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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No CR 04-0125 VRW

UNITED STATES OF AMERICA,
Plaintiff,

ORDER

v

RELIANT ENERGY SERVICES, INC,
et al,
Defendants.

_____ /

The United States has filed criminal charges against Reliant Energy Services, Inc ("Reliant") and four Reliant employees: Jackie Thomas, Reginald Howard, Lisa Flowers and Kevin Frankeny (collectively "defendants"). The indictment charges each defendant with one count of commodities price manipulation in violation of § 9(a)(2) of the Commodity Exchange Act (CEA), 7 USC § 13(a)(2), four counts of wire fraud in violation of 18 USC § 1343 and one count of conspiracy in violation of 18 USC § 371. Doc #1 (Indictment). Defendants jointly moved to dismiss the original

1 indictment on vagueness and other grounds. Doc #72 (MTD).

2 Subsequent to the filing of defendants' motion, the
3 government obtained three superseding indictments. Without
4 abandoning their initial motion, defendants now jointly move to
5 dismiss the third superseding indictment on the ground that it is
6 barred by the applicable statute of limitations. Doc #218 (MTD-
7 3SI). Based upon the parties' arguments and the applicable law,
8 both motions are DENIED.

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This case arises from California's electricity "crisis" in summer 2000. In 1996, California created two new non-governmental entities to orchestrate the transmission and sale of electricity: the California Independent System Operator ("CAISO") and the California Power Exchange ("CalPX"), both of which were California non-profit, public-benefit corporations. Until it ceased operation in 2001, CalPX was a crucial hub of the electricity generation market, overseeing an auction system for the sale and purchase of electricity on a non-discriminatory basis to meet the electricity loads of CalPX customers, called load-serving entities ("LSEs"), that provide electricity to retail, end-use customers. CalPX's auctions ran on a day-ahead and same-day basis. CalPX would determine, on an hourly basis, a single "market clearing price" which all electricity wholesalers would be paid based on short-term supply and demand bids submitted by all CalPX participants ("spot market"). In addition, CalPX operated a block forward market by matching supply and demand bids for long-term

1 electricity contracts ("term market").

2 Responsibility for the efficient functioning of the high-
3 voltage transmission grid fell to CAISO and, to that end, it ran
4 the spot market for electricity. During the time period in
5 question in this case, if consumer demands were not met by
6 scheduled supplies into CalPX or other sources, CAISO was required
7 to procure additional electricity to serve consumers' requirements
8 and maintain the stability of the grid. To facilitate this, CAISO
9 purchased reserve capacity from wholesalers. This reserve capacity
10 was left idle until CAISO required additional generation of power.
11 If CAISO required additional generation of power, it issued an
12 order to the wholesaler to generate such power out of the reserve
13 capacity; if not, the reserve capacity was left ungenerated. The
14 CAISO-operated market was called the "real time" or "imbalance"
15 market.

16 While CAISO and CalPX were organized under California
17 law, both were subject to the jurisdiction and regulation of the
18 Federal Energy Regulatory Commission (FERC). Under the Federal
19 Power Act (FPA), FERC has jurisdiction over "the sale of electric
20 energy at wholesale in interstate commerce," 16 USC § 824(b), but
21 the California Public Utility Commission retained jurisdiction over
22 all retail sales of electricity in California.

23 While LSEs had sources of electricity that they
24 themselves owned or controlled (e g, nuclear, hydraulic), retail
25 customer demand for electricity greatly exceeded this source of
26 supply. The court will refer to this excess demand for an LSE's
27 supply as the LSE's "net short." CalPX operated as the exclusive
28 market for LSEs' net short electricity needs. LSEs were required

1 to purchase the majority of their net short demand in the CalPX
2 spot market.

3 Reliant, based in Houston, Texas, owns five generation
4 plants in southern California. According to the indictment, in
5 early June 2000, defendant Flowers (on behalf of Reliant) entered
6 into long-term trading contracts for electricity delivery for the
7 third quarter of 2000 and 2001, expecting that electricity prices
8 would increase. Indictment ¶16. On June 19, 2000, however, the
9 spot market price for electricity unexpectedly fell. Based upon
10 the trading contracts entered into by Flowers and the sharply
11 decreased market price, defendants determined that Reliant was
12 facing a multi-million dollar loss. Id. To avoid this loss, the
13 indictment alleges that defendants conspired to manipulate (and did
14 manipulate) the California electricity market to increase the price
15 of electricity.

16 Specifically, the government asserts that defendants
17 manipulated the market by creating a false and misleading
18 appearance of an electricity supply shortage to CalPX, CAISO and
19 other market participants. Id ¶19. Defendants were able to create
20 this illusion of a supply shortage by (1) shutting down some of
21 Reliant's generation plants, (2) physically withholding electricity
22 from the spot market, (3) submitting supply bids at inflated prices
23 to ensure that the bids were not accepted and (4) disseminating
24 false and misleading rumors and information to CAISO, brokers and
25 other traders regarding the availability and maintenance status of,
26 and environmental limitations on, Reliant's southern California
27 generation plants. Id.

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1 2005. A pre-trial conference was held on October 17, 2005, and
2 after reviewing the parties' proposed jury instructions, the court
3 served upon the parties its own proposed final jury instructions on
4 October 24, 2005. On October 25, 2005, the government obtained a
5 third superseding indictment ("Indictment S3"). Doc #208 (3SI).
6 On October 28, 2005, defendants filed a joint motion to dismiss
7 Indictment S3. Doc #218.

8 Also on October 28, 2005, the Friday before trial was to
9 commence, the government, pursuant to 18 USC § 3731, filed a notice
10 of appeal of one of the court's pre-trial evidentiary rulings. Doc
11 #219. Upon receipt of the government's notice of appeal, the court
12 conveyed to the parties its understanding that the government's §
13 3731 filings "would divest the court of jurisdiction over aspects
14 of the case that are involved in the appeal and prevent the court
15 from empaneling a jury during the pendency of the appeal." Doc
16 #216 (citations omitted). The court nonetheless requested the
17 parties to appear as scheduled on October 31, 2005, in order to
18 discuss certain matters. Id. One matter the parties took up at
19 that time was the court's jurisdiction to hear and rule upon
20 defendants' motion to dismiss Indictment S3 during the pendency of
21 the appeal, the issue to which the court now turns.

22
23 II

24 A

25 A trio of Ninth Circuit opinions guides the court:
26 United States v Gatto, 763 F2d 1040 (9th Cir 1985), United States v
27 Emens, 565 F2d 1142 (9th Cir 1977), and United States v Cox, 475
28 F2d 837 (9th Cir 1973).

1 In Cox, the district court granted the defendants' motion
2 to suppress and, apparently, the government timely appealed
3 pursuant to § 3731. During the pendency of the appeal, the
4 defendant moved to dismiss the indictment. "[C]oncerned as he was
5 with the aspects of the guarantee of speedy trial within the sixth
6 amendment," the district court granted the motion to dismiss, and
7 the Ninth Circuit unanimously affirmed. Cox, 475 F2d at 841.
8 Although it is not perfectly clear whether the court viewed the
9 issue as one of jurisdiction, significantly, the Cox panel did not
10 conclude that the district court lacked jurisdiction to dismiss the
11 indictment due to the government's pending § 3731 appeal.

12 In Emens, the Ninth Circuit clarified that Cox's holding
13 was indeed jurisdictional in nature. In rejecting the government's
14 argument that "§ 3731 impliedly prohibits a District Court from
15 dismissing an indictment pending appeal of an order granting a
16 motion to suppress evidence," the panel explained that under Cox,
17 "the District Court has the naked power, in appropriate cases, to
18 dismiss an indictment during appeal time." Emens, 565 F2d at 1144.
19 The panel declined, however, to address whether the district
20 court's exercise of that power was appropriate, and instead
21 remanded on the distinct (but for present purposes not irrelevant)
22 ground that the district court erred in concluding that it lacked
23 jurisdiction to reconsider the evidentiary ruling from which appeal
24 was taken. *Id.*

25 Most recent and instructive is Gatto. In Gatto, four
26 days before trial, the district court exercised its supervisory
27 power to exclude evidence that was the byproduct of perceived
28 misconduct by law enforcement agents. The government timely

1 appealed under § 3731 and refused to proceed to trial after the
2 district court declined to stay proceedings pending the appeal.
3 The government's appeal was rewarded by the district court
4 dismissing the indictment with prejudice on the ground that the
5 government had unnecessarily delayed prosecution.

6 On appeal, the Ninth Circuit rejected the government's
7 argument — the same argument the government advances here — "that
8 the district court lost jurisdiction over the action when the
9 government filed its notice of appeal pursuant to 18 USC § 3731 to
10 challenge the exclusionary order." 763 F2d at 1049. Quoting
11 Griggs v Provident Consumer Discount Co, 459 US 56 (1982), the case
12 upon which the government principally relies, the panel
13 acknowledged that "[i]n the usual circumstance, the filing of a
14 notice of appeal confers jurisdiction on the court of appeals and
15 divests the district court of its control over those aspects of the
16 case involved in the appeal." Gatto, 763 F2d at 1049 (quotations
17 and alterations omitted) (emphasis added). But the court went on:
18 "Section 3731 appeals, however, are not usual. As we previously
19 observed [in Cox and Emens], a district court retains the naked
20 power, in appropriate cases, to dismiss an indictment while a
21 section 3731 appeal from a pretrial order is pending. We believe
22 this to be a sound policy." *Id* (emphasis added).

23 The court proceeded to debunk the notion that the
24 government's right to appeal mandates unqualified jurisdictional
25 deference by district courts without regard to a defendant's
26 interest in swift proceedings:

27 The government has a conditional right to appeal a
28 suppression order, but the exercise of that right
may result in a disruptive effect on the criminal

1 trial process, therefore harboring a potential for
2 abuse. As a result, the government's right to
3 appeal pretrial suppression orders must be balanced
4 with a defendant's right to proceed to trial on the
indictment. This can best be accomplished * * * by
retaining jurisdiction in the district court to
dismiss the indictment in appropriate cases.

5 Id at 1050.

6 The government's appeal on the eve of trial in a matter
7 of the magnitude, apparent public importance and complexity of the
8 case at bar is, to say the very least, a "fly in the ointment."
9 10/31/05 Tr at 5:10. This case involves a large corporation, four
10 individual defendants and teams of lawyers. The duration of the
11 trial will be measured in weeks or months, not days. Due to the
12 publicity surrounding the events that led to this prosecution, only
13 a very large jury venire will yield a panel of twelve jurors who
14 are both impartial and available for the duration of the
15 proceedings. The defendants have already once anticipated, and the
16 court has once made preparations for, the commencement of trial —
17 for naught. It is surprising that the government would deem a case
18 of this nature seriously jeopardized by the evidentiary ruling that
19 sparked the present appeal. A weighty prosecution is seldom landed
20 on light tackle. In light of the government's representation that
21 it would appeal dismissal of Indictment S3 (presumably even if the
22 court did not dismiss any other operative charging instrument),
23 10/31/05 Tr at 11:23-12:2, piecemeal resolution of pre-trial issues
24 is a palpable concern.

25 Given these circumstances, this is an "appropriate
26 case[]," Gatto, 763 F2d at 1050, for the court to entertain a
27 motion to dismiss during the pendency of a § 3731 appeal of an
28 evidentiary ruling. Moreover, the undersigned perceives little

1 risk that this court and the Ninth Circuit will be "stepping on
2 each other's toes." United States v Ienco, 126 F3d 1016, 1018 (7th
3 Cir 1997) (Posner, J). Despite the passage of almost four months
4 since the government filed its notice of appeal, the government has
5 not even filed its opening brief in the court of appeals, cf 18 USC
6 § 3731 (mandating that interlocutory appeals by the government be
7 "diligently prosecuted"); United States v Jenkins, 490 F2d 868, 869
8 (2d Cir 1973) (Friendly, J) (stating that a delay of several months
9 between the government's notice of appeal and filing of its opening
10 appellate brief "scarcely conforms with our notion of diligent
11 prosecution and we would have dismissed the appeal on that ground
12 if defendant had so requested"); United States v Goldstein, 479 F2d
13 1061, 1064 n 4 (2d Cir 1973) ("In view of the statutory command of
14 diligent prosecution, we believe that the Government's brief in
15 appeals of this sort should ordinarily be filed within 30 days
16 after the notice of the appeal."). Government counsel represented
17 to the court that the government would "expeditiously" pursue the
18 requisite approval of the Solicitor General and subsequently "file
19 a motion to expedite the appeal in order to move this matter as
20 quickly as possible toward a resolution in the court of appeals,"
21 10/31/05 Tr at 5:17-23. A four-month delay in filing an opening
22 brief serves only to thicken the riddle of the government's
23 conduct.

24 Having concluded that the government's appeal does not
25 divest the court of jurisdiction to rule upon defendants' motion to
26 dismiss Indictment S3, the court turns to that motion.

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B

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2 Defendants argue that Indictment S3 is barred by the
3 five-year statute of limitations applicable to non-capital federal
4 offenses, 18 USC § 3282. Specifically, defendants contend that
5 because Indictment S3 is substantially broader than Indictment S1
6 (the last timely filed indictment) with respect to the conspiracy
7 and wire fraud charges, Indictment S3 cannot relate back to
8 Indictment S1 for limitations purposes.

9 "Generally speaking, the return of an indictment tolls
10 the statute of limitations with respect to the charges contained in
11 the indictment. If a superseding indictment on the same charges is
12 returned while a previous indictment is still pending, the tolling
13 continues." United States v Pacheco, 912 F2d 297, 305 (9th Cir
14 1990) (citations omitted). Tolling does not continue, however, if
15 the superseding indictment "broadens or substantially amends the
16 charges in the original indictment." United States v Sears,
17 Roebuck & Co, 785 F2d 777, 778 (9th Cir 1986) (quotations and
18 alterations omitted).

19 The case law does not indicate any formula for
20 determining whether a superseding indictment is substantially
21 broader than its timely filed predecessor, but one principle guides
22 the way in all cases:

23 Notice to the defendant is the central policy
24 underlying the statute of limitations. If the
25 allegations and charges are substantially the same
26 in the old and new indictments, the assumption is
27 that the defendant has been placed on notice of the
charges against him. That is, he knows that he will
be called to account for certain activities and
should prepare a defense.

28 Pacheco, 912 F2d at 305 (quoting United States v Italiano, 894 F2d

1 1280, 1283 (11th Cir 1990)); accord United States v Salmonese, 352
2 F3d 608, 622 (2d Cir 2003) ("No single factor is determinative;
3 rather, the 'touchstone' of our analysis is notice, i e, whether
4 the original indictment fairly alerted the defendant to the
5 subsequent charges against him and the time period at issue.");
6 United States v Schmick, 904 F2d 936, 940 (5th Cir 1990) ("[N]otice
7 is the touchstone in deciding whether a superseding indictment
8 substantially changes the original charges.").

9 "To determine whether the superseding indictment
10 impermissibly changed the charges in the original indictment it is
11 necessary to examine the two indictments carefully." Sears,
12 Roebuck & Co, 785 F2d at 779. To that task the court now turns.

13
14 C

15 The court begins by observing what has not changed. Like
16 its predecessors, Indictment S3 charges each defendant with one
17 count of conspiracy, four counts of wire fraud and one count of
18 commodities price manipulation. Thus, Indictment S3 "neither added
19 new charges nor rendered [defendants] susceptible to increased
20 punishment." Schmick, 904 F2d at 941. Furthermore, "[t]he dates
21 of the conspiracy remain the same." United States v Lash, 937 F2d
22 1077, 1082 (6th Cir 1991). Finally, Indictment S3 recites without
23 modification the same four factual allegations that are the nucleus
24 of this prosecution (the "four key acts"):

- 25 (a) the shut down of certain of defendant Reliant's
26 power plants in California;
- 27 (b) the physical and economic withholding of
28 electricity from the California spot markets,
by declining to submit supply bids and by
submitting false and misleading supply bids at

1 prices designed to ensure that the bids were
2 not accepted;

3 (c) the exacerbation of the supply shortage through
4 the purchase of additional electricity from the
PX and other markets to cover Reliant's
preexisting delivery commitments;

5 (d) the dissemination of false and misleading
6 rumors and information to the ISO, brokers, and
7 other traders regarding the availability and
8 maintenance status of, and environmental
limitations on, defendant Reliant's power
plants.

9 Compare 1SI ¶19 with 3SI ¶19. And both indictments characterize
10 these four key acts as "conduct that was designed to create and did
11 create the false and misleading appearance of an electricity supply
12 shortage to the market." Id.

13 Defendants focus on the elimination of references to
14 "artificial" electricity prices in the allegations of
15 conspiratorial objectives, unlawful means, sources of injury, overt
16 acts and wire transmissions. For example, where ¶21 of Indictment
17 S1 alleged that the "conspiracy, scheme to defraud, and
18 manipulation" caused CalPX and CAISO to publish, pay and charge
19 "artificially inflated" or "artificially higher" spot prices for
20 electricity, corresponding ¶20 of Indictment S3 alleges that "[i]t
21 was an important part of the scheme to defraud that any increase in
22 spot electricity prices" would be published, paid and charged by
23 CalPX and CAISO. And where ¶22 of Indictment S1 alleged that
24 Pacific Gas & Electric Co ("PG&E") "submitted higher-priced demand
25 bids and paid artificially higher prices" for spot electricity and
26 ancillary services "[a]s a result of the defendants' conspiracy,
27 scheme to defraud, and manipulation," corresponding ¶21 of
28 Indictment S3 alleges that it was "an important part of the scheme

1 to defraud" that PG&E and other market participants would submit
2 bids and pay prices "that were higher than they would have been if
3 not for the defendants' conduct." Similarly, where ¶28 of
4 Indictment S1 alleged overt acts that included causing CalPX to
5 publish "artificially inflated spot prices," corresponding ¶26 of
6 Indictment S3 alleges the publication of prices "that were higher
7 than they would have been absent the defendants' conduct."

8 These changes reflect deletions rather than additions.
9 Defendants nonetheless argue that Indictment S3 is broader than
10 Indictment S1. According to defendants, under Indictment S1, the
11 government could not obtain a conviction on the wire fraud charges
12 unless the jury found that the defendants' alleged
13 misrepresentations caused the price of electricity to be
14 artificial. This is so, defendants argue, because the purpose of
15 the scheme to defraud alleged in Indictment S1 was to inflate the
16 price of electricity artificially. Because the four wire
17 transactions alleged in the indictment all occurred after the
18 prices were alleged to have become artificially inflated, if
19 electricity prices were not in fact artificially inflated, the
20 wires could not have been used in furtherance of the scheme alleged
21 in Indictment S1. But under Indictment S3, defendants contend, the
22 jury could convict on the wire fraud and conspiracy counts if it
23 were to find that defendants made misrepresentations but that
24 higher electricity prices were caused by defendants' legitimate
25 supply and demand decisions and not their misrepresentations.
26 Thus, in defendants' view, the government has broadened its theory
27 on the wire fraud counts.

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1 Defendants conceded at oral argument that for purposes of
2 the present motion it is not necessary to resolve the question
3 whether proof of an artificial price was necessary to sustain
4 convictions for wire fraud under Indictment S1. In any event, a
5 "finding that the alleged objectives of the scheme differ between
6 the two indictments does not end [the] inquiry." Italiano, 894 F2d
7 at 1285; cf United States v Gengo, 808 F2d 1, 3 (2d Cir 1986)
8 (holding that new conspiratorial objectives did not prevent
9 superseding indictment from relating back). Because notice is the
10 touchstone, "the crucial inquiry is whether approximately the same
11 facts were used as the basis of both indictments." Italiano, 894
12 F2d 1285; cf United States v Charnay, 537 F2d 341, 354 (9th Cir
13 1976) (quoting Mende v United States, 282 F2d 881, 883-84 (9th Cir
14 1960)).

15 In this regard, defendants propose that the price of
16 electricity is "the one critical fact" linking the four key acts to
17 the wire fraud counts. MTD-3SI at 10. Because an artificially
18 inflated price is, in defendants' view, "worlds apart" from a
19 merely higher price, the critical facts of the two indictments are
20 not approximately the same. Id.

21 The court first notes that Indictment S3 does not speak
22 in terms of "merely higher" prices, but rather "fraudulently
23 increas[ed]" prices, 3SI ¶19, and "prices that were higher than
24 they would have been absent the defendants' conduct," id ¶26. And
25 as defendants are no doubt well aware, every indictment in this
26 case has proceeded from the premise that the same four key acts
27 caused electricity prices to be higher than they otherwise would
28 have been. So even accepting defendants' hypotheses that (1)

1 electricity prices somehow provide the "missing link" to the
2 alleged wire fraud and (2) "[w]hether electricity prices were
3 artificially inflated — rather than merely higher — is a fact,"
4 Doc #229 at 3, the allegations regarding prices do not differ by
5 much, if at all. For in the context of this prosecution, to
6 ascribe the term "artificial" to a price that is higher than it
7 would have been absent the four key acts is merely to imply that
8 the resulting prices did not reflect the legitimate forces of
9 supply and demand, i e, that the four key acts constituted
10 illegitimate market forces. See *infra* III(A)(3)(c)(i). Viewed in
11 this light, the new indictment simply omits the characterization
12 (implicit in the term "artificial") that the higher prices brought
13 about by defendants' conduct did not reflect legitimate market
14 forces. If anything, then, the Indictment S3 has omitted, rather
15 than added or changed, facts; under this circumstance, the court
16 perceives the factual allegations, if any different, to be
17 narrower, not broader. And if the difference between artificially
18 higher prices and higher prices brought about by the four key acts
19 is what distinguishes Indictment S3 from its predecessors (and
20 bearing in mind that notice is the touchstone of the court's
21 inquiry), defendants' argument is strained at best. This argument
22 rests on the premise that defendants were not on notice that the
23 four key acts did not constitute illegitimate market forces. The
24 court finds this argument unpersuasive. Cf United States v Miller,
25 471 US 130, 131 (1985) (holding that the Fifth Amendment right not
26 to be prosecuted except upon indictment by a grand jury is not
27 violated "when a defendant is tried under an indictment that
28 alleges a certain fraudulent scheme but is convicted based on trial

1 proof that supports only a significantly narrower and more limited,
2 though included, fraudulent scheme”).

3 Further, allegations regarding the artificiality of
4 electricity prices (or lack thereof) are not allegations regarding
5 defendants’ activities, i e, what defendants actually said or did
6 (or did not say or do). Statutes of limitations are particularly
7 concerned with acts, not facts generally. Judge Pollack implicitly
8 recognized as much in United States v O’Neill, 463 F Supp 1205 (ED
9 Pa 1979), a case upon which defendants heavily rely. O’Neill
10 involved a prosecution for, among other charges, a violation of 18
11 USC § 1014, which prohibits the making of false statements to
12 certain federally chartered lenders in connection with loan
13 applications. Although both indictments alleged misrepresentations
14 in connection with the same loan application, the two
15 misrepresentations alleged in the superseding indictment were
16 completely different from the single misrepresentation alleged in
17 the original indictment. Judge Pollack observed that statutes of
18 limitations are intended to ensure “that a defendant receives
19 notice, within a prescribed time, of the acts with which he is
20 charged, so that he and his lawyers can assemble the relevant
21 evidence before documents are lost, memory fades, etc.” Id at 1208
22 (emphasis added). Judge Pollack dismissed the § 1014 count because
23 “[t]he original indictment, alleging a single misrepresentation,
24 could not have put the defendant on notice that he might face a
25 revised indictment alleging two quite different
26 misrepresentations.” Id. In stark contrast, Indictment S3 does
27 not allege anything new or different in terms of what defendants
28 said or did.

1 In sum, the claim that Indictment S1 and its predecessor
2 did not place defendants on notice of the conduct and violations of
3 law charged in Indictment S3 ultimately rings hollow. Nothing has
4 changed in terms of the statutes violated, the time period of the
5 alleged scheme, the four key acts or any other allegations
6 regarding what defendants actually said or did. The differences
7 upon which defendants seize, in essence, all amount to omissions of
8 the allegation that the higher electricity prices, which were the
9 object, means and resulting injury of the conspiracy and scheme to
10 defraud, did not reflect the legitimate forces of supply and
11 demand. This omission did not result in a broader or substantially
12 amended indictment. Indictment S3 therefore relates back to
13 Indictment S1, and defendants' motion to dismiss Indictment S3 as
14 time-barred is accordingly DENIED.

15 Having concluded that Indictment S3 is not barred by
16 limitations, the court turns to defendants' substantive arguments
17 for dismissing this prosecution. As noted, three superseding
18 indictments have been returned since defendants moved to dismiss
19 the original indictment. The court construes defendants' motion as
20 directed toward any indictment upon which the government can
21 proceed. See United States v Holm, 550 F2d 568, 569 (9th Cir 1977)
22 ("It is undisputed that the Government may have two indictments
23 outstanding against an accused at the same time."). Because it is
24 clear that the government plans to proceed to trial on Indictment
25 S3, the court will discuss defendants' motion against that backdrop
26 (and in the interest of simplicity, will henceforth refer to
27 Indictment S3 simply as the "indictment").

28 //

1 III

2 It is appropriate to address first defendants' challenges
3 to count six. Defendants advance several arguments. First,
4 defendants argue that the criminal manipulation provision is
5 unconstitutionally vague on its face and as applied to the case at
6 hand. Assuming the criminal manipulation provision is not vague,
7 defendants alternatively argue that (1) the CEA does not apply to
8 the wholesale electricity market, (2) application of the CEA to
9 defendants' conduct violates the filed rate doctrine and (3) the
10 conduct alleged in the indictment does not constitute criminal
11 manipulation.

12 A

13
14 "A statute is void for vagueness if it fails to give
15 adequate notice to people of ordinary intelligence concerning the
16 conduct it proscribes * * *." United States v Doremus, 888 F2d
17 630, 634 (9th Cir 1989) (citing Schwartzmiller v Gardner, 752 F2d
18 1341, 1345 (9th Cir 1984)). In other words, a defendant has
19 adequate notice if a person of ordinary intelligence would
20 understand that his or her conduct is prohibited by the law in
21 question.

22 Although the criminal manipulation provision does not
23 specify a required *mens rea*, the government accepts that specific
24 intent is required. Doc #81 (Opp) at 13 ("The price manipulation
25 provision * * * criminalizes the knowing and intentional
26 manipulation or attempted manipulation of a price or commodity in
27 interstate commerce * * *"). Although a specific intent
28 requirement will generally thwart a defendant's vagueness argument,

1 it will "not necessarily validate a criminal statute against all
2 vagueness challenges." United States v Bohonus, 628 F2d 1167, 1174
3 (9th Cir 1980). Hence, there is a small group of cases in which a
4 defendant may have the required *mens rea*, but the *actus reus* which
5 is prohibited by the statute is undefined or unclear and cannot
6 form the basis of a criminal conviction (i e, the defendant commits
7 the prohibited conduct with specific intent, yet a person of
8 ordinary intelligence would not understand what physical acts are
9 within the scope of the statute's *actus reus*). See United States v
10 Scrows, 325 US 91, 105 (1945) (stating that "willful conduct cannot
11 make definite that which is undefined"). Defendants assert that
12 this is such a case.

13 The *actus reus* of the criminal manipulation provision is
14 "manipulation." The term "manipulate" is not defined in the CEA.
15 Omission of a statutory definition of a term, however, does not
16 necessitate a finding that the statute is impermissibly vague.
17 Rather, the court "will normally construe [the term] in accord with
18 its ordinary meaning" to determine whether a person of ordinary
19 intelligence would understand that defendant's conduct was
20 prohibited by the statute. Smith v United States, 508 US 223, 228
21 (1993) (citing Perrin v United States, 444 US 37, 42 (1979)); see
22 also United States v Iverson, 162 F3d 1015, 1022 (9th Cir 1998)
23 ("When a statute does not define a term, we generally interpret
24 that term by employing the ordinary, contemporary and common
25 meaning of the words that Congress used."). Moreover, a "vagueness
26 challenge will not be upheld if judicial explication of a statute
27 provides sufficient clarity to afford fair notice." Bohonus, 628
28 F2d at 1174. And where, as here, "a criminal statute regulates

1 economic activity, it generally is subject to a less strict
2 vagueness test because its subject matter is more often narrow and
3 because businesses can be expected to consult relevant legislation
4 in advance of action." Iverson, 162 F3d at 1021.

5 With these principles in mind, the court turns to the
6 arguments advanced by defendants in connection with their vagueness
7 challenge.

8
9 1

10 Defendants make much of the fact that, "[i]n the 68 years
11 since commodity 'manipulation' was made a crime, there has never
12 been a reported criminal prosecution" — until now. MTD at 8.
13 Yet, as Judge Selya stated when presented with this argument by a
14 criminal defendant: "There is a first time for everything."
15 United States v Nippon Paper Industries Co, Ltd, 109 F3d 1, 6 (1st
16 Cir 1997). There had to be a first time a defendant was prosecuted
17 for price fixing under the Sherman Act. There had to be a first
18 time a defendant was charged with illegal dumping under the Clean
19 Water Act. The fact that this might be the government's premiere
20 criminal prosecution under the criminal manipulation provision does
21 not itself answer the court's inquiry whether the statute is
22 unconstitutionally vague. See United States v Kinzler, 55 F3d 70,
23 74 (2d Cir 1995) ("The claimed novelty of this prosecution does not
24 help [defendant's vagueness challenge], for 'it is immaterial that
25 "there has been no litigated fact pattern precisely in point.'"")
26 (quoting United States v Ingredient Technology Corp, 698 F2d 88, 96
27 (2d Cir 1983) (quoting United States v Brown, 555 F2d 336, 339-40
28 (2d Cir 1977))).

1 To be sure, a gap of two generations between enactment of
2 a statute and prosecution under that statute is certainly a
3 surprise.¹ If commodities price manipulation were sufficiently
4 harmful to society to require a criminal prohibition, it seems
5 strange that it would take the government this long to get around
6 to enforcing the statute. Surely, if there is such a thing as
7 criminal market manipulation, the California energy crisis in the
8 early 21st century cannot be the first instance of such conduct.
9 Perhaps, the government has been able to deal with market
10 manipulation through other criminal laws. If so, one wonders what
11 a prosecution under the CEA adds to the government's law
12 enforcement arsenal? But the absence of prior prosecutions is not
13 enough to support dismissal of the indictment.

14
15 2

16 Next, defendants argue that the CEA's criminal
17 manipulation provision is void for vagueness on its face.

18 "The threshold question in any vagueness challenge is
19 whether to scrutinize the statute for intolerable vagueness on its
20 face or whether to do so only as the statute is applied in the
21 particular case.'" Doremus, 888 F2d at 634 (quoting Schwartzmiller
22 v Gardner, 752 F2d 1341, 1345 (9th Cir 1984)). "It is well
23 established that vagueness challenges to statutes which do not
24 involve First Amendment freedoms must be examined in light of the

25
26 ¹ In fact, it appears that § 9(a)(2) has been criminally enforced
27 in the past, but it also appears that those actions were not the
28 subject of reported opinions. See Jerry W Markham, Manipulation of
Commodity Futures Prices — The Unprosecutable Crime, 8 Yale J on
Regulation 281, 318 & n 258, 328 & n 329, 375 & n 604 (1991).

1 facts at hand." United States v Mazurie, 419 US 544, 550 (1975)
2 (citing United States v Nat'l Dairy Products Corp, 372 US 29
3 (1963)); see also United States v Fitzgerald, 882 F2d 397, 398 (9th
4 Cir 1989) ("[B]ecause this action does not involve [F]irst
5 [A]mendment rights, this court need only examine the vagueness
6 challenge under the facts of the particular case * * *").

7 Because defendants do not contend that the criminal
8 manipulation provision implicates their First Amendment rights,
9 their facial challenge to the criminal manipulation provision
10 fails.

11
12 3

13 Defendants argue that the criminal manipulation provision
14 is unconstitutionally vague as applied for three reasons: (1) the
15 term "manipulate" has no ordinary or plain meaning, (2) judicial
16 explication has not remedied the term's ambiguity and (3) the
17 legislative history of the CEA fails to evidence a sufficient
18 definition of the term. In supplemental briefing, defendants
19 further argue that by choosing to pattern a recent anti-
20 manipulation amendment to the FPA after § 10(b) of the Securities
21 Exchange Act of 1934 rather than the CEA, Congress implicitly
22 recognized that the criminal manipulation provision is
23 unconstitutionally vague. Doc #158 at 4.

24
25 a

26 As mentioned above, when a term lacks a statutory
27 definition, the court will normally construe the term in accord
28 with its ordinary meaning. Smith, 508 US at 228. This canon of

1 construction begins by examining the term's dictionary definition.
2 See United States v Akintobi, 159 F3d 401, 403 (9th Cir 1998)
3 (using a dictionary to construe the term "proceeds" in the federal
4 money laundering statute); Iverson, 162 F3d at 1023 (construing the
5 term "responsible corporate officer" in the Clean Water Act in
6 accord with the dictionary definition of "responsible").

7 As pertinent here, one modern dictionary defines
8 "manipulate" as "to control, manage or play upon by artful, unfair
9 or insidious means[;] esp to one's own advantage." Webster's Third
10 New Int'l Dictionary 1376 (1981); see also The Oxford American
11 Dictionary and Language Guide 604 (1999) (defining manipulate as to
12 "manage (a person, situation, etc) to one's own advantage, esp
13 unfairly or unscrupulously"). Based on this definition, a person
14 who "manages, controls or plays upon" the price of a commodity in
15 interstate commerce by "artful, unfair or unscrupulous means" may
16 be liable for criminal price manipulation under the CEA.
17 Defendants characterize this ordinary meaning as full of "vague and
18 subjective concepts." MTD at 12. The court shares defendants'
19 concern to some extent. Terms such as "unfairly," "unscrupulously"
20 and the like are too subjective to afford a determinable legal
21 standard by which criminal liability may be imposed.

22 Because a term's ordinary meaning should be assessed as
23 of the time Congress enacted the provision at issue, dictionary
24 definitions contemporaneous with enactment are most useful. See
25 Perrin, 444 US at 42; see also United States v Auginash, 266 F3d
26 781, 784-85 (8th Cir 2001) (looking to contemporary dictionary
27 definition to resolve vagueness issue). Congress enacted § 9(a)(2)
28 in 1936. Commodity Exchange Act of 1936, 49 Stat 1491. At that

1 time, Webster defined "manipulate" as "to manage or treat artfully
2 or fraudulently." Webster's New Int'l Dictionary 1496 (2d ed 1934)
3 (emphasis added); see also Ernst & Ernst v Hochfelder, 425 US 185,
4 199 & n 21 (1976) (relying in part upon this dictionary definition
5 and stating that the word "manipulative" as used in § 10(b) of the
6 Securities Exchange Act of 1934 "connotes intentional or willful
7 conduct designed to deceive or defraud investors by controlling or
8 artificially affecting the price of securities"). To the extent §
9 9(a)(2) of the CEA makes it a crime to "manage" the price of a
10 commodity in interstate commerce by "fraudulent" means, the court
11 is less inclined to agree that the term "manipulate" provides too
12 vague a standard.

13
14 b

15 Any uncertainty surrounding the term "manipulation" has
16 been to an extent clarified by judicial explication. As defendants
17 observe, the term "manipulation," like any term left to judicial
18 interpretation, did not have a fixed meaning at the CEA's
19 incipency or during its adolescence.

20 In more recent times, however, courts and the Commodities
21 Future Trading Commission (CFTC) appear to have settled on a
22 similar definition: "Manipulation, broadly stated, is an
23 intentional exaction of a price determined by forces other than
24 supply and demand." Frey v CFTC, 931 F2d 1171, 1175 (7th Cir
25 1991); accord In re Abrams, No 88-10, 1994 WL 506250, *10 (CFTC
26 1994) ("A market participant must have acted with the purpose or
27 conscious object of causing or effecting a price or price trend in
28 the market that did not reflect the legitimate forces of supply and

1 demand * * *." (internal quotations omitted)); In re Soybean
2 Futures Litigation, 892 F Supp 1025, 1044 (ND Ill 1995)
3 ("[M]anipulation is intentional conduct that has resulted in a
4 price which does not reflect basic forces of supply and demand."
5 (internal quotations omitted)); Cargill, Inc v Hardin, 452 F2d
6 1154, 1163 (8th Cir 1971) ("The aim must be * * * to discover
7 whether conduct has been intentionally engaged in which has
8 resulted in a price which does not reflect the basic forces of
9 supply and demand."); cf United States v Socony-Vacuum Oil Co, 310
10 US 150, 223 (1940) (explaining in the antitrust context that
11 "market manipulation in its various manifestations is implicitly an
12 artificial stimulus applied to * * * market prices, a force which
13 distorts those prices, a factor which prevents the determination of
14 those prices by free competition alone").

15 To this end, the courts and the CFTC have adopted four
16 necessary elements an accuser must prove to prevail on a
17 manipulation claim: (1) the defendants possessed the ability to
18 influence prices, (2) an artificial price existed, (3) the
19 defendant caused the artificial price and (4) the defendant
20 specifically intended to cause the artificial price. Soybean
21 Futures, 892 F Supp 2d at 1045 (citing Frey, 931 F2d at 1173-78,
22 and In re Abrams, 1994 WL 506250, *10); In re Fenchurch Capital
23 Management, Ltd, No 96-7, 1996 WL 382313, *5 (CFTC 1996).

24 This judicially explicated definition of manipulation is
25 consistent with the term's ordinary meaning. "To control, manage
26 or play upon" is embodied by the judicial requirement that the
27 conduct be intentional and with purpose. Moreover, this
28 intentional conduct must be directed at something such as a person

1 or a situation; under the criminal manipulation provision, the
2 conduct must be directed at the price of a commodity in interstate
3 commerce. Further, in the context of commodities trading and
4 selling, it would be "artful" to affect intentionally the price of
5 a commodity so that the price does not reflect the basic forces of
6 supply and demand. Finally, as discussed below, one can create an
7 artificial price by acting "fraudulently."

8
9 c

10 Perhaps realizing that the judicial explication of the
11 term "manipulate" is in line with the term's ordinary meaning,
12 defendants' reply memorandum singles out a different term —
13 "artificial price" — and attempts to demonstrate why this term's
14 proposed definition is unconstitutionally vague. Doc #83 (Reply)
15 at 10-13 (stating that "the concept of basic supply and demand does
16 not provide meaning for the term 'manipulate'"). The court
17 addresses defendants' arguments in turn.

18
19 i

20 First, defendants posit that criminalizing conduct
21 undertaken with the intent to create a price that does not reflect
22 the basic forces of supply and demand would "require businesses to
23 guess what the 'reasonable' or 'real' value of a good was in order
24 to conform their conduct to the law." MTD at 18. In other words,
25 defendants argue that the criminal manipulation provision requires
26 them first to guess what the price of a commodity would be if the
27 forces of supply and demand were uninhibited (i e, guess what the
28 "reasonable" or "real" price would be) and then avoid conduct that

1 would cause the price of the commodity to deviate from this
2 reasonable price. Because "[t]he Supreme Court has struck down as
3 unconstitutionally vague other statutes that similarly required
4 businesses to guess" at a reasonable price, defendants argue that
5 the court must find the criminal manipulation provision
6 unconstitutionally vague as applied. Id (citing United States v
7 Cohen Grocery Co, 255 US 81, 89 (1921), and International Harvester
8 Co of America v Kentucky, 234 US 216, 222 (1914)). This argument
9 is unconvincing.

10 In Cohen Grocery, the statute in question made it
11 "unlawful for any person willfully * * * to make any unjust or
12 unreasonable rate or charge in handling or dealing in or with any
13 necessaries." 255 US at 86. Defendant was charged with selling
14 sugar at an unjust and unreasonable rate; it sold a 50-pound bag of
15 sugar for \$10.07 and a 100-pound bag of sugar for \$19.50. Id. But
16 there was no set rate for sugar that was reasonable *per se*. Hence,
17 the Court found the statute impermissibly vague because no one can
18 "foreshadow or adequately guard against" a price that would be
19 considered "unreasonable." Essentially, every time a dealer sold a
20 bag of sugar, he would have to hope that the price he sold the item
21 for was a reasonable one; every transaction would be a guessing
22 game and the cost of losing a criminal prosecution. Similarly, in
23 International Harvester, the Court declared vague a law that
24 allowed farmers to "make any combination for the purpose of
25 controlling [crop] prices unless for the purpose * * * of fixing a
26 price that was greater or less than the real value of the article."
27 234 US at 855 (emphasis added).

28 //

1 Section 9(a)(2) presents a different situation. To avoid
2 liability, defendants are not required to guess what the reasonable
3 price of electricity is and then conform their conduct so as to
4 create this price or sell at this price. The criminal manipulation
5 provision does not criminalize the selling of a product at an
6 unreasonable price. Rather, the criminal manipulation provision
7 prohibits defendants from engaging in intentional conduct aimed at
8 preventing the basic forces of supply and demand from operating
9 properly. Thus, the criminal manipulation provision is concerned
10 less with the price itself than it is with the process by which the
11 price is set. See In re Indiana Farm Bureau Cooperative, No 75-14,
12 1982 WL 30249, *35 n 2 (CFTC 1982) ("[T]he focus should not be as
13 much on the ultimate price, as on the nature of the factors causing
14 it."). Defendants' reliance upon Cohen Grocery and International
15 Harvester is therefore misplaced. See United States v Brown, 5 F
16 Supp 81, 84 (SDNY 1933) (similarly distinguishing Cohen Grocery and
17 International Harvester and rejecting a vagueness challenge to an
18 indictment "which, boiled down, denounced as a fraud the
19 substitution of an artificially stimulated and controlled market
20 for an appraisal of the stock in an open and free market").

21 Furthermore, in the context of this case, the notion of
22 price artificiality is not as elusive as defendants suggest. The
23 CFTC has explained the concept of price artificiality as follows:

24 [T]o determine whether an artificial price has
25 occurred, one must look at the aggregate forces of
26 supply and demand and search for those factors which
27 are extraneous to the pricing system, are not a
28 legitimate part of the economic pricing of the
commodity, or are extrinsic to that commodity
market. When the aggregate forces of supply and
demand bearing on a particular market are all
legitimate, it follows that the price will not be

1 artificial. On the other hand, when a price is
2 effected by a factor which is not legitimate, the
3 resulting price is necessarily artificial.

4 Indiana Farm Bureau, 1982 WL 30249, *35 n 2.

5 Whether a particular market force is "legitimate" might
6 be debatable in any given case, especially those involving schemes
7 where the alleged manipulation is effected solely by the
8 defendant's power and position in the market. But, in the context
9 of an as-applied challenge, defendants cannot invoke the
10 uncertainty that may exist at the periphery of commodities
11 manipulation theory when their alleged conduct is unquestionably
12 encompassed by the concepts of price manipulation and price
13 artificiality. The dissemination of false information into a
14 commodities market has long been recognized as a form of price
15 manipulation. See Soybean Futures, 892 F Supp 2d at 1045-47
16 (discussing numerous judicial and administrative opinions dealing
17 with "manipulation by false reports" under the anti-manipulation
18 prong of § 9(a)(2)).

19 This is as it should be. Fraud and deceit are not
20 legitimate market forces. Fundamentally, markets are information
21 processing systems. The market price is only as "real" as the data
22 that inform the process of price discovery. By the same token, the
23 market price is "artificial" when the market is misinformed. Just
24 as price artificiality implies misinformation, a specific intent to
25 create an artificial price implies fraud or deceit. Indeed, Judge
26 Easterbrook has suggested that "[w]hen there is no fraud, there is
27 also no manipulation." Frank H Easterbrook, Monopoly,
28 Manipulation, and the Regulation of Futures Markets, 59 J Business

1 s103, s118 (1986); cf Schreiber v Burlington Northern, Inc, 472 US
2 1, 12 (1985) (holding that "the term 'manipulative' as used in §
3 14(e) [of the Securities Exchange Act of 1934] requires
4 misrepresentation or nondisclosure"); Hochfelder, 425 US at 199
5 (stating that the word "manipulative" as used in § 10(b) of the
6 Securities Exchange Act of 1934 "connotes intentional or willful
7 conduct designed to deceive or defraud investors by controlling or
8 artificially affecting the price of securities"). Although the
9 court declines to hold that fraud or deceit is a prerequisite to a
10 finding of price manipulation, it is — and has always been —
11 virtually axiomatic that price artificiality can be caused by fraud
12 or deceit upon a market that performs a price discovery function.
13 And, as already discussed, fraud or deceit was inherent in the
14 ordinary meaning of "manipulate" in 1936 when the criminal
15 manipulation provision was enacted. See *supra* III(A)(3)(a).

16 To be clear, the court is not departing from the existing
17 judicial formulation of commodities price manipulation. Rather,
18 the court is simply making explicit what has always been implicit:
19 if one intends to deceive the market into setting a price different
20 from the price that would otherwise prevail, one intends to create
21 an artificial price.

22
23 ii

24
25 Next, defendants argue that even if this definition of
26 manipulation suffices in some areas of commodity trading and sales,
27 "the government does not come to grips with how the concepts of
28 supply and demand apply in the FERC-regulated wholesale electricity

1 market." Reply at 11. Specifically, defendants argue that
2 "[w]hatever the 'basic forces of supply and demand' may be in * * *
3 commodities markets generally, they were entirely supplanted in the
4 California electricity market by a set of rules defined in the
5 FERC-approved tariff." Id. According to defendants, it is
6 impossible for a "market participant [in the California electricity
7 market] to know, under the impossibly vague standard for
8 'manipulation,' when a decision regarding how much of its own
9 product to offer, and at what price, will be deemed a felony." Id.
10 Hence, defendants argue that the criminal manipulation provision is
11 vague as applied to the entire California electricity market and
12 thus, to the present case. The court disagrees for two reasons.

13 First, it appears that defendants are arguing that the
14 "basic forces of supply and demand" are different or individualized
15 when applied to the California electricity market and thus conduct
16 that might be manipulation in the commodities market generally
17 cannot be manipulation in the California electricity market as it
18 existed in June 2000. Whether defendants had the ability to
19 influence prices in the California electricity market and whether
20 defendants' intentional conduct created a price that did not
21 reflect the forces of supply and demand (as these forces existed in
22 the California electricity market) is a fact-sensitive question for
23 a jury.

24 Next, and more important, it appears that defendants take
25 an unduly cramped view of the allegations contained in the
26 indictment. Defendants repeatedly argue that a reasonable person
27 would not understand that a unilateral decision to withhold one's
28

1 own product from the market could be manipulation so as to affect
2 the basic forces of supply and demand. On this point, the court
3 agrees with defendants and if the indictment was premised entirely
4 on a defendant's unilateral decision to withhold its own supply,
5 this would be a very different motion. A seller of a commodity is
6 acting quite rationally and legally to withhold his supply from the
7 market if he believes that in the future the commodity will command
8 a higher price — assuming, of course, the seller is under no legal
9 duty to sell. But the government does not base the indictment
10 solely on defendants' mere withholding of electricity. Defendants'
11 withholding of electricity is only one act done in furtherance of
12 defendants' alleged scheme to create the appearance of an
13 electricity supply shortage in June 2000. The indictment also
14 charges that defendants shut down several power plants. 3SI
15 ¶19(a). Next, the indictment charges that defendants
16 "exacerbat[ed] the supply shortage through the purchase of
17 additional electricity from the CalPX and other markets * * *." Id
18 ¶19(c). Compare Great Western Food Distributors v Brannan, 201 F2d
19 476, 478-79 (7th Cir 1953) ("[M]anipulation may be effected * * *
20 by purchase of all the available cash supply * * *."). Finally,
21 and most importantly, defendants are charged with the
22 "dissemination of false and misleading rumors and information to
23 the [CA]ISO, brokers and other traders regarding the availability
24 and maintenance status of" Reliant's power plants. 3SI ¶19(d).
25 Compare Cargill, 452 F2d at 1163 ("[I]t may be pointed out that one
26 of the most common manipulative devices [is] the floating of false
27 rumors which affect future prices * * *."). While it is clear
28 defendants take issue with the government's allegations of false

1 rumors and misrepresentations, those questions are factual in
2 nature and must be resolved by a jury.

3 It bears reemphasis that the court is only permitted to
4 conduct an as applied analysis. Mazurie, 419 US at 550. To this
5 end, the court need only determine whether a person of ordinary
6 intelligence would understand that these defendants' specific
7 actions in June 2000 were manipulative within the meaning of the
8 criminal manipulation provision. The court declines to find that
9 defendants could not have been aware that the fraudulent and
10 deceptive conduct alleged in the indictment might subject them to
11 prosecution under § 9(a)(2) of the CEA.

12
13
14 4

15 The court also declines defendants' lengthy invitation to
16 give dispositive weight to the fact that "the legislative history
17 of the [criminal] price manipulation provision reflects the
18 persistent depth of confusion concerning what conduct constitutes
19 prohibited 'manipulation.'" MTD at 13-17. The Supreme Court has
20 stated: "'Resort to legislative history is only justified where
21 the face of the Act is inescapably ambiguous * * *.'" Garcia v
22 United States, 469 US 70, 76 n 3 (1984) (quoting Schwegmann
23 Brothers v Calvert Distillers Corp, 341 US 384, 395-96 (1951)
24 (Jackson, J, concurring)); see also United States v Wicks, 833 F2d
25 192, 193 (9th Cir 1987) ("Unless exceptional circumstances dictate
26 otherwise, 'when we find the terms of a statute unambiguous,
27 judicial inquiry is complete.'" (quoting Burlington Northern
28 Railroad Co v Oklahoma Tax Commission, 481 US 454 (1987))). The

1 required exceptional circumstances are absent here.

2 Again advertng to the intent of Congress, defendants'
3 supplemental brief argues that a recent amendment to the FPA
4 reflects Congress's recognition that the criminal manipulation
5 provision is unconstitutionally vague. Doc #158 at 4. As part of
6 the Energy Policy Act of 2005, Congress amended the FPA by adding a
7 provision making it unlawful for any entity "to use or employ, in
8 connection with the purchase or sale of electric energy * * * any
9 manipulative or deceptive device or contrivance" and authorizing
10 FERC to promulgate rules directed at the same. Energy Policy Act
11 of 2005 § 1283, Pub L No 109-58, 119 Stat 594, to be codified at 16
12 USC § 824 et seq. Congress explicitly patterned this provision
13 after § 10(b) of the Securities Exchange Act of 1934. Defendants
14 contend that Congress's decision to pattern the FPA's new
15 manipulation provision after § 10(b), complete with a delegation of
16 rulemaking authority to FERC to define prohibited practices, is
17 tantamount to an acknowledgment that the criminal manipulation
18 provision lacks sufficient definition.

19 This legislative choice could have been motivated by a
20 number of considerations that have nothing to do with the CEA. For
21 example, Congress may have looked to § 10(b) because of the
22 sizeable corpus of interpretive case law that has developed around
23 that provision. In any case, the court is not engaged in a beauty
24 contest between different approaches to the problem of market
25 manipulation. The court must only determine whether the approach
26 taken by the CEA is constitutionally acceptable as applied to
27 defendants' conduct.
28

1
2 Finally, defendants invoke the rule of lenity. But the
3 term "manipulate" is not ambiguous and, therefore, the rule of
4 lenity is inapplicable. United States v Shabani, 513 US 10, 17
5 (1994) ("The rule of lenity * * * applies only when, after
6 consulting traditional canons of statutory construction, we are
7 left with an ambiguous statute.").

8
9 Putting aside the theoretical question whether a person
10 of ordinary intelligence would understand that defendants' conduct
11 was prohibited, it is sufficiently clear that defendants themselves
12 knew their conduct was prohibited. Because all parties are
13 familiar with them and in the interest of protecting the
14 confidentiality of these criminal proceedings, the court will not
15 recite portions of the taped telephone conversations offered by the
16 government. It should suffice to say that one defendant actually
17 uses the phrase "market manipulation" to explain why one of
18 Reliant's generating facilities was idle. Moreover, in other
19 telephone conversations some defendants appear to misrepresent the
20 reasons for shutting down some of Reliant's power plants.

21 While the court does not afford much, if any, weight to
22 these calls in addressing defendants' vagueness challenge, these
23 telephone calls certainly do not add credibility to defendants'
24 claims that they were unaware that their conduct in June 2000 was
25 illegal. See United States v Weitzenhoff, 35 F3d 1275, 1289 (9th
26 Cir 1993) ("We are further persuaded that appellants had adequate
27 notice of the illegality of their [conduct] by the considerable
28 pains they took to conceal their activities.").

1 Applying the less exacting vagueness test mandated by the
2 Ninth Circuit in construing statutes regulating economic activity,
3 Iverson, 162 F3d at 1021, the court concludes that the criminal
4 manipulation provision is not vague as applied to the facts of this
5 case. Accordingly, defendants' motion to dismiss count six of the
6 indictment on vagueness grounds is DENIED.

7
8 B

9
10 Assuming arguendo that the criminal manipulation
11 provision is not unconstitutionally vague, defendants assert five
12 additional grounds for dismissing count six. First, defendants
13 argue that the CEA regulates only futures markets, not physical
14 markets. Next, assuming the CEA is applicable to physical markets,
15 defendants argue it is not applicable to wholesale electricity
16 markets, which are regulated exclusively by FERC. Similarly,
17 defendants argue that the filed rate doctrine precludes application
18 of the CEA to conduct that is regulated by FERC. Fourth,
19 defendants argue that the conduct alleged in the indictment does
20 not constitute manipulation. Finally, defendants suggest that the
21 indictment does not sufficiently allege that defendants had the
22 ability to influence prices. The court addresses these arguments
23 in turn.

24
25 1

26 Defendants assert that the CEA is concerned only with
27 manipulative conduct occurring in the market for trading futures
28 contracts and options and not physical or "cash" markets like the

1 CalPX and CAISO spot markets.

2 Although certain provisions of the CEA are concerned
3 exclusively with transactions in futures contracts and similar
4 derivative instruments, other provisions, including those dealing
5 with price manipulation, are not so limited in scope. See Philip
6 McBride Johnson and Thomas Lee Hazen, Commodities Regulation
7 ¶1.02[3] (3d ed 2003) ("Spot market transactions are not presently
8 subject to regulation under the commodity laws (other than for
9 price manipulation and certain position limits) * * *." (emphasis
10 added)). One example of a provision exclusively concerned with
11 futures contracts is § 4 of the CEA, 7 USC § 6, which regulates
12 transactions in "contract[s] for the purchase or sale of a
13 commodity for future delivery." The definition of "future
14 delivery" expressly excludes "any sale of any cash commodity for
15 deferred shipment or delivery." Id § 1a(19). This is known as the
16 "cash forward" exclusion. CFTC v Co Petro Marketing Group, Inc,
17 680 F2d 573, 577-78 (9th Cir 1982). Although courts have sometimes
18 struggled to distinguish cash forwards from futures, they have
19 never doubted that § 4 does not apply to transactions in cash or
20 spot markets. See In re Bybee, 945 F2d 309, 312-15 (9th Cir 1991);
21 Co Petro, 680 F2d at 577-79. On occasion, these courts have made
22 sweeping statements that could be interpreted as suggesting that
23 the CEA is categorically inapplicable to transactions in cash or
24 spot markets. See Salomon Forex, Inc v Tauber, 8 F3d 966, 970 (4th
25 Cir 1993) (discussing the legislative history of the CEA and
26 broadly stating that "Congress never purported to regulate 'spot'
27 transactions * * * or 'cash forward' transactions"). But,
28 significantly, those courts were not construing or applying CEA

1 provisions that apply to transactions in "any commodity in
2 interstate commerce."

3 Defendants' reliance on such cases is accordingly
4 misplaced. Judicial construction of the cash forward exclusion for
5 purposes of § 4 is inapposite to the charge of commodities price
6 manipulation in this case, which is based on § 9(a)(2). Unlike
7 § 4, § 9(a)(2) makes it a crime for "[a]ny person to manipulate or
8 attempt to manipulate the price of any commodity in interstate
9 commerce, or for future delivery on or subject to the rules of any
10 registered entity * * *." 7 USC § 13(a)(2) (emphasis added). The
11 comma, followed by the "or" leads the court to conclude, as other
12 courts have, that "Congress clearly intended the term 'interstate
13 commerce' to have a meaning distinct from the phrase 'for future
14 delivery on or subject to the rules of any registered entity.'" United States v Valencia, 2003 WL 23174749, *29 (SD Tex 2003). If
15 Congress had intended the criminal manipulation provision of §
16 9(a)(2) to apply only to futures contracts, the phrase "any
17 commodity in interstate commerce" would have been superfluous.
18 Because the Ninth Circuit directs lower courts to "give meaning to
19 every word of a statute," Carson Harbor Village, Ltd v Unocal Corp,
20 270 F3d 863, 883 (9th Cir 2001) (emphasis added), the court
21 concludes that the criminal manipulation provision of § 9(a)(2) is
22 not limited to futures contracts. Rather, according to the plain
23 meaning of the text, the criminal manipulation provision also
24 applies to "any commodity in interstate commerce." Defendants do
25 not dispute that the electricity at issue in this case fits that
26 description.
27
28

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1 and deceptive practices in wholesale electricity markets. Doc #158
2 at 6. While defendants' argument is logical, Supreme Court and
3 circuit precedent stand in contrast to defendants' position.

4 First, defendants' argument overlooks the Supreme Court's
5 decision in Otter Tail Power Co v United States, 410 US 366 (1973).
6 In Otter Tail, the United States brought suit against Otter Tail,
7 an electric utility, alleging illegal monopolization in violation
8 of § 2 of the Sherman Act. Id at 368. Specifically, the United
9 States alleged that Otter Tail had obtained a monopoly by (among
10 other things) refusing to sell power at wholesale to municipalities
11 with local distribution systems. Id. Otter Tail argued that it
12 was immune from antitrust regulation because the FPA gave the
13 Federal Power Commission (predecessor to FERC) the sole authority
14 to regulate the sale of electricity. Id at 372. The Court
15 disagreed, stating that "[r]epeals of the antitrust laws by
16 implication from a regulatory statute are strongly disfavored, and
17 have only been found in cases of plain repugnancy * * *." Id.
18 Hence, the Court concluded that Otter Tail was subject to antitrust
19 scrutiny by the United States regardless of the FPA's grant of
20 authority to the Federal Power Commission.

21 Because the Court has held that wholesale electricity
22 markets are subject to the scrutiny of the antitrust laws,
23 wholesalers are prohibited from engaging in a plethora of
24 activities, including refusing to deal, price fixing, boycotting
25 and dividing markets territorially. Otter Tail thus makes clear
26 that the FPA does not provide the impregnable armor defendants seek
27 to employ. This court has followed the Supreme Court's instruction
28 in Otter Tail. See People of the State of California v Mirant

1 Corp, 266 F Supp 2d 1046, 1056-57 (ND Cal 2003) (Walker, J)
2 (stating that, under Otter Tail, "the FPA does not provide blanket
3 immunity against * * * federal antitrust claims").

4 Case law from other circuits is also instructive. In
5 United States v Palumbo Bros, Inc, 145 F3d 850 (7th Cir 1998), the
6 Seventh Circuit addressed a situation similar to the one presently
7 before the court. In Palumbo, defendants were two major highway
8 construction firms in Chicago, engaged in various projects and
9 activities related to the construction, maintenance and repair of
10 streets and expressways. Defendants entered into construction and
11 repair contracts with the Illinois Department of Transportation and
12 local municipalities and employed many unionized employees who were
13 represented by the International Brotherhood of Teamsters. Id at
14 856-57. In 1996, defendants were indicted for (among other things)
15 allegedly scheming "to defraud their employees [and] the Unions
16 * * * by depriving them of money to which they were entitled under
17 the terms and conditions of the collective bargaining agreements."
18 Id at 857. Based upon this conduct, defendants were charged with
19 violating RICO, 18 USC § 1961 et seq, the mail fraud statute, 18
20 USC § 1341, and ERISA, 29 USC § 1001 et seq. Id at 856.

21 Defendants moved to dismiss this portion of the
22 indictment, arguing that "the indictment fail[ed] to charge them
23 with criminal violations of RICO, mail fraud and ERISA, but instead
24 alleged unfair labor practices and breaches of collective
25 bargaining agreements in violation of the National Labor Relations
26 Act (NLRA), 29 USC § 151 et seq, and the Labor Management Relations
27 Act (LMRA), 29 USC §§ 141-197." Id. In other words, defendants
28 argued that the NLRA and LMRA preempted criminal claims made under

1 RICO, ERISA and the mail fraud statute inasmuch as those claims are
2 based on conduct that constitutes unfair labor practices, because
3 the NLRA grants primary jurisdiction to the National Labor
4 Relations Board (NLRB) "to review and remedy unfair labor
5 practices." Id at 861. The district court agreed and dismissed
6 these portions of the indictment as preempted. A three-member
7 panel of the Seventh Circuit unanimously reversed.

8 The panel began by observing that "it is a cardinal
9 principle of construction that * * * when there are two acts upon
10 the same subject, the rule is to give effect to both." Id at 862
11 (quoting United States v Borden Co, 308 US 188, 198 (1939)).
12 "Congressional intent behind one federal statute should not be
13 thwarted by the application of another federal statute if it is
14 possible to give effect to both laws." Id.

15 Applying these principles, the Palumbo panel found that
16 the intersection of two federal statutes "does not implicate the
17 constitutional concerns underlying [preemption]." Id at 862.
18 Moreover, the panel stated that even if the doctrine of preemption
19 applied to the intersection of federal criminal law and the NLRA,
20 "we are not convinced that this indictment presents an unresolvable
21 conflict between the preemptive force of the NLRA and the criminal
22 statutes charged that requires us to apply one body of law, labor
23 or criminal, to the exclusion of the other." Id at 863. "It is
24 not clear to us that the primary jurisdiction of the NLRB is
25 violated by the government's indictment and potential prosecution
26 of the defendants' alleged criminal conduct." Id. In other words,
27 the panel found that because the criminal prosecution would not
28 prohibit the NLRB from analyzing and resolving any alleged unfair

1 labor practices, the criminal prosecution did not violate the
2 NLRB's primary jurisdiction.

3 In reaching this conclusion, the panel stated that
4 because "[1] each criminal statute explicitly proscribes the
5 conduct alleged in the indictment and [2] [there is an] absence of
6 any express congressional intent that unfair labor practices, which
7 also independently qualify as violations of criminal statutes, are
8 insulated from criminal liability, we find that the jurisdiction of
9 a federal district court to adjudicate a criminal prosecution does
10 not infringe or interfere with the primary jurisdiction of the
11 NLRB." Id.

12 The court finds the reasoning of Palumbo highly
13 persuasive. First, as the court has concluded above, the criminal
14 manipulation provision explicitly proscribes the conduct allegedly
15 engaged in by defendants. Next, Congress has not expressed that
16 enactment of the FPA was intended to insulate from criminal
17 liability any manipulative practice in the wholesale electricity
18 market which independently qualifies as a violation of a criminal
19 statute. Nor do the recent amendments to the FPA cited by
20 defendants reveal an intent to keep electricity wholesalers outside
21 the reach of the CEA's anti-manipulation provisions.

22 Finally, the court fails to see how the government's
23 prosecution of defendants will prohibit FERC from regulating and
24 remedying the conduct which purportedly caused the 2000 energy
25 crisis; indeed, FERC has already attempted civilly to do so.
26 Accordingly, like the Palumbo panel, the court finds no
27 unresolvable or repugnant conflict between the FPA and the criminal
28

1 manipulation provision.

2 In support of their argument that the wholesale
3 electricity market is subject to regulation by FERC only,
4 defendants rely on several inapposite cases. In California ex rel
5 Lockyer v Dynegy, Inc, 375 F3d 831 (9th Cir 2004), the state of
6 California sought restitution, injunctive relief, disgorgement and
7 civil penalties against several producers and traders of wholesale
8 electricity for double-selling reserve generation capacity during
9 the 2000 energy crisis in violation of Cal Bus & Prof Code § 17200
10 et seq, California's prohibition on unfair business practices. Id
11 at 836. The Dynegy defendants argued that California's state law
12 tort claims were preempted by the FPA and its delegation of
13 authority to FERC "to regulate the transmission and sale at
14 wholesale of electricity in interstate commerce." Id at 849. The
15 Ninth Circuit agreed, holding that California could not encroach on
16 "an area reserved exclusively to FERC, both to enforce and to seek
17 remedy." Id at 852; see also Duke Energy Trading & Marketing, LLC
18 v Davis, 267 F3d 1042, 1057 (9th Cir 2001) ("[I]t is common ground
19 that if FERC has jurisdiction over a subject, the States cannot
20 have jurisdiction over the same subject.'" (quoting Mississippi
21 Power & Light v Mississippi Power ex rel Moore, 487 US 354, 377
22 (1988) (Scalia, J, concurring)) (emphasis added). Hence, Dynegy
23 and Duke Energy were premised on federal preemption of state law
24 claims relating to the wholesale electricity market; neither
25 involved two competing federal statutes.

26 The same is true of Public Utility District No 1 of
27 Snohomish County v Dynegy Power Marketing, 384 F3d 756 (9th Cir
28 2004). In Snohomish, a local Washington utility that bought

1 electricity during the 2000 energy crisis at allegedly inflated
2 prices brought suit against several electricity generators and
3 wholesalers under California's antitrust and unfair competition
4 laws. Id at 759. The Ninth Circuit affirmed the district court's
5 conclusion that these state law claims encroached on FERC's
6 exclusive jurisdiction. Id at 761. Federal preemption of state
7 law property and tort claims was also the gravamen of TANC, 295 F3d
8 at 927-29.

9 But federal preemption of state law is not at issue in
10 the present case. Here, the court is faced with two federal laws
11 that arguably cover the same conduct. In such a scenario (which
12 appears to have arisen rarely), the court cannot, and thus ought
13 not, jettison the Supreme Court's directive that "Congressional
14 intent behind one federal statute should not be thwarted by the
15 application of another federal statute if it is possible to give
16 effect to both laws." Borden, 308 US at 198 (emphasis added). As
17 the court discussed above, it is possible to give effect to both
18 laws in the present case.

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21 3

22 Defendants argue that the filed rate doctrine prohibits
23 application of the criminal manipulation provision to defendants'
24 FERC-regulated conduct.

25 "Since the 1920s the 'filed rate' or 'filed tariff'
26 doctrine has barred antitrust recovery by parties claiming injury
27 from the payment of a filed rate for goods or services." County of
28 Stanislaus v Pacific Gas & Electric Co, 114 F3d 858, 862 (9th Cir

1 1997) (citing Keogh v Chicago Northwestern Railway Co, 260 US 156
2 (1922)). In Keogh, petitioner, a private manufacturer of excelsior
3 and flax tow, alleged that respondents, a group of interstate
4 freight carriers, formed a conspiracy to fix the rate charged by
5 interstate carriers in violation of section 1 of the Sherman Act.
6 260 US at 159-60. Petitioner sought treble damages in a private
7 antitrust action. *Id.* The respondents' rates, however, had been
8 submitted to and approved by the Interstate Commerce Commission
9 (ICC). *Id.* The Court rejected petitioner's claim, agreeing with
10 respondents that the ICC approval of their rates conclusively
11 established that the rates were "reasonable and nondiscriminatory."
12 *Id.* at 161. In concluding that petitioner could not maintain a
13 private cause of action for damages against respondents, however,
14 Keogh made clear that the filed-rate doctrine did not preclude the
15 government from bringing suit against the respondents under the
16 antitrust laws, especially criminal proceeding:

17 [U]nder the [Sherman Act], a combination of carriers
18 to fix reasonable and non-discriminatory rates may
19 be illegal; and if so, the Government may have
20 redress by criminal proceedings [under the antitrust
21 laws]. * * * The fact that these rates had been
approved by the [ICC] would not, it seems, bar
proceedings by the Government.

22 *Id.* at 161-62 (citations omitted) (emphasis added).

23 In 1951, the Court applied the filed rate doctrine to
24 rates filed with FERC's predecessor, the Federal Power Commission
25 (FPC). See Montana-Dakota Utilities Co v Northwestern Public
26 Services Co, 341 US 246 (1951). In Montana-Dakota, the Court
27 rejected petitioner's claim that respondent utility companies'
28 allegedly fraudulent conduct had led to illegal and unreasonably

1 high rates on the ground that the rates were reasonable because
2 they were filed with the FPC. Id at 251-52. But like Keogh,
3 Montana-Dakota applied the filed rate doctrine to a private claim
4 seeking to recover damages.

5 The viability of the filed rate doctrine (which from its
6 inception suffered from extensive criticism) came before the Court
7 in Square D Co v Niagra Frontier Tariff Bureau, Inc, 476 US 409,
8 410 (1986). In Square D, petitioner commercial shippers utilized
9 respondent interstate carriers' services to ship goods between the
10 United States and Canada. Id at 412. Petitioners alleged that
11 respondents had illegally fixed freight transportation costs rates
12 in violation of § 1 of the Sherman Act and sought, among other
13 remedies, treble damages. Id at 410-12. Respondents argued that
14 since their rates were filed with the ICC, the filed rate doctrine
15 barred petitioners' claim. Id at 414. Finding the facts virtually
16 indistinguishable from Keogh, the district court dismissed the
17 complaint, holding that the claims violated the filed rate doctrine
18 and the Second Circuit affirmed the dismissal of the treble damages
19 claim. The Court granted certiorari to determine whether Keogh
20 should be overruled. Id at 414-15. The Court, per Justice
21 Stevens, declined to overrule Keogh and held that petitioners'
22 claims were precluded.

23 While the Court upheld the validity of the filed rate
24 doctrine in Square D, the Court reemphasized the limited scope of
25 the doctrine, echoing the words of Justice Brandeis in Keogh. Id
26 at 415 n 17. Specifically, in rejecting petitioners' argument that
27 the filed rate doctrine essentially created an "immunity" from
28 antitrust scrutiny, the Court stated:

1 We disagree [] with petitioners' view that the
2 issue in Keogh and in this case is properly
3 characterized as an "immunity" question. The
4 alleged collective activities of the defendants
5 in both cases were subject to scrutiny under
6 the antitrust laws by the Government and to
7 possible criminal sanctions or equitable
8 relief. Keogh simply held that an award of
9 treble damages is not an available remedy for a
10 private shipper claiming that the rate
11 submitted to, and approved by, the ICC was the
12 product of an antitrust violation.

13 Id at 422 (emphasis added).

14 Accordingly, under the clear language of Keogh and Square
15 D, the filed rate doctrine is not a bar to the kind of proceedings
16 currently before the court: criminal enforcement proceedings by
17 the federal government. Defendants' attempt to characterize Keogh
18 and Square D's limitations on the filed rate doctrine as "dicta" is
19 unpersuasive. Reply at 26. Moreover, to the extent defendants
20 attempt to distinguish criminal antitrust prosecutions of the type
21 contemplated by Keogh and Square D from the present case on the
22 ground that the former "do not require proof of damages to
23 establish a violation," id, the court disagrees for the reasons
24 below.

25 Notwithstanding that the filed rate doctrine has never
26 been used to bar a criminal prosecution, defendants argue that the
27 filed rate doctrine prohibits application of the criminal
28 manipulation provision to their allegedly manipulative conduct.
Specifically, defendants argue that because the filed rate doctrine
forbids inquiries into some hypothetical price other than that
actually approved by FERC, the commodities price manipulation
charge violates the filed rate doctrine. This is so, according to
defendants, because proof that an artificial price existed requires

1 proof that some different, "natural" price would have obtained
2 absent defendants' conduct. MTD at 30-34. The court disagrees.

3 As already discussed, whether or not a price is
4 artificial does not necessarily turn on a comparison of that price
5 with some other price that would have prevailed in the absence of
6 illegitimate market forces. See *supra* III(A)(3)(c)(i). Rather,
7 the inquiry focuses primarily upon whether illegitimate forces were
8 at work in the marketplace. Indeed, the CFTC has suggested that a
9 comparison of the alleged artificial price with (as defendants put
10 it) a "natural" price is nonessential. Indiana Farm Bureau, 1982
11 WL 30249, *35 n 2 ("[W]hen a price is effected by a factor which is
12 not legitimate, the resulting price is necessarily artificial.").
13 This is not to say that evidence of prices set by wholly legitimate
14 market forces is irrelevant. If such proof is offered, however, it
15 is only incidental. Further, to the extent that any comparative
16 evidence consists of prices actually set by the market outside of
17 the time period at issue in this case, the fact finder would not be
18 required to "assum[e] a hypothetical rate different from that
19 actually set by FERC." TANC, 295 F3d at 930.

20
21 In this regard (and apart from the fact that they all
22 involved state law claims, see *supra* III(B)(2)), the following
23 cases are distinguishable: Snohomish, where claims for monetary
24 relief essentially "ask[ed] the district court to determine the
25 rates that 'would have been achieved in a competitive market,'" 384
26 F3d at 761; Pub Util Dist No 1 of Grays Harbor County v Idacorp
27 Inc, 379 F3d 641 (9th Cir 2004), where calculation of damages
28 "would [have] require[d] the court to set damages by assuming a
hypothetical rate, the 'fair value,' in violation of the filed rate

1 doctrine," id at 651; and TANC, where, in order to grant the
2 requested relief, the court "would have [had] to hold that under
3 state contract law TANC was entitled to 4800 MW of transfer
4 capacity" (impermissible because "state law can no more assume how
5 FERC would allocate access to interstate transmission capacity than
6 it can assume how FERC would set rates"), 295 F3d at 931.

7 In sum, the court concludes that this case is not
8 different from the federal prosecutions for antitrust violations to
9 which the United States Supreme Court has assumed the filed rate
10 doctrine does not apply. Accordingly, the court concludes the
11 filed rate doctrine does not bar application of the criminal
12 manipulation provision to the conduct alleged in the indictment.

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16 Next, defendants argue that the "alleged conduct is not
17 'manipulation' as a matter of law." MTD at 34. Specifically,
18 defendants contend that unilateral supply decisions cannot
19 constitute commodities price manipulation. As the court has
20 already explained, if count six were predicated solely upon
21 defendants' unilateral supply decisions, "this would be a very
22 different motion." *Supra* III(A)(3)(c)(ii). But the indictment
23 alleges that artificial prices were effected through the illusion
24 of a supply shortage, which was created by the interplay between
25 defendants' supply and bidding practices and the false and
26 misleading rumors and information they allegedly disseminated into
27 the market. The jury could find that defendants' conduct taken as
28 a whole constituted commodities price manipulation.

1 Similarly, the fact that withholding of supply might have
2 been permitted by the rules governing the California wholesale
3 electricity market in 2000 does not require dismissal of count six.
4 Whether the conduct alleged in the indictment, taken as a whole,
5 violated those rules is a question the court need not resolve,
6 because defendants do not stand accused of violating those rules;
7 they are accused of manipulating the price of a commodity in
8 interstate commerce in violation of 7 USC § 13(a)(2).

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12 In their reply memorandum, almost as an afterthought,
13 defendants challenge the sufficiency with which the indictment
14 alleges that defendants had the ability to influence prices.

15 "The sufficiency of an indictment is judged by 'whether
16 the indictment adequately alleges the elements of the offense and
17 fairly informs the defendant of the charge * * *.'" United States
18 v Blinder, 10 F3d 1468, 1471 (9th Cir 1993) (quoting United States
19 v Buckley, 689 F2d 893, 897 (9th Cir 1982)); see also FRCrP 7(c)(1)
20 (stating that an indictment must be a "plain, concise and definite
21 written statement of the essential facts constituting the offense
22 charged"). The indictment alleges that in 1996 Reliant "assumed
23 control of approximately 20% of all gas-fired power generation in
24 the State of California." 3SI ¶7. Although defendants take issue
25 with the indictment's characterization of Reliant's market share,
26 Reply at 29 n 21, the court must presume the truth of the
27 allegations, Blinder, 10 F3d at 1471. Given that the indictment
28 also alleges that defendants disseminated false and misleading

1 rumors and information to the market, the court finds the
2 indictment sufficiently alleges ability to influence prices. See
3 Soybean Futures, 892 F Supp at 1053 ("When these alleged
4 misrepresentations are factored into their alleged ability to
5 influence prices, one might reasonably infer that [d]efendants
6 might not have required as large a position in the * * * market as
7 would a manipulator relying on market power alone.").

8
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10 IV

11 Finally, defendants move the court to dismiss counts two
12 through five of the indictment, which allege wire fraud.
13 Defendants' motion has two dimensions. First, defendants argue
14 that the wire fraud statute, 18 USC § 1343, is unconstitutionally
15 vague as applied to this case. Next, defendants argue that the
16 indictment "fails to allege a valid wire fraud claim." Neither
17 argument is persuasive.

18
19 A

20 Defendants suggest in passing that the wire fraud statute
21 fails to provide constitutionally sufficient notice "because
22 persons of average intelligence in a FERC-regulated market could
23 not reasonably understand that conduct not prescribed by market
24 rules would nevertheless be prohibited by law." MTD at 27. For
25 reasons already discussed in the context of defendants' arguments
26 for dismissing count six, the court disagrees. That regulation by
27 FERC does not equate to immunity from government enforcement
28 proceedings or criminal prosecutions was established no later than

1 Otter Tail. See *supra* III(B)(2). To the extent defendants claim
2 ignorance of this established law, that is no excuse. See, e g,
3 Shevlin-Carpenter Co v Minnesota, 218 US 57, 68 (1910).
4 Accordingly, the court finds it unnecessary to address the
5 government's contention that defendants' conduct was in fact
6 prohibited by the rules governing the wholesale electricity market
7 in California.

8
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10 B

11 In arguing that the scheme alleged in the indictment
12 cannot support the wire fraud charges, defendants first draw a bead
13 on ¶19(b), which alleges that defendants engaged in "the physical
14 and economic withholding of electricity from the California spot
15 markets, by declining to submit supply bids and by submitting false
16 and misleading supply bids at prices designed to ensure that the
17 bids were not accepted." According to defendants, the "idea of a
18 'false and misleading bid' is incoherent on its face. * * * A bid
19 could only be 'false' if the bidding entity had no capacity to
20 fulfill it." MTD at 42. But the "falsity" of bids as such is
21 irrelevant, see United States v Woods, 335 F3d 993, 998-99 (9th Cir
22 2003), especially when, as the government concedes, "their import
23 is that they contributed to the overall scheme to defraud, not that
24 they independently amounted to a 'false representation,'" Opp at 39
25 n 45.

26 Next, defendants argue that the wire fraud charges are
27 invalid to the extent they hinge on defendants' failure to disclose
28 the true reasons for their bidding and supply decisions. If non-

1 disclosure were the lynchpin of the alleged scheme to defraud,
2 again, "this would be a very different motion." *Supra*
3 III(A)(3)(c)(ii). But that is not the scheme alleged. To the
4 contrary, the indictment postulates, albeit not explicitly, that by
5 disseminating false information regarding Reliant's generating
6 capacity, defendants effectively told the market that Reliant's
7 sudden reduction in supply was not motivated by an intent merely to
8 increase the price of electricity.

9
10 Nonetheless, defendants contend that "it is impossible to
11 ignore that a wire fraud scheme based on allegedly false 'cover-up'
12 conversations is quite different from the scheme actually alleged
13 in the indictment." Reply at 30. The court disagrees with this
14 myopic reading of the indictment, which clearly alleges that
15 defendants shut down certain Reliant power plants, withheld
16 electricity from the market, purchased electricity from other
17 markets, 3SI ¶¶19(a)-(c), and then explained these anomalies to the
18 market through "the dissemination of false and misleading rumors
19 and information to the ISO, brokers, and other traders regarding
20 the availability and maintenance status of, and environmental
21 limitations on, [Reliant]'s power plants," id ¶19(d).

22 Defendants argue that ¶19(d) cannot stand on its own as a
23 basis for the wire fraud charges. Because the court declines to
24 strike any of the allegations contained in ¶¶19(a)-(c), defendants'
25 argument is moot. Similarly, defendants argue that if the court
26 dismisses count six, the remaining charges cannot stand. To the
27 extent this argument has not been mooted by Indictment S3, it is
28 mooted by the court's conclusion that count six should not be
dismissed.

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V

In sum, defendants' joint motion to dismiss Indictment S3 as barred by the statute of limitations is DENIED. Defendants' original joint motion to dismiss the indictment is DENIED.

SO ORDERED.



VAUGHN R WALKER

United States District Chief Judge