128 FERC ¶ 61,182
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Richard Blumenthal, Attorney General for The State of Connecticut	Docket No. EL09-47-000
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. EL09-48-000
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 ESTABLISHING HEARING PROCEDURES AND CONSOLIDATING PROCEEDINGS

(Issued August 24, 2009)

1. This order addresses two complaints filed on April 20 and 23, 2009, as amended on May 22 and June 29, 2009, by Richard Blumenthal, Attorney General for The State of Connecticut (Connecticut Attorney General), and jointly by the Connecticut Department of Public Utility Control (CT DPUC) and the Connecticut Office of Consumer Counsel

(CT OCC), respectively. The complaints relate to the bidding activity of certain market participants importing capacity over the Northern New York AC interface (capacity importers). As discussed below, the Commission will establish hearing procedures and consolidate the proceedings in Docket Nos. EL09-47-000 and EL09-48-000 for purposes of hearing and decision.

I. Background

2. Under the existing market rules in New England, market participants with installed capacity (ICAP) import contracts must submit a supply offer or self-schedule for the energy-equivalent of the import contract amount for each operating day.[1] The only limit on the energy price component of supply offers associated with ICAP import contracts was the overall $1,000 per megawatt-hour (MWh) energy offer cap.[2] Since the commencement of the ICAP transition period in December 2006,[3] market participants with ICAP import contracts have typically submitted high-priced supply offers over the Northern New York AC Interface,[4] with most of these offers approaching the offer cap.[5]

3. In a March 20, 2009 filing (later corrected on May 6, 2009), ISO New England Inc. (ISO-NE) and New England Power Pool Participants Committee (NEPOOL) (together, Filing Parties) sought to apply competitive offer requirements to energy transactions associated with ICAP import contracts.[6] Further, they sought to reform the existing penalty structure with respect to non-delivery of energy when requested by ISO-

[1] ISO-NE, FERC Electric Tariff No. 3, Transmission, Markets and Services Tariff, Market Rule 1, § III.8.3.7.1(c) (Market Rule 1).

[2] Market Rule 1, § III.1.10.1A(d)(ix).

[3] Because of the forward nature of the Forward Capacity Market (FCM) in New England, the 2010-2011 Power Year is the first year for which capacity will be auctioned. The transition period bridges the gap between December 2006 and the 2010-2011 Power Year.

[4] The Northern New York AC interface is also referred to as the Roseton Interface or Roseton Node.

[5] *ISO New England Inc.*, Transmittal Letter, Docket No. ER09-873-000, at 4-5 (filed Mar. 20, 2009) (referring to attached LaPlante/O'Connor Testimony at 9-13).

[6] *ISO New England Inc.*, 127 FERC ¶ 61,235 (2009) (accepting and suspending proposed competitive offer requirements).

NE.[7] They averred that ISO-NE's internal market monitoring unit identified concerns regarding the market rules governing energy transactions associated with ICAP import contracts. In support of the proposed tariff revisions, they stated that, during the period of January 2005 to January 2009, every market participant that had submitted a supply 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 they also alleged that these market participants had been paid a collective $85.8 million in capacity payments despite their alleged non-delivery.[8]

4. On May 6, 2009, ISO-NE filed its answer in Docket No. ER09-873-000 in which it corrected the record and withdrew its allegations regarding non-delivery, stating that, in fact, none of the 108 offers referenced in the March 20 filing cleared the real-time energy market, nor did ISO-NE confirm next-hour delivery of these transactions, i.e., they were not dispatched.

5. Prior to ISO-NE's May 6 answer and its correction of the record, the Connecticut Attorney General and, jointly, CT DPUC and CT OCC filed two separate complaints calling for an investigation into the market activities, disgorgement of certain monies, and structural changes to the market monitoring unit related to the alleged 108 instances of non-delivery of energy when called upon by ISO-NE and the millions of dollars in transmission capacity payments made to those who failed to deliver. After ISO-NE corrected the record, the complaints were amended.

II. The Complaints

6. In his original April 20 complaint, the Connecticut Attorney General claims that New England electricity customers have paid a total of $85.8 million in capacity payments to capacity importers that offered energy above $660/MWh and failed to respond to dispatch calls by ISO-NE from December 2006 through January 2009.[9] The

[7] The Filing Parties explain that performance penalties for ICAP import contracts were assessed only when the energy associated with an ICAP import contract had failed to be delivered for a threshold number of hours tied to the designated resource's EFORd (i.e., Demand Equivalent Forced Outage Rate). This threshold number of hours was often higher than the number of hours during which the capacity import was called upon due to the high price of the bids, thus allowing these imports to avoid a penalty. *ISO New England Inc.*, Transmittal Letter, Docket No. ER09-873-000, at 5.

[8] These statements were later corrected, as explained more fully below.

[9] Connecticut Attorney General Complaint at 4. ISO-NE publicized these figures in its March 20, 2009 filing under Docket No. ER09-873-000. On April 24, 2009, ISO-NE submitted a notice of its intention to file a corrected version.

Connecticut Attorney General states that the capacity importers in question have been paid, and continue to receive, substantial ICAP transition payments for the provision of capacity services intended to benefit electric consumers in ISO-NE. The Connecticut Attorney General further states that these market participants have engaged "in a purposeful and continuing pattern of conduct designed to evade the obligation ever to provide such capacity through a combination of bidding high in the energy markets far in excess of the cost of production so as to reduce the likelihood of dispatch by ISO-NE and failing to generate any power when called on even at the high bid prices."[10] The Connecticut Attorney General therefore requests that the Commission investigate and impose sanctions, including disgorgement.[11]

7. The Connecticut Attorney General also alleges that the capacity importers' conduct is "an electric energy market manipulation" that violates Federal Power Act (FPA) section 222 and section 1c.2 of the regulations.[12] The Connecticut Attorney General contends that repeated and concurrent action over a two-year period to receive substantial payments but escaping any obligation associated with those payments "plainly involves the requisite *scienter* and intent to find market manipulation."[13] The Connecticut Attorney General therefore seeks prospective and retroactive relief (back to the first capacity payment to the capacity importers), as well as structural changes to the ISO-NE internal market monitoring units.

8. In their joint April 23 complaint,[14] CT DPUC and CT OCC contend that the capacity importers at issue in this proceeding violated section 206 of the FPA by entering ICAP import contracts and accepting capacity payments when they never intended to perform the obligations of capacity resources. CT DPUC and CT OCC explain that such capacity payments require ICAP resources to provide energy when ISO-NE calls them and when they are needed for reliability[15] and that the capacity importers offered their

---

[10] Connecticut Attorney General Complaint at 4.

[11] The Connecticut Attorney General submitted a related data and document request on April 23, 2009.

[12] Connecticut Attorney General Complaint at 6 (citing 16 U.S.C. § 824v (2006) and 18 C.F.R. § 1c.2 (2009)).

[13] *Id.* at 7-8.

[14] CT DPUC and CT OCC and the Connecticut Attorney General jointly filed motion to consolidate Docket Nos. EL09-47-000 and EL09-48-000.

[15] CT DPUC & CT OCC Complaint at 14.

energy at "prices that would rarely, if ever, be accepted."[16] They allege that, consequently, energy prices in New England were higher and less competitive than they would have been if these market participants had performed reasonably as import capacity (i.e., by giving ISO-NE first call on their energy).[17] CT DPUC and CT OCC point to *In re Edison Mission*, in which case they state the Commission addressed the nearest analogy to the current high-price bidding strategy of the capacity importers.[18] By accepting capacity payments under the false pretense that they would perform, CT DPUC and CT OCC also contend that the capacity importers defrauded customers in violation of FPA section 222.

9. They request retroactive refunds, including disgorgement of unjust profits; the disclosure of critical information, and substantial reforms to ISO-NE's market monitoring structure.[19]

III. Notice and Responsive Pleadings

10. Notice of the April 20, 2009 complaint filed by the Connecticut Attorney General was published in the *Federal Register*, 74 Fed. Reg. 19,218-19 (2009), with interventions and protests due on or before May 11, 2009.

11. Notice of the April 23, 2009 complaint filed by CT DPUC and CT OCC was published in the *Federal Register*, 74 Fed. Reg. 20,477 (2009), with interventions and protests due on or before May 11, 2009.

12. Notice of the May 22, 2009 amended complaint filed by CT DPUC, CT OCC, and the Connecticut Attorney General (the Connecticut Representatives) was published in the

[16] *Id.* at 15.

[17] *Id.* at 15.

[18] *Id.* (citing *In re Edison Mission*, 123 FERC ¶ 61,170 (2008)).

[19] *Id.* at 26-30. "As this case demonstrates, however, ISO-NE's market monitoring function delayed identifying or disclosing this scheme…. [Its] market monitoring function does not provide an effective market watchdog, does not operate independently from ISO-NE management, and has not exposed market abuse and market design flaws." *Id.* at 26.

Federal Register, 74 Fed. Reg. 26,850 (2009), with interventions and protests due on or before June 12, 2009.[20]

13. The Attorney General of Rhode Island and the Rhode Island Division of Public Utilities and Carriers (Rhode Island Parties), Electric Power Supply Association, Exelon Corporation, TransCanada Power Marketing Ltd., and the New England Power Generators Association filed timely motions to intervene.

14. ISO-NE filed an answer on May 6, 2009, which ISO-NE amended on May 20, 2009. Subsequently, the Connecticut Representatives jointly submitted an amended complaint.

15. Following the amended complaint, the Eastern Massachusetts Consumer-Owned Systems,[21] American Public Power Association, Long Island Power Authority and LIPA, NSTAR Electric Company, and Dominion Resources Services, Inc. filed timely motions to intervene. The Massachusetts Department of Public Utilities submitted a notice of intervention.

16. The Maine Public Utilities Commission (Maine Commission), the Massachusetts Attorney General and Massachusetts Department of Public Utilities (Massachusetts Parties), NEPOOL, NEPOOL Industrial Customer Coalition (NEPOOL Coalition), The United Illuminating Company (United Illuminating), New England Conference of Public Utilities Commissioners (NECPUC), and Northeast Utilities Service Company (Northeast Utilities) filed timely motions to intervene and comments. The Rhode Island Parties jointly filed timely comments.

17. On June 12, 2009, Brookfield Energy Marketing Inc. (Brookfield), H.Q. Energy Services (U.S.) Inc. (HQUS), and Constellation Energy Commodities Group, Inc. (Constellation) filed answers. On the same date ISO-NE filed a supplement to its May 6 answer.

---

[20] Originally noticed as "June 11, 2009," but later corrected. On May 8, 2009, upon request, the Secretary of the Commission issued a notice extending the comment deadline.

[21] The Eastern Massachusetts Consumer-Owned Systems include: Belmont Municipal Light Department, Braintree Electric Light Department, Concord Municipal Light Plant, Reading Municipal Light Department, Taunton Municipal Lighting Plant, and Wellesley Municipal Light Plant.

18. On June 29, 2009, the Connecticut Representatives filed a notice of the withdrawal of their complaint as to HQUS.[22] On the same date the Connecticut Representatives filed a response to Brookfield's and Constellation's answers. On July 10, 2009, Brookfield submitted a reply. On July 14, 2009, NEPOOL submitted an answer.

A. ISO-NE Answer

19. In its original answer, ISO-NE explains that the testimony in its March 20 filing in Docket No. ER09-873-000 incorrectly stated that there were 108 occasions on which ISO-NE had confirmed high-priced energy offers from capacity importers over the Roseton Node for next-hour delivery and that the capacity importers had failed to deliver that energy every time. ISO-NE points out that these capacity importers were paid a total of $85.8 million in ICAP payments for capacity imports for which they offered energy above $660/MWh between December 2006 and January 2009.[23] Based on further analysis, however, ISO-NE states that the market monitor determined that the energy associated with the capacity imports was not needed in those 108 hours to meet reliability or economic needs.

20. ISO-NE states that, to the extent the complaints involve the submission of high-priced capacity offers or ISO-NE's conduct with respect to such offers, the offers in fact did not violate the current ICAP import rules or any other tariff provision.[24] Except for a single hour during an OP-4 event,[25] ISO-NE states that high-priced external transactions over the Roseton Node were not needed by ISO-NE for delivery during region-wide capacity shortages.[26] ISO-NE explains that the implementation of OP-4 by itself does not mean that it must automatically dispatch all resources and seek delivery of all submitted external transactions.[27]

---

[22] For this reason, the order does not summarize the answer submitted by HQUS.

[23] ISO-NE Answer at 3 (quoting March 20 Filing, Testimony at 13). ISO-NE later corrected the alleged amount in ICAP payments as $56.9 million. ISO-NE Amended Answer at 1.

[24] *Id.* at 23.

[25] OP-4 refers to Operating Procedure No. 4 (Action During a Capacity Deficiency).

[26] ISO-NE Answer at 24, 25-29.

[27] *Id.* at 27.

21. ISO-NE also states that its actions and those of the market monitor in producing the ICAP import rule revisions demonstrate a reasonable and timely response to high-priced offers.[28] In response to complainants' statements about the capacity importers' motives and intent, ISO-NE states that it takes no position on these importers' compliance with statutes and regulations. Finally, ISO-NE states that the existing market monitor structure does not require modification, as requested by complainants.[29]

B. Joint Amended Complaint

22. In their amended complaint, the Connecticut Representatives continue to seek a hearing and investigation into the allegedly fraudulent, manipulative scheme conducted over a two-year period by certain ICAP resources that had committed to import over the Northern New York AC interface and which were paid at least $50.9 million for reliability services that their conduct demonstrates they never intended to provide.[30] The Connecticut Representatives contend that the delay in identifying, disclosing, and dismantling this alleged scheme; the acknowledged errors in analyzing the capacity importers' conduct; and the failure to take action to make customers whole cast doubt on the independence and efficacy of ISO-NE's market monitoring function.[31] The Connecticut Representatives allege that "(1) ISO-NE's market monitors, despite early, explicit warnings, failed to detect an unwavering pattern of implausible energy price offers and concomitant lack of performance, or (2) the market monitors identified the contours of this unlawful strategy at an earlier stage but permitted it to persist without disclosure or correction." [32]

---

[28] *Id.* at 29. ISO-NE recalls the history of such efforts, beginning in 2007. *See id.* at 30-31.

[29] ISO-NE states that, to the extent complainants raise concerns about the Market Monitor structure or ISO-NE's compliance filing under Order No. 719, those issues should be addressed in the proceeding in Docket No. ER09-1051-000. ISO-NE Answer at 37 (referring to *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008)).

[30] Amended Complaint at 2. We take note that ISO-NE's amended answer provides the corrected amount as "$56.9 million." *See* ISO-NE Amended Answer at 1.

[31] Amended Complaint at 3.

[32] *Id.* at 4.

23. The Connecticut Representatives point out that, according to the transition rules in Market Rule 1, an ICAP import contract represents a commitment by the submitting party to offer and supply firm energy to the ISO-NE control area from resources located in an external control area.[33] They aver that an ICAP import contract must perform as an ICAP resource and that all arrangements must be made so that the energy associated with the ICAP import contract could actually be delivered.[34] They allege that even in early 2008, there were warnings that external resources might engage in strategic bidding behavior as a means for avoiding their delivery obligations.[35]

24. The Connecticut Representatives maintain that the capacity importers at issue here did not intend to supply energy when called. They assert that the uncompetitive bids—the "high-offer strategy"—was no less culpable or injurious to customers, markets, and long-term reliability" than the alleged withholding activity by Edison Mission.[36]

25. The Connecticut Representatives further maintain that the capacity importers manipulated New England markets and defrauded customers in violation of FPA section 222.[37] They criticize the market monitor's oversight *vel non*, and they contend that the structural changes that ISO-NE filed in compliance with Order No. 719 "do not rectify the core deficiencies that permitted the [capacity importers] to violate the tariff and defraud customers for more than two years."[38] Therefore, the Connecticut Representatives request that the Commission direct refunds, even disgorgement, where market manipulation is found and, as a first step, direct ISO-NE to disclose critical information.

26. As relief, the Connecticut Representatives specifically request (a) a full and complete public hearing to investigate and disclose the extent of the Northern New York (NNY) Capacity Resources' market manipulation and tariff violations and how these practices were permitted to persist for more than two years; (b) disgorgement under section 309 of all capacity payments made to the NNY Capacity Resources since December 1, 2006; (c) an order requiring the NNY Capacity Resources to make

---

[33] *Id.* at 11 (citing Market Rule 1, Section III.8.3.7.2, 2nd Rev. Sheet No. 7246).

[34] *Id.* at 12.

[35] *Id.* at 13 (citing the so-called Reservation Flexibility Order, *ISO New England Inc.*, 123 FERC ¶ 61,190, at P 1, 4 (2008)).

[36] *Id.* at 21-22 (citing *In re Edison Mission*, 123 FERC ¶ 61,170 at P 3, 10 (2008)).

[37] *Id.* at 30; *see also id.* at 29-31.

[38] *Id.* at 34.

customers whole for any injury caused by their high-offer strategy; (d) penalties to be levied against the NNY Capacity Resources for market manipulation; and (e) modifications to the structure of ISO-NE's market monitoring functions to ensure independence and protection of customers and competitive markets.

C. Answers to and Comments on May 22 Amended Complaint

27. In their answers, Brookfield and Constellation contend that the claim of market manipulation made by the Connecticut Representatives should be dismissed because FPA section 222 does not create a right to private action.[39] Brookfield explains that the prohibition on a private right of action reflects Congress' intent that entities will not be subject to civil actions by third parties based on alleged violations of these proposed regulations. Further, Brookfield states that the Connecticut Representatives cannot do by means of section 206 what section 222(b) explicitly prohibits, namely, assert a private right of action for alleged manipulation.

28. Brookfield states that the amended complaint does not allege any tariff violations. According to Brookfield, ISO-NE's corrected filing acknowledges proper performance by capacity importers and retracts all allegations that those capacity importers failed to deliver energy when called. Brookfield points out that ISO-NE stated that Brookfield met all of its obligations specified in ISO-NE's ICAP import rules.[40] Constellation states that the complaint fails to identify a violation of section 206 of the FPA for which relief can and should be granted.[41]

29. Brookfield states that the allegations in the amended complaint are based on a fundamental misunderstanding of how the markets operate, specifically when the Connecticut Representatives argue that capacity importers offering energy at a "high price" engaged in economically irrational behavior and that such capacity importers should have offered import energy at the variable cost of an underlying resource. [42] Brookfield states that they confuse the bidding and scheduling of underlying capacity resources in the New York Independent System Operator, Inc. (NYISO) market with the

[39] Brookfield Answer at 9-10 (citing FPA § 222(b), 16 U.S.C. § 824v ("No Private Right of Action")); Constellation Comments at 10.

[40] Brookfield Answer at 12 (citing ISO-NE Answer at 24).

[41] Constellation Comments at 8.

[42] Brookfield Answer at 13 (citing Shapiro Aff. at 12, ¶ 22).

bidding and scheduling of import and export transactions across the Northern New York Interface, which support the ICAP import contracts.[43]

30. Brookfield points out that ISO-NE noted in its answer that it has received a significant quantity of economic energy from New York since December 2006.[44] Brookfield avers that it was one of those unidentified entities providing economic energy to New England and that it provided hundreds of thousands of megawatt-hours of energy from New York to New England. Such sales demonstrate that Brookfield engaged in "economically rational, market based energy sales into New England."[45]

31. Contrary to the allegations and arguments of the Connecticut Representatives, Brookfield states that the capacity importers' alleged "scheme" of high-priced bids did not result in higher energy prices in New England. Brookfield explains that the capacity importers could not tie up use of the transmission system, because transmission service across the New York-New England interface is not reserved in advance for New York capacity importers, but rather is allocated by economics.[46]

32. Brookfield and Constellation argue that the Connecticut Representatives are attempting to re-litigate issues that were addressed in the ISO-NE FCM proceedings[47] and that the issues raised are fundamentally based on the structure of the capacity market created by the FCM settlement agreement and the rules for the transition payments.[48]

33. In its answer, Constellation states that it denies any and all allegations contained in the Connecticut Representatives' amended complaint to the extent that such allegations are directed toward Constellation. Since the complaint rests on withdrawn allegations, Constellation asks the Commission to dismiss the complaint with prejudice as meritless and lacking the required factual support.[49]

---

[43] *Id.* at 14 & n.29 (citing attached Affidavit of Robert Stoddard at 13).

[44] *Id.* at 19.

[45] *Id.* (quoting Stoddard Aff. at 16).

[46] *Id.* at 20.

[47] *Devon Power, LLC*, 115 FERC ¶ 61,340 (2006) (accepting FCM Settlement).

[48] Brookfield Answer at 22-23; Constellation Comments at 9.

[49] Constellation Comments at 5.

34. The Massachusetts Parties state that the capacity importers' practice of submitting energy supply offers at or near the price cap should be investigated; they allege that this high-bidding strategy seems to suggest that parties were taking advantage of a long-identified flaw in the market rules.[50] Further, the Massachusetts Parties argue that, because the capacity resources were not available as capacity, receiving ICAP transition payments is therefore unjust and unreasonable.[51] For these primary reasons, they ask the Commission to set for public hearing the Connecticut Representatives' amended complaint and that the Commission direct the Office of Enforcement to conduct an investigation.

35. In addition to investigating the capacity importers' conduct, the Massachusetts Parties also ask the Commission to review the performance of ISO-NE and the internal and external market monitoring units.[52] Noting that ISO-NE recognized as early as June 2007 that a capacity importer potentially could exploit a market rule flaw in this manner, the Massachusetts Parties argue that ISO-NE should have referred this flaw to the Commission, especially since supply offers are confidential and only ISO-NE is privy to the information necessary to identify manipulative behavior.

36. NEPOOL argues that the Connecticut Representatives' request for relief is unaffected by the facts, which are remarkably different from what originally prompted the complaints.[53] NEPOOL notes that the market monitor structure established by PJM—which the Connecticut Representatives want imposed on New England—was the result of settlement and compromise of specific claims and actions and did not establish precedent on any issues.[54]

37. NEPOOL also notes that, in recent stakeholder discussions, ISO-NE committed to an independent audit of the facts surrounding this matter and committed to continued discussions.

38. Given these circumstances, NEPOOL argues that the stakeholder process is the appropriate forum in which to determine whether changes to the internal market monitor are needed and, if so, what changes. NEPOOL also asks for a separation between the

---

[50] Massachusetts Parties Comments at 12.

[51] *Id.* at 14.

[52] *Id.* at 15.

[53] NEPOOL Comments at 9.

[54] *Id.*

relief sought by the Connecticut Representatives with respect to the capacity importers and the relief sought with respect to the market monitor structure in New England.

39. The Maine Commission supports an investigation by the Commission to compel ISO-NE to identify and disclose certain information regarding the market participants at issue here and the 108 transactions highlighted in the original complaint. If disclosure of this information shows that the capacity importers engaged in fraudulent or manipulative behavior, the Maine Commission asks the Commission to order any and all appropriate relief.[55]

40. NECPUC asks the Commission to investigate the issues raised in the complaint. In particular, it asks the Commission to investigate whether certain market participants engaged in manipulative behavior via high-offer bidding strategies. NECPUC also asks the Commission to investigate ISO-NE's market monitoring performance, i.e., whether the market monitor timely identified the bidding behavior as inconsistent with a competitive market and what actions were taken once the bidding activities were identified. NECPUC asks the Commission to consider whether reforms to the market monitoring structure are necessary.[56]

41. The Rhode Island Parties and United Illuminating support the request for investigations contained in the complaint.

42. United Illuminating states that its concern over the potential for gaming by ICAP import contract-holders since the implementation of the FCM is among the reasons it and others opposed an amendment to Market Rule 1 that proposed to remove the requirement that a firm transmission reservation be in place at the time an external transaction is offered into the ISO-NE market over interfaces that are not pool transmission facilities (PTF).[57] United Illuminating here reiterates its position that market participants utilizing non-PTF interties for ICAP import contracts should be required to reserve and pay for transmission service for a period commensurate with their supply obligations.[58]

43. Northeast Utilities states that while ISO-NE's answer indicates that there was no failure to deliver energy when requested, a full review of the facts is warranted in order to

---

[55] Maine Commission Comments at 5-6.

[56] NECPUC Comments at 4-5.

[57] United Illuminating Comments at 8.

[58] *Id.* at 9-10. United Illuminating's request for clarification or rehearing of the amendments to Market Rule 1 is pending in Docket No. ER08-697-001.

preserve the integrity of the New England capacity market and fashion appropriate remedies where necessary.[59]

44. NEPOOL Coalition shares the concerns of the Connecticut Representatives about the possibility that ISO-NE paid over $50 million in capacity payments for installed capacity that the capacity importers never intended to deliver, as well as the possibility of collusion.[60] NEPOOL Coalition argues that the allegations made in this proceeding, coupled with the incomplete evidentiary record, warrant a Commission investigation and hearing procedures.

45. In addition, NEPOOL Coalition questions whether the events in this case expose serious defects in ISO-NE's market monitoring procedures, including the market monitoring unit's failure to serve as an effective market watchdog, expose market abuse and flaws, and operate independently from ISO-NE's management,[61] warranting an investigation and hearing.

D. ISO-NE Supplemental Answer

46. Following the amended complaint, ISO-NE submitted a supplemental answer in which it argues that the Commission should deny the relief requested with respect to the market monitoring functions and structure. ISO-NE states that the use of both an internal and external market monitor has a long history of broad support within New England and that Order No. 719 specifically permits such a structure. ISO-NE maintains that the now corrected errors in the March 20 Testimony do not provide any basis for restructuring ISO-NE's market monitoring function.[62] ISO-NE disputes that the formulation and adoption of the ICAP import rule revisions were delayed by ISO-NE or either of its market monitors. ISO-NE states that the Commission should direct the complainants to advocate their reforms in the New England stakeholder process in order to discourage parties from bypassing this process. ISO-NE agrees, however, that the Commission should examine the capacity importers' conduct and intent, either through a hearing or an enforcement investigation.[63]

---

[59] Northeast Utilities Comments at 6.

[60] NEPOOL Coalition Comments at 8.

[61] *Id.* at 8.

[62] ISO-NE Supplemental Answer at 17.

[63] *Id.* at 3.

E. Connecticut Representatives' Response

47. Having withdrawn their amended complaint with respect to HQUS, the Connecticut Representatives maintain that there is sufficient evidence of wrongdoing to merit inquiry by the Commission and remark that the Commission evaluates the facts in the light most favorable to the complainant.[64] The Connecticut Representatives reiterate that Brookfield and Constellation "consciously and deliberately took their ICAP-designated supply out of the New England energy market."[65]

48. The Connecticut Representatives state that Brookfield's and Constellation's "admitted high-offer bid strategy" is inconsistent with their obligations, demonstrates that they never intended to perform, and reflects economic withholding.[66] According to the Connecticut Representatives, Brookfield concedes that it followed "a consistent high-offer bid strategy that was intentionally designed to ensure that ISO-NE would never call [Brookfield's] ICAP-designated resources to perform."[67] They argue that the capacity payments obligated Brookfield to forego whatever economic opportunities that it might have elsewhere and to accept some degree of economic risk.

49. With respect to the preclusion of a private right of action by section 222(b), the Connecticut Representatives explain that the language of the section reflects Congress' intent that entities will not be subject to civil action in state or federal courts by third parties based on alleged violations of the Commission's regulations and that section 222 was not intended to preclude administrative actions initiated by third parties before the jurisdictional agency.

50. In its answer, NEPOOL disputes the Connecticut Representatives' suggestion that the stakeholder process should be bypassed in consideration of changes to the market monitoring structure. Addressing the Connecticut Representatives' supporting allegation that they are "mere guests" in New England stakeholder meetings, NEPOOL avers that State representatives are eligible to join NEPOOL as voting members and that CT OCC is a voting member and has participated in the NEPOOL process. Notwithstanding the State regulatory representatives' request not to be voting members in the current negotiated governance arrangements, NEPOOL maintains that "they have the full and

---

[64] Connecticut Representatives Response at 9-10.

[65] *Id.* at 11; *see also id.* at 14 ("disregarded their capacity supply obligations").

[66] *Id.* at 11, 12.

[67] *Id.* at 12.

unhindered opportunity to have their motions moved formally through the Participant Processes by any sympathetic voting member."[68]

IV. Discussion

A. Procedural Matters

51. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceedings in which they sought to invervene.

52. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers of the Connecticut Representatives, Brookfield, and NEPOOL because they have provided information that assisted us in our decision-making process.

B. Commission Determination

53. The disputed issue identified in the complaints, arising under section 222 of the FPA and section 1c.2 of the Commission's regulations,[69] is the capacity importers' intent behind the high-priced offers. Connecticut Parties have made broad allegations of market manipulation. The complainants have provided little evidence in support of these allegations. Typically, the Commission looks with disfavor on poorly supported complaints. We are mindful, however, of the unique history of the allegations regarding the capacity importers' bidding strategy raised in the complaint, including the inconsistency in the ISO-NE's position regarding these allegations. Because of this unique history, we will in this instance set the complaint for trial-type evidentiary hearing before an administrative law judge as described below. At hearing, the Complainants must meet the burdens typically imposed on complainants.

54. We will set the issues related to the allegations regarding the capacity importers' bidding strategy for hearing, and, given the common issues of law and fact, we will consolidate the proceedings in Docket Nos. EL09-47-000 and EL09-48-000 for purposes of hearing and decision. The litigation staff of the Commission's Office of Enforcement will participate in the hearing.

---

[68] NEPOOL Answer at 4-5.

[69] 16 U.S.C. § 824 v (2006); 18 C.F.R. § 1c.2 (2009).

55. We note that, with respect to Complainants' allegations of market manipulation, Complainants improperly filed their complaint under section 206 of the FPA, which applies to rate changes for pubic utility tariffs. The complaint here does not seek changes in the rates, terms, and conditions of ISO-NE's tariff, other than with respect to the market monitoring unit provisions of the tariff; Complainants should have filed their market manipulation complaint under section 306 of the FPA, which permits the filing of complaints regarding any violation of the FPA. Accordingly, we will set the market manipulation allegations for hearing pursuant to our authorities under FPA sections 306 and 307 of the FPA.[70]

56. Although section 222(b) of the FPA does not provide a private right of action, a person alleging energy market manipulation[71] is not foreclosed from bringing such an allegation before the Commission pursuant to section 306 of the FPA which, as noted above, expressly permits a complaint to be brought to the Commission for any violation of the FPA.[72]

57. With respect to comments related to ISO-NE's market monitoring unit and ISO-NE's pending Order No. 719 compliance filing, including their claims arising under section 206 of the FPA,[73] the Connecticut Representatives have not raised a reasonable doubt that the existing tariff provisions are unreasonable and thus should be set for hearing under section 206. Accordingly, we will not institute a section 206 proceeding to consider tariff changes. In any event, such comments are more appropriately addressed in ISO-NE's Order No. 719 compliance proceeding in Docket No. ER09-1051-000 that is presently before the Commission, because that proceeding will comprehensively address the issue of market monitoring.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 306 and 307 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a

[70] 16 U.S.C. §§ 825e, 825f (2006).

[71] 16 U.S.C. § 824v (2006); 18 C.F.R. § 1c.2(2009).

[72] 16 U.S.C. § 825e (2006).

[73] 16 U.S.C. § 824e (2006).

public hearing shall be held concerning the capacity importers' intent behind their high-priced offers.

(B) A presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, D.C. 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(C) The proceedings in Docket Nos. EL09-47-000 and EL09-48-000 are hereby consolidated for purposes of hearing and decision.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.