

140 FERC ¶ 61,227
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

J.P. Morgan Ventures Energy Corporation

Docket No. EL12-103-000

ORDER TO SHOW CAUSE

(Issued September 20, 2012)

1. In this order, the Commission directs J.P. Morgan Ventures Energy Corporation (JP Morgan) to show cause why it should not be found to have violated section 35.41(b) of the Commission's regulations under the Federal Power Act (FPA).¹ JP Morgan is alleged to have violated section 35.41(b) by submitting misleading information and omitting material facts in communications with the Commission, the California Independent System Operator Corporation (CAISO), and CAISO's Department of Market Monitoring (DMM). The Commission further directs JP Morgan to show cause why JP Morgan's authorization to sell electric energy, capacity, and ancillary services at market-based rates should not be suspended. This order also initiates a proceeding, pursuant to section 206 of the Federal Power Act (FPA)² and Rule 209(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.209(a)(2) (2012), in Docket No. EL12-103-000, where the show cause filing will be considered.

Background and Authority

2. The integrity of the Commission's process ensuring that market-based transactions result in just and reasonable rates, as required by sections 205³ and 206 of the FPA, relies on the openness and honesty of market participants in their communications with the Commission and other jurisdictional entities.⁴ Implicit in Commission orders granting

¹ 18 C.F.R. § 35.41(b) (2012).

² 16 U.S.C. § 824e (2006).

³ 16 U.S.C. § 824d (2006).

⁴ *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218, at P 107 (2003).

market-based rate authority is a presumption that a company's behavior will not involve fraud, deception or misrepresentation.⁵ Thus, the Commission has repeatedly emphasized that companies failing to adhere to the Commission's rules and regulations are subject to suspension or revocation of their market-based rate authority, in addition to the disgorgement of unjust profits and the assessment of civil penalties.⁶

3. Informed by the trading practices observed in the Western markets during the California Energy Crisis in 2000 and 2001, the Commission approved a series of Market Behavior Rules in 2003.⁷ The Commission explained that market-based rate authorization is subject to compliance with the Market Behavior Rules.⁸ Market Behavior Rule 3, codified in section 35.41(b) of the Commission's regulations, requires sellers to provide accurate and factual information and prohibits sellers from submitting false or misleading information or omitting material information in any communication with the Commission, market monitors, independent system operators, regional

⁵ *Enron Power Mktg., Inc.*, 102 FERC ¶ 61,316, at P 8 (2003).

⁶ See, e.g., *Enforcement of Statutes, and Regulations and Orders*, 123 FERC ¶ 61,156, at P 49 (2008); *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, at P 32 (2006); *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at PP 6, 146, 151; *Enron Power Mktg., Inc.*, 102 FERC ¶ 61,316 at P 8 (citing *Fact Finding Investigation of Potential Manipulation of Elec. and Natural Gas Prices*, 99 FERC ¶ 61,272, at 62,153-54 (2002); *accord Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 97 FERC ¶ 61,220, at 61,975-77 (2001); *GWF Energy, LLC*, 98 FERC ¶ 61,330, at 62,390 (2002)).

⁷ *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 1.

⁸ *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at PP 6, 146, 151; see also *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Pub. Utils*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at PP 914-915, 924 (a seller with market-based rate authority must comply with the provisions of 18 C.F.R. Part 35, Subpart H), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizens, Inc. v. FERC*, 2012 U.S. LEXIS 4820 (U.S. June 25, 2012).

transmission organizations, and jurisdictional transmission providers, unless the seller can demonstrate that it has exercised due diligence to prevent such occurrences.⁹ As a result, the Commission has explained that section 35.41(b) only applies if a seller submits (i) “false or misleading information” or (ii) if the seller “omits material information” in “any communication” to the Commission or one of the entities specified in section 35.41(b).¹⁰ However, no showing of intent is necessary in order to demonstrate that a violation of section 35.41(b) has occurred.¹¹

4. In 2005, the Commission authorized JP Morgan to sell electric energy, capacity, and ancillary services at market-based rates in several regions, including the CAISO market.¹² JP Morgan continues to be an active participant in the CAISO market, and is therefore subject to the terms and conditions of CAISO’s Open Access Transmission Tariff (Tariff). Section 11.1 of Appendix P of CAISO’s Tariff requires the DMM to refer to the Commission all instances in which the DMM has reason to believe that a Market Violation has occurred.¹³ However, pursuant to section 11.5 of Appendix P of the Tariff, following such a referral, the DMM is prohibited from undertaking “any investigative steps regarding the referral except at the express direction of FERC or FERC [s]taff.”¹⁴

⁹ 18 C.F.R. § 35.41(b). For the purpose of section 35.41(b), the Commission’s regulations define the term “seller” to mean “any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the [FPA].” 18 C.F.R. § 35.36 (2012).

¹⁰ See *Cobb Customer Requesters v. Cobb Elec. Membership Corp.*, 136 FERC ¶ 61,084, at P 42 (2011).

¹¹ See *Moussa I. Kourouma*, 135 FERC ¶ 61,245, at PP 20-22 (2011).

¹² *J.P. Morgan Ventures Energy Corp.*, 112 FERC ¶ 61,322 (2005).

¹³ CAISO, eTariff, FERC Electric Tariff, App. P, § 11.1 (3.0.0) (section 11.1). The Tariff defines a “Market Violation” as “A CAISO Tariff violation, violation of a Commission-approved order, rule or regulation, market manipulation, or inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.” CAISO, eTariff, FERC Electric Tariff, App. A (0.0.0).

¹⁴ CAISO, eTariff, FERC Electric Tariff, App. P, § 11.5 (section 11.5); see also section 11.1 (“Once DMM has obtained sufficient credible information to warrant referral to FERC, DMM shall immediately refer the matter to FERC and desist from independent action related to the alleged Market Violation.”).

Discussion

5. In March of 2011, CAISO informed JP Morgan that CAISO had reviewed JP Morgan's bidding activities in the CAISO market and intended to refer the matter to the Commission's Office of Enforcement.¹⁵ CAISO also sent two data requests to JP Morgan. Notably in this case, CAISO sent a data request to JP Morgan on May 4, 2011 (May 4 data request), which required JP Morgan to respond by May 18, 2011.¹⁶

6. In a letter dated May 18, 2011, JP Morgan's outside counsel cited the "post-referral bar" in section 11.1 of Appendix P of CAISO's Tariff and argued that "the DMM should refer the matter to FERC and stop its independent action."¹⁷ On May 20, CAISO officially referred JP Morgan's bidding activities to the Office of Enforcement for further investigation.¹⁸ In letters dated June 13 and 17, 2011, to the DMM and CAISO, respectively, JP Morgan's outside counsel again cited section 11.1 and reiterated its argument that the DMM "should refer the matter to FERC and stop its independent action."¹⁹

7. Also on June 17, JP Morgan purports to have provided CAISO "voluntarily" with official economic profit and loss statements for the generating units under investigation.²⁰ In response, CAISO indicated that JP Morgan had provided those materials 30 days after its response to the May 4 data request was due.²¹

8. On June 24, 2011, staff from the Office of Enforcement emailed JP Morgan alerting it to the fact that staff had expressly directed CAISO to continue to seek responses to all data requests issued before June 20, 2011, including the May 4 data

¹⁵ JP Morgan, Complaint, Docket No. EL12-70-000, at 5 (filed May 21, 2012) (JP Morgan Complaint). This complaint is described in more detail below.

¹⁶ *Id.* at 6.

¹⁷ Office of Enforcement, Submission, Docket No. EL12-70-000, at 6 (filed July 3, 2012) (Office of Enforcement July 2012 Submission).

¹⁸ JP Morgan Complaint at 7. CAISO also referred JP Morgan's bidding activities in 2010 to the Office of Enforcement in June 2011. *Id.* n.13.

¹⁹ Office of Enforcement July 2012 Submission at 7-8.

²⁰ JP Morgan Complaint at 8.

²¹ *Id.*

request.²² Further, on July 28, 2011, JP Morgan was informed by a second email from the Office of Enforcement that CAISO had been expressly directed to continue to seek JP Morgan's official economic profit and loss statements for the generating units under investigation (the 2011 emails).²³

9. In a letter dated October 15, 2011, from the Office of Enforcement to JP Morgan's deputy general counsel, the Office of Enforcement asked JP Morgan to provide the DMM with certain materials that still had not been provided in response to the earlier requests made by the DMM and the 2011 emails by the Office of Enforcement.²⁴ The Office of Enforcement reminded JP Morgan of the Office of Enforcement's two previous requests, each of which advised the company of staff's express direction to the DMM, and attached copies of the 2011 emails confirming DMM's authorization.²⁵ In a letter dated October 18, 2011, JP Morgan's outside counsel provided additional materials but continued to cite section 11.1 and characterize its submission of materials as voluntary.²⁶

10. In an exchange of letters in December 2011 and January 2012, CAISO and JP Morgan again disputed the applicability of the post-referral bar.²⁷ CAISO informed JP Morgan that it considered the materials submitted in October of 2011 to have been submitted 162 days after JP Morgan's response to the May 4 data request was due.²⁸ As a result, CAISO imposed a financial penalty of \$486,000 against JP Morgan for failing to submit all responsive materials to CAISO by the deadline established in the May 4 data request.²⁹

²² See Office of Enforcement, Submission, Docket No. EL12-70-000, at 4 (filed June 19, 2012) (Office of Enforcement June 2012 Submission).

²³ *Id.* at 6-7.

²⁴ Office of Enforcement July 2012 Submission at App. A.

²⁵ *Id.*

²⁶ *Id.* at 23. Hereinafter, this letter will be referenced as the "October 18 Statement."

²⁷ *Id.* at 25-26.

²⁸ See JP Morgan Complaint at 8-9; Office of Enforcement July 2012 Submission at 27.

²⁹ JP Morgan Complaint at 8-9.

11. JP Morgan filed a non-public appeal of CAISO's decision to impose the monetary penalty pursuant to Part 1b of the Commission's regulations³⁰ on March 21, 2012.³¹ Among other things, JP Morgan once again argued that its responses to the May 4 data request were "completely voluntary" and that, pursuant to sections 11.1 and 11.5 of the Tariff, the DMM was divested of its authority to continue its investigation and impose a monetary penalty.³² Further, JP Morgan stated that it "reasonably concluded as of March 9, 2011—and continues to conclude—that any responses to the DMM after that date were completely voluntary and that the assessed penalty has no basis under the CAISO Tariff."³³ On April 20, 2012, in a non-public order, the Commission rejected JP Morgan's appeal as procedurally deficient.

12. On May 21, 2012, pursuant to section 206 of the FPA, JP Morgan filed a complaint alleging that the monetary penalty imposed by CAISO for JP Morgan's alleged failure to timely respond to the May 4 data request is unjust, unreasonable and unduly discriminatory.³⁴ Among other things, JP Morgan argued that CAISO's imposition of the monetary penalty and continued efforts to obtain information in response to the May 4 data request after CAISO had referred the matter to the Office of Enforcement violated sections 11.1 and 11.5 of the Tariff.³⁵ According to JP Morgan, once CAISO referred the matter to the Office of Enforcement, sections 11.1 and 11.5 of the Tariff prohibited CAISO from taking any further action against JP Morgan in the absence of an "express direction of FERC or FERC Staff."³⁶ Notably, however, JP Morgan also stated:

Neither the DMM nor [the Office of Enforcement] informed [JP Morgan] that the DMM had been authorized or instructed to continue to seek responses to the DMM's May 4 [data request]—or any other request—either at the direction of [the Office of Enforcement] or the Commission under [s]ection 11.5 [of the Tariff] or the monitoring clause. When [the

³⁰ 18 C.F.R. Part 1b (2012).

³¹ JP Morgan, Non-Public Appeal, Docket No. IN11-08-000 (filed March 21, 2012).

³² *Id.* at 8-10.

³³ *Id.* at 10. Hereinafter, the statements made in JP Morgan's Non-Public Appeal will be referenced as the "March 21 Statements."

³⁴ JP Morgan Complaint at 2.

³⁵ *Id.* at 1-5.

³⁶ *Id.* at 12-13 (quoting section 11.5).

Office of Enforcement] later requested that [JP Morgan] provide specific documents to the DMM, there was no suggestion that [the Office of Enforcement] was triggering the “express direction” exception in [s]ection 11.5 or that [JP Morgan] had an on-going [sic] duty to respond to the May 4 [data request]. Therefore, it was entirely reasonable for [JP Morgan] to believe that the DMM had no legal basis for mandating information from the company relating to the relevant 2010 and 2011 bidding activity.³⁷

13. In response to JP Morgan’s complaint, the Office of Enforcement submitted a response identifying certain facts described above, particularly the 2011 emails and the October 15 letter to JP Morgan.³⁸ Following the Office of Enforcement’s submission, JP Morgan withdrew its complaint.³⁹ In its subsequently filed answer, JP Morgan acknowledges that the May 21 Statements contained a “factual error.”⁴⁰ JP Morgan states that it “did not recall” the 2011 emails at the time JP Morgan’s complaint was filed because the 2011 emails had been received nearly a year earlier.⁴¹ JP Morgan further asserts that one factor contributing to its “error” was that the 2011 emails “did not expressly refer” to section 11.5 of the Tariff.⁴²

Show Cause Order

14. Based on the various statements made in Docket No. EL12-70-000, in JP Morgan’s Non-Public Appeal in Docket No. IN11-08-000, and to CAISO and the DMM, we preliminarily find that JP Morgan may have submitted misleading information or omitted material information in its communications with CAISO, the DMM, and the Commission in violation of section 35.41(b).⁴³ In particular, we preliminarily find that

³⁷ *Id.* at 13. Hereinafter, the statements made in this passage of the JP Morgan complaint will be referenced as “the May 21 Statements.”

³⁸ *See* Office of Enforcement June 2012 Submission.

³⁹ JP Morgan, Motion, Docket No. EL12-70-000 (filed June 20, 2012).

⁴⁰ JP Morgan, Answer, Docket No. EL12-70-000, at 1 (filed June 22, 2012) (JP Morgan Answer).

⁴¹ *Id.* Hereinafter, the statements in this passage of the JP Morgan Answer will be referenced as “the June 22 Statements.”

⁴² *Id.* at 1-2.

⁴³ The record and materials submitted in Docket No. EL12-70-000 are hereby incorporated into this proceeding by reference.

four separate statements (including multiple statements in a single document) by JP Morgan may constitute violations of section 35.41(b): the October 18 Statement, the March 21 Statements, the May 21, 2012 Statements, and the June 22, 2012 Statements. Accordingly, we direct JP Morgan to show cause in an answer filed with the Commission, why it should not be found to have violated section 35.41(b) of the Commission's regulations. In its answer, JP Morgan shall also show cause why its authority to sell electric energy, capacity, and ancillary services at market-based rates should not be suspended.

15. After reviewing JP Morgan's answer, as well as any pleadings that may be submitted by intervenors, the Commission will consider what further action is appropriate in this case, if any. In particular, the Commission will consider whether it has sufficient evidence to decide the matter on the merits or if hearing procedures are necessary to resolve any disputed issues of material fact. If it is determined that no hearing is necessary and no violation of section 35.41(b) has occurred, this proceeding will be terminated. Alternatively, we also reserve the right to defer our decision regarding the alleged misrepresentations to the ongoing market manipulation investigation being conducted by the Office of Enforcement pursuant to Part 1b of the Commission's regulations.

16. As ordered below, any entity desiring to participate in this proceeding must file a timely notice of intervention or a motion to intervene, as appropriate, with the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), no later than 21 days after publication of notice in the *Federal Register* of the Commission's initiation of this section 206 proceeding.

17. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than the date of publication of the notice of the Commission's initiation of its investigation in the *Federal Register*, and no later than five months after the publication date.⁴⁴ Consistent with our general policy of providing maximum protection to customers, we will set the refund effective date at the earliest date possible, which will be the date the notice of the initiation of the investigation in Docket No. EL12-103-000 is published in the *Federal Register*.⁴⁵

⁴⁴ 16 U.S.C. § 824e(b).

⁴⁵ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989). We, however, note that section 206 of the FPA does not require that the Commission order refunds in every instance. *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121, at P 154 (2009).

18. Section 206(b) of the FPA also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision.⁴⁶ We expect that we should be able to render a decision within six months of initiating this proceeding, or March 20, 2013.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the FPA (18 C.F.R. Chapter I), the Commission hereby institutes an investigation in Docket No. EL12-103-000 to determine whether the October 18 Statement, the March 21 Statements, the May 21 Statements, and the June 22 Statements constitute violations of section 35.41(b) of the Commission's regulations. After reviewing the answers submitted by JP Morgan and intervenors, the Commission will determine whether it is appropriate to convene a trial-type evidentiary hearing concerning the veracity and completeness of the October 18 Statement, the March 21 Statements, the May 21 Statements, and the June 22 Statements, in addition to whether JP Morgan's market-based rate authority should be suspended, as discussed in the body of this order.

(B) Within 21 days of publication of notice in the *Federal Register* of the Commission's initiation of section 206 proceedings in Docket No. EL12-103-000, JP Morgan must file an answer with the Commission in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause (i) why the October 18 Statement, the March 21 Statements, the May 21 Statements, and the June 22 Statements should not be found to constitute violations of section 35.41(b) of the Commission's regulations; and (ii) why JP Morgan's market-based rate authority should not be suspended.

(C) In any answer, JP Morgan should address any matter, legal, factual, or procedural, that it would urge in the Commission's consideration of this matter.

(D) Any entity desiring to participate in Docket No. EL12-103-000 as ordered above, must file a notice of intervention or a motion to intervene, as appropriate, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure,

⁴⁶ 16 U.S.C. § 824e(b).

18 C.F.R. § 385.214 (2012), within 21 days of publication of notice in the *Federal Register* of the Commission's initiation of section 206 proceedings in Docket No. EL12-103-000.

(E) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of section 206 proceedings in Docket No. EL12-103-000.

(F) The refund effective date established pursuant to section 206(b) of the FPA, will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (E) above.

By the Commission. Commissioner Moeller concurring with a separate statement attached.

Commissioners Moeller and LaFleur concurring jointly with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

J.P. Morgan Ventures Energy Corporation

Docket No. EL12-103-000

(Issued September 20, 2012)

MOELLER, Commissioner, *concurring*:

An extensive review of the evidence, and the many unanswered questions about the knowledge of individuals working on behalf of JP Morgan, FERC, or the California Independent System Operator (CAISO), indicates that further consideration of this matter could provide evidence that individuals working for, or on behalf of, JP Morgan knowingly made statements that were false.

At this point in the development of the record, several questions need answers. And without doubt, all of the individuals working on this matter could have communicated with each other in a better way. Formal letters --- in writing --- are obviously important for a matter where three or more Commissioners contend that market-based rates could be jeopardized.

Because all of this evidence merits further review, I concur in the result.

Philip D. Moeller
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

J.P. Morgan Ventures Energy Corporation

Docket No. EL12-103-000

(Issued September 20, 2012)

LaFLEUR, Commissioner, and MOELLER, Commissioner, *concurring*:

While we agree that JP Morgan's alleged misrepresentations merit further review, we write separately to highlight an important consideration that we believe should guide the Commission as we determine how to proceed.

The Commission's credibility as both a rate regulator and an enforcement agency is greatest when the boundary between ratemaking and enforcement is clear. If there is any ambiguity as to the Commission's reasons for exercising its ratemaking authority, it could create the perception that the Commission is leveraging its ratemaking authority to achieve an enforcement result.

As today's order explains, JP Morgan's alleged misrepresentations arise from an ongoing investigation into its bidding activities in the CAISO market. While the Commission is within its authority to address these statements outside of that investigation, we believe the Commission should carefully consider whether opening a proceeding under its ratemaking authority is the most appropriate course of action. In this regard, we note that it may be especially difficult to view JP Morgan's alleged misrepresentations in isolation of the broader circumstances of the ongoing investigation because of their close connection to discovery in that investigation. The Commission should also carefully consider that revoking market based rates for statements made during discovery, although within our authority, would be a novel use of that authority. Previous decisions concerning market-based rates have focused largely on whether a market participant has market power, or has in fact manipulated the market. Finally, the Commission should consider its other options. As the order notes, we may decide to address the alleged misrepresentations as additional allegations in the underlying investigation, or treat them as obstruction under the Penalty Guidelines and increase any civil penalty accordingly.

Misrepresentation to the Commission or an RTO or ISO is serious and cannot be tolerated. In deciding how to address potential misrepresentation, however, the Commission must consider all of its options. We urge the Commission to think carefully about the consequences of unduly blurring the line between enforcement and ratemaking.

Accordingly, we respectfully concur.

Cheryl A. LaFleur
Commissioner

Philip D. Moeller
Commissioner