

138 FERC ¶ 61,013
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Richard Blumenthal, Attorney General for The State of Connecticut Docket No. EL09-47-002

v.

ISO New England Inc., Brookfield Energy Marketing Inc., H.Q. Energy Services (U.S.) Inc., Constellation Energy Commodities Group, Inc., and Other Unidentified Installed Capacity Resources Committed to Import over the Northern New York AC Interface

The Connecticut Department of Public Utility Control and the Connecticut Office of Consumer Counsel Docket No. EL09-48-002

v.

ISO New England Inc., Brookfield Energy Marketing Inc., H.Q. Energy Services (U.S.) Inc., Constellation Energy Commodities Group, Inc., and Other Unidentified Installed Capacity Resources Committed to Import over the Northern New York AC Interface

ORDER DENYING REHEARING

(Issued January 9, 2012)

1. On June 6, 2011, the Attorney General for the State of Connecticut (Connecticut Attorney General), the Connecticut Department of Public utility Control (CT DPUC), and Connecticut Office of Consumer Counsel (CT OCC) (collectively, Connecticut Representatives) filed a request for rehearing of Opinion No. 513.¹ Opinion No. 513

¹ *Richard Blumenthal, Att’y Gen. for the State of Connecticut v. ISO New England Inc.*, Opinion No. 513, 135 FERC ¶ 61,117 (2011) (affirming Initial Decision, *Richard Blumenthal, Att’y Gen. for the State of Connecticut v. ISO New England Inc.*, 132 FERC ¶ 63,017 (2010) (Initial Decision)).

affirmed the Initial Decision in this proceeding, finding that Connecticut Representatives failed to support their complaint against Brookfield Energy Marketing, Inc. (Brookfield), Constellation Energy Commodities Group, Inc. (Constellation), and Shell Energy North America (US), L.P. (Shell) (collectively, Respondents), which alleged that Respondents had engaged in market manipulation. In this order, the Commission denies rehearing.

I. Background

2. This proceeding arose within the context of capacity prices and conditions in the ISO New England Inc. (ISO-NE) and New York Independent System Operator, Inc. (NYISO) regions during the “Transition Period” leading up to implementation of ISO-NE’s Forward Capacity Market.² During the portion of the Transition Period relevant to this case, December 1, 2006, to June 30, 2009 (referred to herein as the partial Transition Period),³ fixed monthly capacity payments made by ISO-NE were significantly higher than the fixed monthly capacity payments made by NYISO.⁴ This made it economically attractive for capacity suppliers, including Respondents, to export capacity from New York to New England to receive higher capacity payments from ISO-NE.

3. Under ISO-NE’s market rules at the time, market participants with installed capacity (ICAP) import contracts (sometimes called “capacity importers” or “capacity resources”) were required to make offers of capacity-backed energy in amounts equal to their ICAP obligations in both the ISO-NE day-ahead and real-time markets for every hour of every day of every month in which they held capacity contracts; this is known as the “must offer” requirement. During the partial Transition Period, ISO-NE’s Transmission, Markets and Services Tariff (Tariff) imposed a \$1,000/MWh price cap on these “must offer” offers but otherwise contained no specific pricing restrictions.⁵

² Because of the prospective nature of the Forward Capacity Market in New England, the 2010-2011 Power Year is the first year for which capacity was auctioned. The Transition Period bridged the gap between December 1, 2006, and May 31, 2010, the beginning of the 2010-2011 Power Year, as provided in the FCM Settlement Agreement. *See Devon Power, LLC*, 115 FERC ¶ 61,340 (2006).

³ The partial Transition Period ends when ISO-NE’s “competitive offer” requirements filed in Docket No. ER09-873-000 became effective. *See ISO New England Inc.*, 127 FERC ¶ 61,235, at P 31 (2009).

⁴ These payments ranged from \$3.05/kW-month and \$4.10/kW-month in ISO-NE and \$0.50/kW-month and \$2.00/kW-month in NYISO.

⁵ *See ISO New England Inc.*, 127 FERC ¶ 61,235 at P 2, 3; ISO-NE, FERC Electric Tariff No. 3, Transmission, Markets and Services Tariff (Tariff), Market Rule 1, § III.8.3.7.1(c). Section III of the Tariff is Market Rule 1.

4. On March 20, 2009, ISO-NE proposed an additional pricing restriction in Docket No. ER09-873-000, submitting Tariff revisions in the form of “competitive” offer requirements for energy transactions associated with ICAP import contracts, as well as proposing reforms to the existing penalties for non-delivery of energy when requested by ISO-NE.

5. In support of the competitive offer requirement, ISO-NE initially alleged that, during the period from January 2005 to January 2009, every market participant that had submitted a capacity-backed energy offer above \$660/MWh over the Northern New York AC interface failed to perform every time it was dispatched, for a total of 108 such instances, and that these market participants had been paid a collective \$85.8 million in capacity payments despite their non-delivery.

6. However, ISO-NE subsequently amended its filing to withdraw the allegations regarding non-delivery during the 2005 to 2009 period. ISO-NE stated that its market monitor had misread the relevant data and that, in fact, none of the 108 offers referenced in the March 20, 2009 filing had cleared the real-time energy market.⁶

A. The Complaints

7. In April 2009, prior to ISO-NE’s May 6, 2009 amendment of its competitive offer filing withdrawing the allegations of non-delivery, the Connecticut Attorney General and, jointly, CT DPUC and CT OCC filed two separate complaints calling for an investigation into ISO-NE market activities, disgorgement of certain monies, and structural changes to ISO-NE’s internal market monitoring unit related to the alleged 108 instances of non-delivery described in ISO-NE’s initial March 20, 2009 filing and the capacity payments made to those capacity resources that allegedly failed to deliver. Specifically, the Connecticut Attorney General contended that, during the partial Transition Period, Respondents received substantial payments for making capacity-backed energy offers at prices approaching the \$1,000/MWh price cap, offer prices which Respondents allegedly never intended to be accepted, for energy they allegedly never intended to deliver, in violation of section 222 of the Federal Power Act (FPA)⁷ and section 1c.2 of the

⁶ The Commission accepted the Tariff revisions relating to ISO-NE’s competitive offer requirements, to become effective July 1, 2009, which marks the end of the partial Transition Period at issue here. *ISO New England Inc.*, 127 FERC ¶ 61,235.

⁷ 16 U.S.C. § 824v (2006), stating:

It shall be unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy . . . subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in [Securities Exchange

(continued...)

Commission's regulations.⁸ Likewise, in their separate complaint, CT DPUC and CT OCC averred that Respondents offered and received payment for capacity-backed energy at offer prices that would rarely, if ever, be accepted, and thereby caused energy prices in New England to be higher and less competitive than if Respondents had submitted lower capacity-backed energy offers (that would have given ISO-NE first call on their energy). The Connecticut Attorney General subsequently joined CT DPUC and CT OCC (jointly, Complainants) in an amended complaint, alleging that Respondents engaged in market manipulation and were paid at least \$50.9 million for capacity which Respondents never intended to deliver.

B. The Hearing Order

8. The Commission consolidated the complaints and set for hearing⁹ issues relevant to Complainants' allegations of market manipulation, including, most pertinent here, whether Respondents acted with the requisite level of intent, or *scienter*, in submitting the bids at issue.

C. Initial Decision

9. The Initial Decision concluded that Complainants' allegations of market manipulation failed, primarily because the record lacked sufficient evidence that Respondents acted with the necessary level of intent required under section 222 of the FPA and section 1c.2 of the Commission's regulations.¹⁰ Instead, the Initial Decision

Act, section 10-b)], in contravention of such rules and regulations as the Commission may prescribe

⁸ 18 C.F.R. § 1c.2(a) (2010), stating:

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy . . . subject to the jurisdiction of the Commission, (1) To use or employ any device, scheme or artifice to defraud, (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

⁹ *Richard Blumenthal, Att'y Gen. for the State of Connecticut v. ISO New England Inc.*, 128 FERC ¶ 61,182 (Hearing Order), *order on clarification*, 129 FERC ¶ 61,057 (2009).

¹⁰ Initial Decision, 132 FERC ¶ 63,017 at P 85-87, 107; *see also id.* P 89.

found that Respondents' behavior "clearly evidences legitimate business and economic objectives," rather than intent to commit fraud.¹¹ Moreover, the Initial Decision found that Brookfield, Constellation, and Shell intended to deliver their capacity-backed energy in the unlikely event ISO-NE called on it, and that each of them had procedures in place to ensure the energy actually could be delivered if necessary.¹² The Initial Decision pointed out that the probability ISO-NE would call upon this capacity was relatively low due to the comparatively low energy prices and the surplus capacity conditions prevailing in New England throughout the partial Transition Period. The Initial Decision concluded, therefore, that it was "completely reasonable/ economically rational" for Brookfield, Constellation, and Shell purposefully to offer their capacity to ISO-NE in a manner which provided reliability but which assured that the associated energy would not ordinarily be called on.¹³ In support of these findings, the Commission also noted that the record similarly confirms that Brookfield, Constellation, and Shell submitted their corresponding New York energy export bids at negative \$999.70 to serve as "placeholders," thereby minimizing risks associated with transaction de-ratings (removing a transaction from consideration for the remainder of the day), false dispatch (over-commitment of NYISO generation with consequent costs to NYISO load), and failure-to-deliver penalties.¹⁴

D. Opinion No. 513

10. Opinion No. 513 affirmed the Initial Decision's determination that Complainants failed to support their allegations of market manipulation against Respondents primarily due to an inadequate showing of the requisite *scienter*. The Commission affirmed the Initial Decision's finding that Respondents intended to deliver their capacity-backed energy in the unlikely event ISO-NE actually called on it, and that each of them had procedures in place to ensure the energy actually could be delivered if necessary.¹⁵ Moreover, the Commission found that Complainants did not demonstrate that, as a practical matter, Respondents could not have timely raised their corresponding energy export bids.

¹¹ *Id.* P 112.

¹² *Id.* P 113 (citing Ex. BEM-35 at 12-13; Ex. BEM-4 at 113-14; Ex. BEM-76 at 38-39; Ex. CT-034 at 114; Ex. CON-1 at 39-40; Ex. CON-039 at 33, 45; Ex. CON-032; Ex. CON-033; Ex. SE-001 at 6-7, 17; Ex. SE-003 at 5-11, 19).

¹³ *Id.*

¹⁴ *Id.* Negative \$999.70/MWh was the lowest bid price allowed under the NYISO tariff. *Id.* P 27 & n.33.

¹⁵ Opinion No. 513, 135 FERC ¶ 61,117 at P 36 (citing Initial Decision, 132 FERC ¶ 63,017 at P 113).

11. Opinion No. 513 further found that, while Complainants argued that Respondents engaged in various Tariff violations, the Initial Decision correctly determined that evidence of a Tariff violation is not dispositive of whether Respondents engaged in market manipulation, the only issue set for hearing in the Hearing Order. In any case, the Commission affirmed the Initial Decision's finding that ISO-NE's Tariff imposed no express "reasonable price" requirement.¹⁶

12. The Commission agreed with the Initial Decision that, although Respondents submitted capacity-backed energy offers approaching the \$1,000 MWh price cap, ample record evidence supports that doing so was a legitimate business decision, resulting from natural market forces, and not alone demonstrative of knowing and intentional or recklessly fraudulent conduct. The Commission also determined that simply because Respondents' capacity-backed energy may not have been needed due to surplus capacity in New England's capacity market, Respondents' offers nonetheless had potential reliability value.¹⁷

13. The Commission further noted that Respondents faced various economic risks as a consequence of the market design and the need to clear two organized electric markets, and that Respondents' high-priced capacity-backed energy offers were designed to provide reliability to ISO-NE while minimizing these risks.¹⁸

II. Request for Rehearing

14. On rehearing, Connecticut Representatives maintain that Respondents accepted \$65 million in payments for capacity-backed energy but then engaged "in a pattern of manipulative and deceptive conduct intended to deprive New England ratepayers of the benefit of their bargain."¹⁹ Specifically, they describe Respondents' conduct as "a coordinated bidding strategy to take advantage of certain structural differences in the

¹⁶ Indeed, ISO-NE's proposed tariff revisions requiring a "competitive" offer is some evidence that, prior to the proposal, Respondents were not bound by any type of "reasonable price" requirement. *See* Opinion No. 513, 135 FERC ¶ 61,117 at P 41 n.81; Initial Decision, 132 FERC ¶ 63,017 at P 101.

¹⁷ Opinion No. 513, 135 FERC ¶ 61,117 at P 43.

¹⁸ The Commission acknowledged, for example, that if an external capacity supplier had flowed capacity-backed energy in every hour of every day during the Transition Period, it would have sustained day-ahead market losses in approximately 60 percent of those hours. Opinion No. 513, 135 FERC ¶ 61,117 at P 44 (citing Initial Decision, 132 FERC ¶ 63,017 at P 113; Constellation Brief Opposing Exceptions at 71-72).

¹⁹ Request for Rehearing at 1.

operations of the [NYISO and ISO-NE] grid operators.”²⁰ Connecticut Representatives aver that Respondents were obligated to bid their supply offers in such a manner that the energy could be delivered to the ISO-NE control area, but, in fact, Respondents were incapable of delivering this energy.²¹ As in their complaint, Connecticut Representatives describe the process used in NYISO and ISO-NE to verify these export bids and supply offers (known as the “checkout” process) and the timing involved in this process with respect to Respondents’ bidding and offer practices and conclude that each Respondent knowingly and systematically priced its export bids on the NYISO side of the transaction so that delivery of its capacity-backed energy would be impossible.²² For this reason, Connecticut Representatives maintain that the Commission erred in Opinion No. 513 by concluding that the Respondents intended to deliver their energy when requested by ISO-NE. Connecticut Representatives also claim (citing *The Wharf (Holdings) Ltd. v. United International Holdings, Inc.*) that Respondents’ selling of “options” (i.e., the option to call on capacity-backed energy offers) while intending not to perform amounts to actionable market manipulation.²³

15. Connecticut Representatives also maintain that the Commission erred by concluding that ISO-NE had an affirmative obligation to pursue so-called “extra-tariff” remedies (i.e., remedies not provided for in the Tariff) to secure its capacity-backed energy, while simultaneously concluding that Respondents were not subject to any obligation not “expressly imposed” by Tariff language.²⁴ They point out that the Commission determined that Respondents had no “reasonable price” requirement because the Tariff imposed no such requirement; therefore, for the same reason, they maintain that the Commission should not now impose any additional, extra-tariff requirements on ISO-NE.²⁵

²⁰ *Id.*

²¹ *Id.* at 2. The resources backing Installed Capacity (ICAP) Import Contracts had to “submit[] [energy] Supply Offers, in both the ISO system and the External Control Area in such a manner that the Energy associated with the ICAP Import Contract could actually be delivered.” *Id.* at 4 (quoting Tariff § III.8.3.7.2.2(e)).

²² *Id.* at 7.

²³ *See id.* at 12, 14 (quoting *The Wharf (Holdings) Ltd. v. United Int’l Holdings, Inc.*, 532 U.S. 588, 596 (2001) (*Wharf*)).

²⁴ Connecticut Representatives note two such “extra-tariff” remedies, namely, “(1) adjusting [the] bids in the hour following ISO-NE’s request for dispatch, after the checkout process had failed; or (2) ... making separate arrangements with NYISO and ISO-NE before the ordinary Tariff dispatch sequence.” Request for Rehearing at 17.

²⁵ *Id.* at 16.

16. In the same vein, Connecticut Representatives assert that the Commission wrongly concluded that ISO-NE had an affirmative obligation to pursue extra-tariff remedies to secure its capacity-backed energy even though the Commission's proposed remedies were unworkable. They explain how adjusting the NYISO "placeholder" bids in the hour following a failed checkout process (so that the bids would be selected going forward) was not workable. They further explain that Respondents would not have been informed that their energy bids failed the checkout process (and thus be able to adjust their placeholder bids in the following hour) because ISO-NE's Tariff does not require ISO-NE to notify market participants when it scheduled or was going to schedule the offered capacity-backed energy.

17. Connecticut Representatives also claim that the Commission erred by concluding that ISO-NE had an affirmative obligation to request that Respondents raise their "sink bids" in the NYISO market notwithstanding record evidence demonstrating that ISO-NE did not and could not have been aware of the NYISO bid data or Respondents' bid and offer strategy.

18. Finally, Connecticut Representatives maintain that the Commission erred by concluding that NYISO's backstop authority to intervene after the close of the export bids market (75 minutes before the hour) somehow demonstrates Respondents' intent to deliver their energy. According to Connecticut Representatives, this "potential for manual intervention" does not excuse Respondents' failure to schedule their energy in a manner that actually could be delivered. Connecticut Representatives state that "manual intervention" of this sort is an emergency measure of last resort to prevent blackouts or a reliability crisis.²⁶

III. Discussion

A. Procedural Matters

19. Brookfield submitted an answer to the Connecticut Representative's rehearing request. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2011), prohibits an answer to a request for rehearing. Accordingly, we will reject Brookfield's answer.

B. Commission Determination

20. For the reasons discussed below, we will deny Connecticut Representatives' request for rehearing.

²⁶ *Id.* at 22.

21. Connecticut Representatives maintain that Respondents did not intend to deliver energy when requested by ISO-NE, but they proffer no direct evidence of this.²⁷ Instead, Connecticut Representatives again claim that this group of capacity importers intentionally and consistently submitted high export bids to NYISO and high capacity-backed energy offers to ISO-NE. We found in Opinion No. 513 and reaffirm here that this alone does not establish *scienter*, i.e., the knowing intent required to find market manipulation.²⁸ As noted in Opinion No. 513, Respondents do not contest the fact that they consistently submitted high bids and offers, but they maintain that they did so to avoid uneconomic transactions. This is a reasonable explanation of their intent and behavior.²⁹ Constellation, for example, explains that submitting high-priced capacity offers “was a reasonable approach to enable it to meet its obligations to ISO-NE while limiting the potential for uneconomic transactions that would be to its detriment and to the detriment of the market.”³⁰ And the fact is that the Tariff permitted capacity importers to submit bids or offers as high as \$1,000 per megawatt-hour during the time period in question; Respondents’ offers were below that threshold.

22. On rehearing Connecticut Representatives reiterate their argument that, although Respondents were obligated to bid their supply offers in such a manner that the energy could be delivered to the ISO-NE control area, in fact, Respondents were incapable of delivering this energy.³¹ Connecticut Representatives also reiterate that Respondents systematically priced their export bids on the NYISO side of the transaction so that delivery of their capacity-backed energy would be impossible (by submitting bids above a “competitive” level).³² But because ISO-NE’s Tariff did not have a “competitive price” requirement, it is reasonable to expect that all Respondents’ bids would be priced to secure profit, if selected, or priced to avoid being selected altogether. If we were to

²⁷ We reiterate that ISO-NE withdrew its initial allegations that Respondents had failed to deliver when requested. *See supra* P 6.

²⁸ *See* Opinion No. 513, 135 FERC ¶ 61,117 at P 42-48 (discussing lack of *scienter*).

²⁹ *See supra* P 12-13 and note 18.

³⁰ Constellation Brief Opposing Exceptions at 50-51.

³¹ Request for Rehearing at 2. The resources backing Installed Capacity (ICAP) Import Contracts had to “submit[] [energy] Supply Offers, in both the ISO system and the External Control Area in such a manner that the Energy associated with the ICAP Import Contract could actually be delivered.” *Id.* at 4 (quoting Tariff § III.8.3.7.2.2(e)). *See, e.g.*, Opinion No. 513, 135 FERC ¶ 61,117 at P 24 (discussing checkout process and inability to actually deliver).

³² Request for Rehearing at 7.

accept Connecticut Representatives' position, we would retroactively impose a competitive offer requirement. Connecticut Representatives raise no new arguments on this issue that the Commission did not previously consider and reject.

23. Connecticut Representatives claim that Respondents were physically incapable of delivering their capacity-backed energy because their bidding strategy on the NYISO side of the transition precluded checkout.³³ But this implies that *any* export bid that was not accepted by NYISO—even one barely above accepted “competitively priced” bids—would prevent ISO-NE from selecting the capacity-backed energy offer related to that bid, thus precluding checkout and delivery. We do not agree with Connecticut Representatives' apparent belief that the Tariff obligation to submit NYISO export bids and ISO-NE capacity-backed energy offers so that they could be “actually delivered” means that the capacity importer is obligated to design its bids and offers so that they are always selected. Such an interpretation would preclude reasonable business decisions, forcing entities to regularly undergo losses, and “effectively would . . . transmute[] [R]espondents' capacity offers [into] energy offers.”³⁴ A more reasonable understanding of the Tariff obligation is that capacity importers must submit bids and offers that otherwise comply with the Tariff (e.g., are under the price cap), which, if accepted by NYISO and ISO-NE, could actually be delivered. Connecticut Representatives have not demonstrated that, in any specific case, any capacity importer failed to meet this obligation.

24. Connecticut Representatives cite *The Wharf (Holdings) Ltd. v. United International Holdings, Inc.* in support of their allegation that Respondents' sale of “options” while allegedly intending not to perform was market manipulation.³⁵ In *Wharf*, the record contained internal Wharf documents, such as writings between company executives indicating that Wharf never intended to honor the option it provided to United International Holdings, Inc., to purchase ten percent of Wharf's stock.³⁶ That proceeding is distinguishable from the record here, where there is no record evidence of Respondents' intent not to perform.

³³ See Request for Rehearing at 15. In Connecticut Representatives' view, the capacity-backed energy associated with Respondents' bids could not actually be delivered into ISO-NE, should ISO-NE select their offers less than 60 minutes before the operating hour, because “Respondents could not adjust their bid[s] after NYISO finished its checkout procedure 75 minutes before the operating hour.” *Id.*; see also *id.* at 5.

³⁴ Initial Decision, 132 FERC ¶ 63,017 at P 104.

³⁵ See Request for Rehearing at 12, 14 (quoting *Wharf*, 532 U.S. 588, 596).

³⁶ See *Wharf*, 532 U.S. at 592.

25. Connecticut Representatives allege that Opinion No. 513 is internally inconsistent, because, according to Connecticut Representatives, it imposed an affirmative obligation on ISO-NE to pursue extra-tariff remedies to secure its capacity-backed energy while simultaneously concluding that Respondents were not subject to any obligation that was not “expressly imposed” by Tariff language. Connecticut Representatives contend that such an affirmative obligation was unworkable because Respondents would not have been informed by ISO-NE that their energy bids failed the checkout process. According to Connecticut Representatives, ISO-NE was not and could not have been aware of the NYISO bid data or Respondents’ bid and offer strategy. In fact, however, the Commission imposed no new affirmative obligation. Rather, based on record evidence, the Commission affirmed the Initial Decision’s finding that Respondents could and would have raised their bids in NYISO’s market if ISO-NE had called upon their capacity-backed energy offers.³⁷

26. First, as stated in Opinion No. 513, the Commission based its conclusion on the contact-and-notice arrangement between NYISO and external control areas (with ICAP resources located in NYISO), which Respondents noted were contained in NYISO’s Technical Bulletin 096. As discussed in Opinion No. 513, that bulletin provides:

In the event that a neighboring control area has an in-day forecasted or actual reserve shortage . . . the affected control area operator will contact their ICAP resource(s) located within the [New York Control Area] to request their ICAP contract energy. They will also notify the NYISO Operator of the situation. [³⁸]

Thus, Technical Bulletin 096 memorializes the expectation that, in this situation, ISO-NE would contact the NYISO operator during an in-day forecasted or actual reserve shortage. Thus, the Commission did not impose any new obligation in Opinion No. 513; the order merely comports with this expectation.

³⁷ See Opinion No. 513, 135 FERC ¶ 61,117 at P 49-51.

³⁸ *Id.* (“External ICAP provided by resources located in the NYCA”); see also Constellation Brief Opposing Exceptions at 55 (quoting Ex. CON-032 at 1-2 (NYISO TB 096)); *id.* at 57 (discussing coordination agreement between ISOs), 59 (averring actual “experience with ISO-NE is that operators are in regular contact with generators to ensure that capacity is available to meet load”). We note that this Technical Bulletin has been revised several times since it was originally issued but that the references cited here, as well as references to manual input by the NYISO operator, remain the same.

27. Second, the Commission previously recognized that Connecticut Representatives' argument did not take into account NYISO's ability to manually intervene to allow Respondents' NYISO energy bids to be accepted.³⁹ Although manual intervention presumably is limited to exceptional situations, the capacity-backed energy product at issue here is a reliability safeguard precisely for use in such cases.⁴⁰ The Commission credited Constellation's citation to NYISO's Technical Bulletin 096, which provides that in certain cases "the NYISO operator will input the [export] transaction."⁴¹

28. Indeed, in their instant request, Connecticut Representatives acknowledge NYISO's "backstop authority"⁴² and contend that this authority to intervene after the close of the export bids market (i.e., beginning 75 minutes before the hour) does not support finding that Respondents intended to deliver their energy, but rather this is an emergency measure of last resort to prevent blackouts or a reliability crisis.⁴³ While the mere existence of the contact-and-notice arrangement in Technical Bulletin 096 discussed above⁴⁴ and the potential for NYISO's manual intervention alone do not establish Respondents' intent to deliver capacity-backed energy if called upon, these facts do show that Respondents' bids and offers were not impossible to deliver if called upon. Moreover, neither Respondents nor the Commission relies exclusively on NYISO's ability to manually intervene as the basis to conclude that Complainants have not met their burden to demonstrate intent in this case.

29. We find that Connecticut Representatives have not shown that, regardless of the specific bid and offer prices, Respondents would not have actually delivered their capacity-backed energy if accepted under a NYISO export bid and accepted under an ISO-NE supply offer. Given their unusually high bids and offers, it is reasonable to assume that such bids and offers rarely, if ever, would be accepted. Nevertheless, the

³⁹Opinion No. 513, 135 FERC ¶ 61,117 at P 49 (citing Constellation Brief Opposing Exceptions at 58, addressing NYISO Technical Bulletin 096 (Nov. 10, 2004)).

⁴⁰ See, e.g., *N.Y. Indep. Sys. Operator, Inc.*, 135 FERC ¶ 61,170, at P 2 n.4 (2011); *ISO New England Inc.*, 115 FERC ¶ 61,340, at P 5 (2006), *reh'g denied*, 117 FERC ¶ 61,133 (2006); see also *ISO New England Inc.*, 117 FERC ¶ 61,082, at P 10 (2006) (considering ICAP generators in anticipation of emergency); *New England Power Pool*, 110 FERC ¶ 61,396, at P 2 (2005) (ICAP for emergency use).

⁴¹ NYISO Technical Bulletin 096 (Nov. 10, 2004), *available at* http://www.nyiso.com/public/webdocs/documents/tech_bulletins/tb_096.pdf.

⁴² Request for Rehearing at 22.

⁴³ Request for Rehearing at 22.

⁴⁴ See *supra* P 26.

Tariff at that time did not mandate “competitive” or “reasonable” offers; rather, the Tariff only required that capacity importers have procedures in place to ensure the actual delivery of energy if necessary. Nor did the Tariff envision that all bids and offers would be delivered, as evidenced by the penalty provisions. The record does not support a finding that Respondents did not submit tariff-compliant bids and offers and, if called upon, would not have delivered the energy associated with those bids and offers. Indeed, for the reasons articulated in Opinion No. 513 and herein, we find that the record wholly lacks sufficient evidence that Respondents engaged in market manipulation.

The Commission orders:

Connecticut Representatives’ request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.