

122 FERC ¶ 61,103  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

O'Connor & Hewitt, Ltd

v.

Docket No. RP08-30-000

Energy Transfer Partners, L.P.  
La Grange Acquisition, L.P., d/b/a Energy Transfer Company  
ETC Marketing, Ltd.  
Houston Pipeline Company  
Energy Transfer Equity, L.P.

ORDER DISMISSING COMPLAINT

(Issued February 6, 2008)

1. This order addresses an October 24, 2007 complaint filed by O'Connor & Hewitt, Ltd., (O'Connor) asserting that Energy Transfer Partners, L.P. and its various entities (ETP) violated the Natural Gas Act (NGA) and various Commission regulations by engaging in the manipulation of natural gas prices at the Houston Ship Channel and caused O'Connor approximately \$6 million in damages. For the reasons discussed below, the Commission dismisses O'Connor's complaint.

**Background**

2. O'Connor's complaint in this proceeding is based, in large part, on the Commission's investigation into potential market manipulation by ETP in Docket No. IN06-3-002. On July 26, 2007, the Commission issued an order in Docket No. IN06-3-002<sup>1</sup> directing ETP to show cause why it should not be found to have violated Market

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<sup>1</sup> *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 (2007) (Show Cause Order), *reh'g denied*, 121 FERC ¶ 61,282 (2007) (Rehearing Order).

Behavior Rule 2<sup>2</sup> by manipulating wholesale gas prices at the Houston Ship Channel by suppressing them to benefit ETP's financial positions and other physical positions for the period from December 2003 through December 2005. The Show Cause Order proposes \$82 million in NGA civil penalties and the disgorgement of unjust profits of \$69 million resulting from the alleged market manipulation. The Show Cause Order also ordered ETP to show cause why the Commission should not revoke ETP's blanket marketing certificate to sell gas subject to the Commission's jurisdiction.<sup>3</sup>

3. On August 23, 2007, O'Connor filed a motion to intervene in the Docket No. IN06-3-002 proceeding. On December 20, 2007, the Commission issued an order which, among other things, denied O'Connor's motion to intervene.<sup>4</sup> The order also established a briefing schedule in the show cause proceeding and clarified several of the Commission's future civil penalty adjudication procedures.<sup>5</sup>

4. On December 21, 2007, O'Connor filed a motion requesting that the Commission allow it until January 21, 2008, to file a response to ETP's answer to O'Connor's complaint. On January 10, 2008, O'Connor filed another motion requesting the Commission allow it until February 20, 2008, to file a response to ETP's answer to O'Connor's complaint. Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2007), an answer to an answer is not permitted unless otherwise ordered by the Commission. Accordingly, O'Connor's motions are rejected.

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<sup>2</sup> 18 C.F.R. § 284.403(a)(2005). Market Behavior Rule 2 states, in part:

Any person making natural gas sales for resale in interstate commerce pursuant to § 284.402 is prohibited from engaging in actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for natural gas.

<sup>3</sup> The Show Cause Order also directed Oasis Pipeline, L.P.; Oasis Pipeline Company Texas, L.P.; and ETC Texas Pipeline LTD., Oasis Division (collectively, Oasis Pipeline) to show cause why the Commission should not find that Oasis Pipeline: (1) unduly discriminated against non-affiliated shippers and unduly preferred one or more affiliated shippers; (2) charged rates in excess of the maximum lawful rate for service under section 311 of the Natural Gas Policy Act of 1978 (NGPA); (3) failed to file an amended operating statement; and (4) should pay civil penalties in the amount of \$15,500,000 and disgorge \$267,122 in unjust profits, plus interest.

<sup>4</sup> Rehearing Order, 121 FERC ¶ 61,282 at P 16-19 (2007).

<sup>5</sup> *Id.* at P 88-90.

### **O'Connor's Complaint**

5. O'Connor states it is the authorized agent of the sellers in a gas purchase agreement effective January 1, 1998, with Houston Pipeline Company (HPL), a subsidiary of ETP. Under the gas purchase agreement, O'Connor asserts it is to be paid for natural gas sold to HPL based on the Houston Ship Channel index published in *Inside FERC*.<sup>6</sup> O'Connor states that it sold all of its natural gas production for 2003 through 2006 to HPL based on the Houston Ship Channel index published by *Inside FERC*. O'Connor states that it believed that the Houston Ship Channel index was a true reflection of market prices. However, O'Connor asserts that the Houston Ship Channel index was not a true reflection of market prices in 2003 through 2006 because, as the Commission's Show Cause Order alleged, ETP manipulated wholesale natural gas prices at the Houston Ship Channel by suppressing them to benefit ETP's financial positions and other physical positions.<sup>7</sup>

6. O'Connor requests that the Commission issue an order establishing a hearing before an administrative law judge (ALJ) to resolve O'Connor's complaint against ETP. O'Connor requests that the Commission find that ETP intentionally engaged in market manipulation in violation of Market Behavior Rule 2<sup>8</sup> and Part 1c of the Commission's regulations.<sup>9</sup> O'Connor incorporates the allegations in the Commission's Show Cause Order that ETP manipulated markets at the Houston Ship Channel on various dates from December 2003 through December 2005. O'Connor also believes that ETP violated Market Behavior Rule 2 in other months in 2003, 2004, and 2005 that are not addressed in the Show Cause Order. In addition, O'Connor believes that ETP engaged in manipulative trading strategies at the Houston Ship Channel in early 2006 in violation of Part 1c of the Commission's regulations. O'Connor bases these allegations on the fact that the Commodity Futures Trading Commission (CFTC) was able to obtain an administrative subpoena requiring the McGraw-Hill Companies, Inc. (the publishers of *Inside FERC*) to produce documents in connection with the CFTC's investigation of whether an energy company (now identified as ETP) manipulated the price of natural gas at certain delivery locations in Texas from August through December 2005 and possibly

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<sup>6</sup> Platts, a division of the McGraw-Hill Companies, publishes daily natural gas prices at certain trading points in its *Inside FERC* Gas Market Report.

<sup>7</sup> Show Cause Order, 120 FERC ¶ 61,086 at P 17 (2007).

<sup>8</sup> 18 C.F.R. § 284.403 (2005).

<sup>9</sup> 18 C.F.R. § 1c.1 (2007) prohibits natural gas market manipulation. Section 1c.1 codifies the authority given to the Commission in section 4A of the NGA that had been enacted as part of the Energy Policy Act of 2005 (EPAAct 2005).

in 2003, 2004 and 2006. O'Connor states that it needs and will seek discovery from Platts and ETP necessary to support and adjudicate these allegations before the Commission and the ALJ.

7. O'Connor asserts that ETP knowingly submitted misleading trade data to Platts for it to include in its calculation of the *Inside FERC* Houston Ship Channel index in violation of section 284.403(b) of the Commission's regulations.<sup>10</sup> O'Connor asserts that:

Platts has been found to engage "in journalistic analysis and judgment in addition to simply reporting data." *In re An Application to Enforce Admin Subpoena of the CFTC v. McGraw-Hill Co.*, 390 F. Supp.2d 27 (D.C. Cir. 2005). As a result, it follows that absent Platts' participation in ETP's illicit trading strategy the HSC trade data submitted by ETP to Platts to push the HSC IFERC Index down must have been false, misleading, or omitted material information. Otherwise, Platts would not have continuously included the manipulative trade data reported by ETP in its calculation of the HSC IFERC Index. *See U.S. v. Valencia*, 2006 WL 3707867, at \*1 (S.D. Tex. 2006) (discussing the development of IFERC index prices and noting that "the inside FERC editor testified that, prior to calculating the volume weighted averages, he removed from the data reported trades that he deemed to be 'outliers,' i.e. trades that appeared to aberrational for one reason or another." ).<sup>11</sup>

O'Connor states that it needs and will seek discovery from Platts necessary to support and adjudicate these allegations before the Commission and the ALJ.

8. O'Connor states that "[p]ursuant to ETP's blanket marketing certificate under 284.402(a), ETP had the Commission's authority to make sales for resale in interstate commerce at 'negotiated rates.' O'Connor believes that ETP's trades at the HSC that were made pursuant to its illegitimate trading strategy of intentionally pushing down the HSC Index in 2003, 2004, 2005, and early 2006 were not 'negotiated rates' as

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<sup>10</sup>18 C.F.R. §284.403(b). Section 284.403(b) requires persons holding blanket certificates to make sales for resale of natural gas in interstate commerce who report their sales information to the publishers of electric and natural gas price indices to accurately report information concerning their transactions .

<sup>11</sup> Complaint at P 30.

contemplated by the authority granted by the Commission.”<sup>12</sup> O’Connor asserts “that the Commission should find that ETP violated the Commission’s regulations in this regard as well.”<sup>13</sup>

9. O’Connor requests that the Commission find that ETP’s violations of the NGA and the Commission’s regulations caused O’Connor to suffer quantifiable economic losses. O’Connor requests that the Commission order ETP to disgorge all profits stemming from its violation of the NGA. O’Connor requests that the Commission order ETP to refund to O’Connor the amount of money necessary to return O’Connor to the status quo ante, including interest at the maximum rate, costs, and attorney’s fees. Based upon Chart 1 in Paragraph 39 of the Show Cause Order and O’Connor’s Gas Sales Summary for those months, O’Connor asserts that it is entitled to a refund in damages in the amount of \$5,922,249.74 plus interests and costs. O’Connor asserts that it has suffered additional economic damages as a result of ETP’s manipulation of the Houston Ship Channel index in months not addressed by the Show Cause Order. O’Connor submits that it will not be able to quantify the amount of that damage in good faith without discovery from ETP and Platts. O’Connor also requests that the Commission order the revocation of ETP’s blanket marketing certificate under section 284.402 of the Commission’s regulations, or, alternatively, order the appointment of an independent monitor to supervise ETP’s future resale trades at the Houston Ship Channel and ETP’s reporting of trade data to *Inside FERC* to ensure that ETP does not manipulate the Houston Ship Channel index.

10. In its complaint, O’Connor states that some of the issues presented in the complaint are pending in other proceedings. O’Connor states that it filed a motion to intervene in Docket No. IN06-3-002. O’Connor also filed a law suit in state court in Victoria County, Texas alleging that ETP and its affiliated entities acted in a conspiracy to manipulate the price for gas at the Houston Ship Channel downward and therefore knowingly reduced the price paid for gas to O’Connor under the gas purchase agreement. O’Connor alleges that the action of ETP and its entities constitute a breach of contract, fraud, unjust enrichment, and a breach of the duty of good faith and fair dealing all to O’Connor’s damage. The Texas state court proceeding is subject to a stay pending an appeal. O’Connor asserts that it filed a complaint with the Commission because it believes that it may not receive all the relief it seeks through the show cause proceeding or the law suit in Texas state court.

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<sup>12</sup> Complaint at P 33.

<sup>13</sup> *Id.*

**ETP's Answer**

11. ETP filed an answer to O'Connor's complaint asserting that the complaint was without merit and should be summarily dismissed. ETP argues that since the complaint is based, in large part, on the allegations in the Commission's Show Cause Order in Docket No. IN06-3-002, and ETP asserts it has refuted those allegations in its answer in that proceeding, O'Connor's complaint should likewise be dismissed.

12. ETP contends that the only claims in O'Connor's complaint that arguably deviate in any respect from the Show Cause Order are claims that ETP engaged in manipulation during periods between 2003 and 2005 not addressed in the Show Cause Order, and that ETP's alleged manipulation continued into 2006, beyond the time period alleged by the Commission. ETP submits that these claims are false and fall woefully short of satisfying the Commission's procedural requirements, including that a complaint "clearly identify" the specific violations alleged.<sup>14</sup> In addition, ETP asserts that Commission staff reviewed in detail all of ETP's transactions and data from September 2003 through December 2005, and alleged no violations other than those expressly set forth in the show cause order. ETP argues that, regarding 2006, the Affidavit of Dr. John R. Morris attached as Exhibit A to ETP's answer makes clear that ETP in many months made zero fixed priced sales of physical natural gas at the Houston Ship Channel that were reportable to Platts in 2006. ETP contends that in certain other months in 2006 ETP made only *de minimis* sales. ETP argues that under any view of the facts, ETP thus could not have engaged in any price manipulation in 2006 as O'Connor alleges. Moreover, ETP asserts that O'Connor's claims that ETP engaged in manipulation during periods not covered in the Show Cause Order are based on the same flawed theory that ETP previously refuted in response to the Show Cause Order.

13. ETP asserts that O'Connor is subject to a binding arbitration clause in its gas purchase agreement with HPL, and O'Connor has already filed suit in state court in Texas for pre-arbitration discovery and injunctive relief. ETP submits that it bears noting that this complaint docket is the third proceeding in which O'Connor has attempted to press essentially the same claims against ETP. Specifically, (1) O'Connor initiated the Texas litigation for pre-arbitration discovery based upon allegations in certain Platts articles that ETP manipulated the Houston Ship Channel Index for natural gas; (2) O'Connor moved to intervene in the Commission's investigation in Docket No. IN06-3-002, claiming damages; and (3) O'Connor has now filed the instant complaint, again making the same trading allegations set forth in the Show Cause Order. ETP states that, in its Answer in Opposition to O'Connor's Motion to Intervene in Docket No. IN06-3-002, it explained that as a matter of law, O'Connor's claims are not proper for Commission review because they are subject to binding arbitration. ETP contends that

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<sup>14</sup> 18 C.F.R. § 385.206 (2007).

certain fundamental issues (including whether ETP violated the NGA –which it did not – and filed rate determinations bearing on calculation of alleged damages) are subject to the Commission’s exclusive jurisdiction and need to be resolved through the Commission’s investigation in Docket No. IN06-3-002, subject to *de novo* federal district court review followed by appeal. ETP argues that, however, does not vitiate the binding nature of the gas purchase agreement’s arbitration provisions. Moreover, ETP asserts that the Commission has no jurisdiction over the underlying transactions from which O’Connor’s alleged injury flows –“first sales” by O’Connor to an intrastate pipeline that have been expressly excluded from the Commission’s NGA jurisdiction by the Natural Gas Policy Act of 1978.

14. ETP concludes that the complaint should be dismissed for all the foregoing reasons. ETP submits that if the Commission does not dismiss the complaint outright, then it urges that this proceeding be held in abeyance until the charges lodged in the Commission’s show cause order are ultimately resolved.

### **Discussion**

15. In its complaint, O’Connor requests various forms of relief, including damages of approximately \$6 million, based, in large part, upon the allegations in the Commission’s Show Cause Order that ETP engaged in manipulation of natural gas prices at the Houston Ship Channel. As discussed below, the Commission dismisses O’Connor’s complaint because certain issues will be addressed in the show cause proceeding in Docket No. IN06-3-002, and O’Connor failed to satisfy its burden of proof under the Commission’s complaint rules for the remainder of the other issues.

16. The Show Cause Order alleges that ETP manipulated markets at the Houston Ship Channel on certain dates from December 2003 through December 2005.<sup>15</sup> The show cause order proposes that ETP pay civil penalties of \$82 million and disgorge approximately \$69 million in unjust profits resulting from the alleged manipulation.<sup>16</sup> In addition, the show cause order proposes that ETP’s blanket certificate to sell gas subject to the Commission’s jurisdiction be revoked.<sup>17</sup> O’Connor incorporates the allegations of the show cause order into its complaint and reiterates several remedies proposed by the show cause order. O’Connor also requests nearly \$6 million in damages from ETP for the period at issue in the Show Cause Order because it asserts that the price it was paid for its natural gas was depressed due to ETP’s alleged manipulation.

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<sup>15</sup> Show Cause Order, 120 FERC ¶ 61,086 at P 39-42 (2007).

<sup>16</sup>*Id.* at P 19.

<sup>17</sup>*Id.* at P 1 and Ordering Paragraph B.

17. The Commission finds that all issues raised by the Show Cause Order must be addressed in that ongoing proceeding and that it would be an inappropriate use of resources to also address such issues in the instant complaint proceeding. In addition, as we stated on rehearing of the Show Cause Order, the Commission's ability to consider issues in an enforcement action in a timely and judicious manner could be interfered with if third parties were allowed to intervene.<sup>18</sup> In that order we found that this is because in such an enforcement proceeding, the Commission is considering closely the particular actions/inactions, rights, obligations and, potentially, violations and penalties of the subject party - here, ETP. Such a proceeding is different from a rate filing, rulemaking, or other proceeding where the rights of third parties are clearly affected. Allowing third parties to intervene in enforcement proceedings in pursuit of their own objectives could delay or sidetrack a proceeding extending or even creating additional uncertainty for the subject party. We find that allowing a party to pursue the same cause of action in a separate docket that raises the same issues as are being considered in an enforcement action, as is the case here, could have the same effect as allowing such party to intervene directly in the enforcement proceeding. Therefore, to the extent that O'Connor's complaint simply reiterates the Show Cause Order, those portions of O'Connor's complaint are dismissed.

18. Further, the primary remedy sought by O'Connor is damages. While the Commission has authority to order disgorgement of unjust profits and to assess civil penalties, it does not have the authority to award damages to aggrieved persons. It is possible that an entity affected by an NGA violation could be allocated some portion of unjust profits required to be disgorged,<sup>19</sup> but this is an issue to be decided in the underlying enforcement proceeding. As we found in the Rehearing Order, if the Commission finds in the Show Cause Proceeding that ETP has engaged in market manipulation and if the Commission determines that disgorgement of unjust profits is an appropriate remedial step, then the Commission may consider allowing entities, such as O'Connor, affected by any such manipulation to demonstrate how allocations should be made.<sup>20</sup> Only at that time, if at all, will the Commission be able to determine if O'Connor would be eligible to receive a portion of any disgorged profits.

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<sup>18</sup>Rehearing Order, 121 FERC ¶ 61,282 at P 19 (2007).

<sup>19</sup> Unjust profits usually would be allocated along affected customers of the jurisdictional company, but it is possible that other affected entities could be allocated some portion of unjust profits.

<sup>20</sup> Rehearing Order, 121 FERC ¶ 61,282 at P 19, n. 28 (2007).

19. O'Connor asserts that ETP violated section 284.403(b) of the Commission's regulations by submitting misleading trade data to Platts to include in its calculation of the Houston Ship Channel index. The Commission dismisses this aspect of O'Connor's complaint as unsupported. The Commission's extensive investigation in Docket No. IN06-3-002 did not uncover any instances where ETP provided misleading information to any gas price index publisher, and the Show Cause Order does not contain any allegations that ETP violated the reporting requirements of section 284.403(b). O'Connor provides no evidence of ETP providing misleading trade data. O'Connor simply speculates that ETP's trading information must have been false or misleading otherwise Platts, who it asserts can remove aberrational trades, would not have included it in its index calculation unless it was a participant in ETP's illicit trading strategy. In addition, the facts show that the information provided by ETP to index publishers were based on actual sales, albeit, at an allegedly manipulated price.<sup>21</sup>

20. O'Connor believes that ETP violated Market Behavior Rule 2 in other months in 2003 through 2005 and also engaged in manipulative trading strategies in 2006 in violation of Part 1c. O'Connor bases this part of its complaint on the fact that the CFTC was able to enforce an administrative subpoena requiring Platts to turn over documents concerning trades made by ETP during these time periods. O'Connor states that it will need discovery to support these allegations. The Commission dismisses this part of O'Connor's complaint as unsupported. Section 385.206(b)(1) of the Commission's regulations states that a complainant must "[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements."<sup>22</sup> The fact that another federal agency was able to subpoena documents based on allegations of wrongdoing does not satisfy a complainant's burden of proof under the Commission's complaint rules. At the very least, O'Connor would be required to provide specific dates on which it asserts ETP allegedly engaged in market manipulation and evidence supporting the theory that manipulation occurred on such dates. The Commission will not permit discovery as requested by O'Connor based on the evidence it has presented.

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<sup>21</sup> In fact, accurately reporting the alleged manipulated price would have been a necessary part of any plan to benefit its financial positions by depressing the physical gas price at the Houston Ship Channel.

<sup>22</sup> 18 C.F.R. § 385.206 (b)(1)(2007).

The Commission orders:

O'Connor's October 24, 2007 complaint against ETP is dismissed.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.