not have been in accordance with its usual procedures. While McGraw-Hill asserts that the spreadsheets for its Tier 3 pricing points will contain the information ETP is seeking, the non-public document referred to by ETP does not appear to be limited to Tier 3 pricing points. Therefore, to the extent such information exists, McGraw-Hill is required to produce it since ETP needs such information to challenge the Show Cause Order's assertions that the Houston Ship Channel prices decoupled from the other South Texas locations. In addition, ETP cannot obtain the information from alternative sources since only Platts would possess any additional information that was used or not used to create index prices for October 2005. The Commission's granting of this item is not intended to allow ETP to seek any independently gathered information or notes concerning a September 22, 2006 article regarding ETP's alleged trading activities at the Houston Ship Channel. ETP itself states at page 6 of its renewed subpoena application that "[a]lthough ETP vigorously disagrees with that particular article, it was not and is not ETP's intent to subpoena McGraw-Hill's notes or seek the identity of unnamed sources."

³⁰ Per Platts' published methodologies, Tier 3 points are defined as "points with volumes below 25,000 MMBtu/day and/or fewer than five trades." According to McGraw-Hill, information other than trade data reported for a given pricing point will not be included in the statistical analyses underlying Tier 1 and Tier 2 points and only become relevant when considering Tier 3 points. McGraw-Hill February 27, 2008 Opposition at n. 3.

³¹ McGraw-Hill February 27, 2008 Opposition at 6.

ETP/McGraw-Hill 1.5, 1.6 and 1.7

24. ETP requests that McGraw-Hill produce certain information with respect to the following eleven trading points across the United States: ANR Pipeline Co.-Oklahoma; Centerpoint Energy Gas Transmission-East; Columbia Gulf Mainline; El Paso Natural Gas Co.-Permian Basin; El Paso Natural Gas Co.-San Juan Basin; Natural Gas Pipeline Co.-Mid-Continent; Northwest Pipeline Corp.-Rockies; Panhandle Eastern Pipeline Corp.-TX/OK; Southern California Gas Co.; Transwestern Pipeline Co.-Permian Basin; and Waha. In Item 1.5 ETP requests that McGraw-Hill produce all trade data reported to McGraw-Hill or Platts that were used to calculate the index price as ultimately published in *Inside FERC* for the period from August 2005 through December 2005 (inclusive) for the eleven trading points. In Item 1.6, ETP requests that McGraw-Hill produce all trade data reported to McGraw-Hill or Platts that were not used to develop any index price as ultimately published in *Inside FERC* for the period from August 2005 through December 2005 (inclusive) for the eleven trading points. In Item 1.7 ETP requests that McGraw-Hill produce all documents reflecting or related to any formulas or methodologies relied upon in developing the index prices (including all documents reflecting or related to any decision to exclude any data or information from consideration in developing the index prices) for the period from August 2005 through December 2005 (inclusive) for the eleven trading points.

25. ETP asserts these requests are directed to the months in 2005 following Hurricanes Katrina and Rita, when the Show Cause Order accuses ETP of depressing the Houston Ship Channel index to as much as \$3.45 below the NYMEX prompt month futures contract price. ETP submits that the Show Cause Order makes the index prices and the magnitude of differentials of other trading locations to the NYMEX contract (i.e., Henry Hub) a central issue in the post-hurricane months.³² ETP argues that the requested Platts data is needed to determine what sales comprised such indexes and on what day of the week such sales were consummated. ETP contends that for Enforcement Litigation Staff's "implied price" theory³³ to have any validity at all it must be demonstrably applicable to all trading locations and supply-demand conditions.³⁴ ETP asserts that its experts demonstrated, based on publicly available data, that the "implied price" theory

³² February 21, 2008 Renewed Application for Subpoena at 7.

³³ETP uses the term "implied price" theory because the Show Cause Order determined what the appropriate price should be at the Houston Ship Channel by "[i]mplying the value of gas at HSC from the prices of the NYMEX Contract and the basis swap contract . . ." Show Cause Order at P 45. The order also states that "[b]y implied price we simply mean a proxy for the value of fixed price gas that is the NYMEX Contract price (or the ICE swap) minus the HSC basis swap price." *Id.*

³⁴ February 21, 2008 Renewed Application for Subpoena at 7-8.

produces numerous “false positives” at multiple trading locations across the country and therefore is completely unreliable. ETP states that it is seeking the Platts data to test Enforcement Litigation Staff’s theory based on all available information.

26. McGraw-Hill opposes ETP’s requests for these items. McGraw-Hill asserts that the information sought about the eleven trading points is clearly peripheral, at best, to the main issue at hand. McGraw-Hill states that none of the eleven trading points is even mentioned in the Show Cause Order. McGraw-Hill submits that ETP does not even claim to have traded at any of the eleven trading points, nor does it attempt to show a relationship between market activity at Houston Ship Channel and any of these eleven trading points. McGraw-Hill asserts that calling upon McGraw-Hill, a third party, to produce privileged documents related to markets which no one has accused ETP of manipulating, let alone even trading at, is precisely the sort of unlicensed fishing expedition from which the privilege shields reporters.³⁵

27. Enforcement Litigation Staff asserts that data for locations other than South Texas are not relevant to this proceeding. Enforcement Litigation Staff states that the Show Cause Order does not accuse ETP of manipulating any monthly market other than the Houston Ship Channel. Enforcement Litigation Staff contends that price activity at the eleven noted locations is not directly related to price activity at the Houston Ship Channel. Enforcement Litigation Staff states that the Show Cause Order does not rely on index prices compiled by Platts outside Texas for its preliminary finding that ETP manipulated monthly natural gas prices at the Houston Ship Channel. Enforcement Litigation Staff asserts that there is nothing relevant to this proceeding in the data itself, however, and seeking information to conduct statistical or other tests is too far removed from the subject matter of this proceeding to be compelled from a third party.

28. The Commission denies ETP’s requests for information contained in Items 1.5, 1.6, and 1.7. The Commission finds that ETP has not justified why the reporter’s privilege should not prevail with respect to these requests for information. In its renewed subpoena application, ETP itself states that its “experts demonstrated, based on publicly available data, that the ‘implied price’ theory produces numerous ‘false positives’ at multiple trading locations across the country and therefore is completely unreliable.”³⁶ At page 31 of its October 31, 2007 answer, ETP states “Prof. Kalt and Dr. Morris found that at other locations, physical trades on ICE fell one percent or more below the price implied by financial basis swaps on at least 590 out of 1,657 occurrences—or 37 percent of the time. Kalt/Morris Aff. ¶ 195, Exh. 52.” ETP also states that “[f]urthermore, using a study of financial basis swaps entered into during bidweek compared to the final settled index price at other locations, the results showed that the physical trades on ICE fell

³⁵Citing, *CFTC v. McGraw-Hill*, 507 F. Supp. 2d 45, 54 (D.D.C. 2007).

³⁶ February 21, 2008 Renewed Application for Subpoena at 7-8.

below the price implied by those financial basis swaps by a difference of one percent or more on at least 5,235 out of 10,766 occurrences—or 49 percent of the time. Exh. 50.”³⁷ Given the extensive studies already conducted by ETP’s expert witnesses using publicly available information, the Commission finds that, based on the pleadings submitted thus far, ETP has not sufficiently demonstrated that it needs the information contained in Items 1.5, 1.6, and 1.7 to prepare its defense to the allegations in the Show Cause Order nor has ETP adequately demonstrated that alternative sources have been exhausted.

ETP/McGraw-Hill 1.9

29. In Item 1.9 ETP requests that McGraw-Hill produce all documents issued to market participants which reflect any instructions regarding the reporting of trade data to Platts during the relevant period.

30. The Commission will grant ETP’s request for subpoena with respect to Item 1.9. McGraw-Hill has not asserted the reporter’s privilege as to this item. It does not appear that this information will implicate the reporter’s privilege because “[t]he information is issued to market participants and hence should not be privileged or confidential.”³⁸ The Commission finds that the information may be relevant and will not put an undue burden on McGraw-Hill. As Enforcement Litigation Staff states in its brief, while ETP, as an entity that reports to Platts, should have this information, “it may help ETP understand how information should be reported to Platts, reporting conventions, or other specialized information.”³⁹ The information will be limited to the period from December 2003 through December 2005, the period for which ETP is alleged to have engaged in market manipulation.

ETP/McGraw-Hill 1.10

31. In Item 1.10 ETP requests that McGraw-Hill produce all documents reflecting or related to the identity of any person responsible, in whole or in part, for developing the price index published in *Inside FERC*, during the relevant period, for the following locations: (a) Houston Ship Channel; (b) NGPL-STX; (c) TGP Z0; (d) TETCO-STX; (e) Katy; (f) ANR Pipeline Co.-Oklahoma; (g) Centerpoint Energy Gas Transmission-East; (h) Columbia Gulf Mainline; (i) El Paso Natural Gas Co.-Permian; (j) El Paso Natural Gas Co.-San Juan Basin; (k) Natural Gas Pipeline Co.-Mid-Continent; (l) Northwest

³⁷ ETP’s October 9, 2007 Answer at page 31, n 16.

³⁸ February 14, 2008 Enforcement Litigation Staff Brief at 43.

³⁹ *Id.*

Pipeline Corp.-Rockies; (m) Panhandle Eastern Pipeline Corp.-TX/OK; (n) Southern California Gas Co.; (o) Transwestern Pipeline Co.-Permian Basin; and (p) Waha.

32. The Commission will grant ETP's request for Item 1.10 but only with respect to (a)-(e), which cover the South Texas trading points, and not with respect to (f)-(p), which concerns eleven other trading points for which the Commission has denied ETP's subpoena requests. McGraw-Hill has not asserted the reporter's privilege with respect to this information. As Enforcement Litigation Staff states, "this item apparently seeks the identities of Platts personnel who compile price indices for possible deposition purposes."⁴⁰ The Commission agrees with Enforcement Litigation Staff that "providing the requested name or names imposes no great burden on Platts and does not implicate privileged information while identities of relevant personnel may facilitate any requests for depositions that ETP may make."⁴¹

33. Accordingly, ETP's request for subpoena is granted in part and denied in part. McGraw-Hill is directed to comply with the directives of this order within 15 days of its issuance. The Commission reminds all participants that any information exchanged pursuant to the subpoena granted by this order will be subject to the February 11, 2008 protective order issued in this proceeding.

The Commission orders:

(A) ETP's request for subpoena is granted in part and denied in part as discussed above.

(B) McGraw-Hill is directed to comply with the directives of this order within 15 days of its issuance.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁰ *Id.*

⁴¹ February 14, 2008 Enforcement Litigation Staff Brief at 43-44.