

129 FERC ¶ 61,057
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Richard Blumenthal, Attorney General for The State of Connecticut Docket No. EL09-47-001

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. EL09-48-001

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 GRANTING IN PART AND DENYING IN PART REQUESTS FOR REHEARING AND CLARIFICATION

(Issued October 23, 2009)

1. On September 23, 2009, Brookfield Energy Marketing Inc. (Brookfield) filed a request for rehearing of the Commission's August 24, 2009 order establishing hearing procedures in this proceeding (Hearing Order).¹ On the same date, Constellation Energy

¹ *Richard Blumenthal, Attorney General for The State of Connecticut v. ISO New England Inc.*, 128 FERC ¶ 61,182 (2009) (Hearing Order).

Commodities Group, Inc. (Constellation) submitted a request for clarification of the Hearing Order. In this order, the Commission grants the requests for rehearing and clarification in part and denies them in part, as discussed below.

I. Background

2. In his original April 20, 2009 complaint in this proceeding, Richard Blumenthal, the Connecticut Attorney General, claimed that New England electricity customers paid a total of \$85.8 million in capacity payments to capacity importers that offered energy above \$660/megawatt-hour (MWh) and which subsequently failed to respond to dispatch calls by ISO New England Inc. (ISO-NE) from December 2006 through January 2009. The Connecticut Attorney General stated that the capacity importers in question were paid, and continue to receive, substantial installed capacity (ICAP) transition payments for the provision of capacity services intended to benefit ISO-NE's electric consumers. The Connecticut Attorney General further stated 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."² The Connecticut Attorney General therefore requested that the Commission investigate and impose sanctions, including disgorgement.

3. The Connecticut Attorney General also alleged 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 Commission's regulations.³ The Connecticut Attorney General contended 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."⁴

4. In their joint April 23, 2009 complaint in this proceeding,⁵ the Connecticut Department of Public Utility Control (CT DPUC) and Office of Consumer Counsel (CT OCC) contended that the capacity importers at issue in this proceeding violated section 206 of the FPA by entering into ICAP import contracts and accepting capacity payments when they never intended to perform the obligations of capacity resources. CT DPUC

² Connecticut Attorney General Complaint at 4.

³ *Id.* at 6 (citing 16 U.S.C. § 824v (2006) and 18 C.F.R. § 1c.2 (2009)).

⁴ *Id.* at 7-8.

⁵ CT DPUC and CT OCC and the Connecticut Attorney General later jointly filed motion to consolidate Docket Nos. EL09-47-000 and EL09-48-000.

and CT OCC explained that such capacity payments require ICAP resources to provide energy when ISO-NE calls them and when they are needed for reliability, and that the capacity importers offered their energy at “prices that would rarely, if ever, be accepted.”⁶ They alleged 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). By accepting capacity payments under the false pretense that they would perform, CT DPUC and CT OCC also contended that the capacity importers defrauded customers in violation of FPA section 222.

5. In its original May 6, 2009 answer, ISO-NE explained that the testimony in its March 20, 2009 filing 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.⁷

6. In their amended complaint, the Connecticut Attorney General, CT DPUC, and CT OCC (together, the Connecticut Representatives) continued to seek a hearing and investigation into the allegedly fraudulent, manipulative scheme under which capacity importers were paid at least \$50.9 million for reliability services that, according to the Connecticut Representatives, their conduct demonstrates they never intended to provide.⁸

7. In their answers, Brookfield and Constellation contended, *inter alia*, 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. Further, Brookfield stated that the amended complaint does not allege any tariff violations. According to

⁶ CT DPUC and CT OCC Complaint at 15.

⁷ In its March 20, 2009 filing under Docket No. ER09-873-000, ISO-NE proposed tariff revisions entailing competitive offer requirements to energy transactions associated with ICAP import contracts and reforms to the existing penalty structure with respect to non-delivery of energy when requested by ISO-NE, because 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. *ISO New England Inc.*, 127 FERC ¶ 61,235, at P 2, 3 (2009). In support of this proposal, ISO-NE averred that during the period from 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 that these market participants had been paid a collective \$85.8 million in capacity payments despite their alleged non-delivery. *Id.* P 4.

⁸ Amended Complaint at 2.

Brookfield, ISO-NE's corrected filing acknowledged proper performance by capacity importers and retracted all allegations that those capacity importers had failed to deliver energy when called. Constellation stated that the complaint fails to identify a violation of section 206 of the FPA for which relief can and should be granted. Brookfield and Constellation argued that the Connecticut Representatives were attempting to re-litigate issues that were addressed in the ISO-NE Forward Capacity Market (FCM) proceedings and that the issues raised were fundamentally based on the structure of the capacity market created by the FCM settlement agreement and the rules for the transition payments.

8. The Commission concluded that the disputed issue identified in the complaints, arising under section 222 of the FPA and section 1c.2 of the Commission's regulations,⁹ is the capacity importers' intent behind the high-priced offers.¹⁰ The Commission noted that the complainants had provided relatively little evidence in support of their allegations but emphasized 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. The Commission stated that, because of this unique history, it would set the complaint for trial-type evidentiary hearing before an administrative law judge with the condition that, at hearing, the complainants must meet the burdens typically imposed on complainants (i.e., in initial complaint proceedings).

9. In his September 18, 2009 order determining the scope of the hearing proceedings, Presiding Judge H. Peter Young concluded that "the primary issue in these proceedings is whether capacity importers' practice of submitting energy supply offers at or near the \$1,000 per megawatt-hour price cap constituted market manipulation in violation of FPA section 222 and Commission regulation 1c.2."¹¹ The Presiding Judge found, consequently, that each essential element of market manipulation is at issue.¹² The Presiding Judge reasoned that it makes no sense to conclude that the Commission intentionally set one essential element of the alleged market manipulation (i.e., intent) for

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

¹⁰ Hearing Order, 128 FERC ¶ 61,182 at P 53.

¹¹ *ISO New England Inc.*, 128 FERC ¶ 63,017, at P 18 (2009) (Scope Order).

¹² *Id.* P 18.

hearing but reserved the other two for consideration in subsequent hearings.¹³ He concluded that “the only reason to examine the intent behind their practice of submitting energy supply offers at or near the price cap—or their bidding strategy in general—is that such examinations serve to inform the market manipulation inquiry at the heart of these proceedings.”¹⁴

II. Requests for Rehearing and Clarification

10. Brookfield raises four issues on rehearing. First, Brookfield reasserts that there is no private right of action to file a market manipulation claim. Brookfield states that the plain meaning of section 222 of the FPA denies private litigants the right to file actions for manipulation claims and that such a prohibition applies to actions filed in court or before the Commission. Brookfield argues that there is no “regulatory gap” or ambiguity in the statutory text that the Commission is filling by interpreting FPA section 222 to allow a private right of action for a claim of manipulation. Further, the Commission erred when it found that a complaint alleging manipulation is permissible under FPA section 306;¹⁵ section 306 must be read together with section 222. Thus, Brookfield concludes that the Commission is not entitled to *Chevron* deference by a reviewing court.¹⁶

¹³ *Id.* P 16. The judge elaborated,

While [Constellation and Brookfield] are correct in arguing that a failure here to establish the requisite intent would obviate the need for further proceedings, it does not follow that intent is a *threshold* issue. There is no hierarchy among market manipulation’s essential elements. Indeed, absent admission, intent must be deduced or inferred from the complex of facts and circumstances attending the behavior at issue. It is difficult to conceive how intent could be established as a threshold matter, without inquiry into that complex.

Id. P 16 n.8.

¹⁴ *Id.* P 15. The judge’s reasoning is consistent with the Commission’s intent in the Hearing Order.

¹⁵ 16 U.S.C. § 825e (2006).

¹⁶ Brookfield Request for Rehearing at 9 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)).

11. Next, Brookfield contends that, by setting this matter for hearing, the Commission made an unexplained departure from its well-established practice for handling manipulation claims. Brookfield maintains that the Commission's practice regarding complaints about alleged manipulation has been to refer any necessary fact-finding to its Enforcement Staff in a non-public investigation or to resolve such allegations in a paper hearing. According to Brookfield, the "abrupt reversal" of past precedent—by allowing private parties to prosecute the development of the record needed to assess whether cognizable violations of the anti-manipulation rule occurred—violates the Commission's obligation to abide by precedent or to provide a reasoned basis for its departures from it.¹⁷

12. Brookfield next avers that the Commission erred by setting unsubstantiated allegations for hearing. Brookfield maintains that, "in light of the ISO-NE acknowledgment, to be cognizable the Amended Complaint must demonstrate that the ostensibly legitimate explanation for [Brookfield's] conduct was not plausible."¹⁸ Moreover, Brookfield avers that a complaint must contain facts sufficient to raise a reasonable expectation that discovery will reveal evidence of a violation.¹⁹

13. Finally, Brookfield contends that the Hearing Order fails to provide essential specifications concerning the scope of the evidentiary hearing. Brookfield states that the Hearing Order provides no clear explanation of what process will be afforded respondents that allows a fair opportunity to be heard. Brookfield points out that the administrative law judge's interpretation of the scope of the evidentiary hearing goes beyond what the Commission directed, namely, "the capacity importers' intent behind their high-priced offers." Brookfield cites the three elements required to establish a market manipulation violation;²⁰ Brookfield concludes that the Hearing Order appears to

¹⁷ *Id.* at 13.

¹⁸ *Id.* at 18.

¹⁹ *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), with respect to the standard concerning when alleged fraudulent or anti-competitive behavior is cognizable).

²⁰ *Id.* at 20 (referring to *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, *order denying reh'g*, 114 FERC ¶ 61,300 (2006)). The three elements to which Brookfield refers are "where an entity: (1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the

limit the scope of the hearing to fact-finding on the second element, *scienter*. Brookfield avers, however, that as a result of the Hearing Order, the Presiding Judge has ruled that each of the three elements of a manipulation claim is within the scope of the evidentiary hearing, including market impacts of the alleged conduct.²¹ Accordingly, Brookfield requests that the Commission clarify the hearing's scope.

14. Constellation likewise asks the Commission to clarify that the sole issue set for hearing is the capacity importers' intent behind their high-priced offers. Constellation requests that the Commission clarify that the more general allegations that market participants' conduct constitutes market manipulation under section 222 of the FPA, the assertions that market participants' behavior has affected market prices, and the appropriate remedy, if any, are issues beyond the scope of the limited hearing. Constellation argues that establishing the hearing to address the single issue of capacity importers' intent behind their high-priced offers is consistent with the complaint, "which rests on the principal, if not exclusive, charge that the capacity importers 'never intended to perform the obligations of capacity resources.'"²²

15. Constellation contends that there are sound reasons for limiting the scope of the hearing to the single issue of the intent behind the challenged offers. Constellation explains, "[b]ecause the complaint provided little, if any, evidence of wrongdoing, it is reasonable for the Commission to limit the hearing to the issue of intent; the resolution of the intent issue could obviate the need for further proceedings in this case."²³ Constellation states that it is within the Commission's discretion to address the issues before it in the manner it sees fit and posits that a limited exercise of that discretion is particularly appropriate here, because this is the first case where the Commission has set any issues related to market manipulation for hearing using its traditional complaint procedures.²⁴ Constellation remarks on the utility of the hearing process, stating that "with the benefit of an initial decision addressing the issue of intent, the Commission can decide what further actions are appropriate."²⁵ With respect to allegations that capacity importers' behavior affected market prices, Constellation avers that this is not relevant to

Commission." Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

²¹ Brookfield Request for Rehearing at 20; *see also* Constellation Request for Clarification at 7.

²² Constellation Request for Clarification at 4-5.

²³ *Id.* at 6.

²⁴ *Id.*

²⁵ *Id.* at 7.

the stated purpose of the evidentiary hearing (i.e., intent) and, at most, is only relevant to the quantification of damages of which the Hearing Order makes no reference.²⁶

III. Discussion

A. Procedural Matters

16. On October 8, 2009, the Connecticut Representatives filed a motion to answer and answer to the requests for rehearing and clarification. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2009), prohibits an answer to a request for rehearing. Accordingly, we will reject the answer to the request for rehearing.

B. Commission Determination

17. The Commission grants in part and denies in part the request for rehearing and the request for clarification of the Hearing Order, as discussed below.

1. No Private Right of Action

18. In cases of alleged market manipulation, as well as in other contexts, the Commission seeks to represent the public interest, not merely to decide which party is right and which is wrong.²⁷ In this proceeding, no litigant has brought a "private action," nor has the Commission permitted a third party to prosecute such a "private action." Rather, the Commission has ordered an evidentiary hearing under sections 306 and 307 of the FPA because, among other things, there are disputed issues of material fact surrounding capacity importers' offers between January 2005 and January 2009 that cannot be resolved in the absence of an evidentiary hearing. The evidentiary hearing will provide the Commission with a proper factual record upon which to base its ultimate legal, and potentially remedial, findings in this proceeding. Section 222(b) of the FPA, while barring "private rights of action," does not operate as a bar to a complainant alleging market manipulation in a complaint filed with the Commission and thereby

²⁶ *Id.* at 7-8.

²⁷ *See Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965) ("This role [as representative of the public interest] does not permit [the Commission] to act as an umpire blandly calling balls and strikes for adversaries appearing before it.").

bringing alleged market manipulation to the Commission's attention.²⁸ We read this section as affirming that there is no private right to bring a claim of manipulation directly to a court as a prosecuting litigant seeking a remedy. Had Congress also intended to bar complaints at the Commission under section 222, it would have amended sections 306 and 307 to exclude potential violations of section 222 from the matters that the Commission may address pursuant to those sections.²⁹ Here, complainants have exercised their statutory rights to bring a complaint to the Commission and the Commission is exercising its statutory prerogative to determine whether any provisions of the FPA have been violated.

2. No Departure from Established Practice

19. In the Hearing Order, the Commission acknowledged that the complainants had provided little evidence in support of their allegations.³⁰ The Commission noted that it typically looks with disfavor on poorly supported complaints. However, the Commission went on to explain why it would set this particular case for a trial-type, evidentiary hearing; namely, the unique history of the allegations regarding the capacity importers' bidding strategy raised in the complaint and the inconsistency in the ISO-NE's position regarding these allegations.³¹ Furthermore, the Commission reminded the parties that, at the hearing, the complainants here must meet the burdens typically imposed on complainants.³² Finally, the involvement of staff from the Commission's Office of Enforcement (rather than its Office of Administrative Litigation) in an evidentiary hearing is not prohibited by any provision of the FPA nor by the Commission's

²⁸ See 16 U.S.C. § 824v(b) (2006); see also Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 72 (“[T]he Commission reiterates that a complaint that alleges market manipulation will proceed under NGA section 4A or FPA section 222, utilizing the procedural rules and mechanisms generally applicable to NGA and FPA proceedings.”).

²⁹ The Commission has previously opined that Congress's intention was that entities should not be subject to “civil actions” by third parties based on alleged violations of section 222 and that section 222(b) was “not intended to take away any other right that may otherwise exist.” *Prohibition of Energy Market Manipulation*, Notice of Proposed Rulemaking, 113 FERC ¶ 61,067, at P 10 & n.13 (2005), Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 2, *reh'g denied*, 114 FERC ¶ 61, 300 (2006).

³⁰ Hearing Order, 128 FERC ¶ 61,182 at P 53.

³¹ *Id.*

³² *Id.*

regulations and is fully within the Commission's discretion regarding the conduct of a hearing,³³ even if many of the investigations more typically handled by the Office of Enforcement are non-public. Given the nature of the allegations, the experience of the Enforcement staff may aid in producing the necessary evidentiary record on capacity importers' bidding strategy.

3. Pleading Requirements

20. Brookfield contends that the Connecticut Representatives' complaint rests on "nothing more than unsupported assertions and inferences."³⁴ We previously recognized that the complainants have made broad allegations of market manipulation and have provided little factual evidence in support of these allegations.³⁵ However, we also stated that in the context of the unique history of the allegations regarding the capacity importers' bidding strategy, this "paucity of facts"³⁶ raised by complainants' claims is still enough to warrant our taking a closer look—through an evidentiary hearing—at capacity importers' bidding strategy.³⁷

21. With respect to the contents of a complaint, the Commission's procedural rules require, *inter alia*, that the complainant identify the action or inaction upon which the alleged violation is based; explain how the action or inaction violates applicable statutory standards or regulatory requirements; indicate the impacts imposed as a result of the action or inaction; and include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits.³⁸ The Commission likewise weighs and evaluates evidence

³³ The Commission enjoys substantial discretion in managing its procedure. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 544-46 (1978) (finding that agency has right to exercise its administrative discretion in deciding how to proceed to develop needed evidence); *Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) (same); *cf.* 18 C.F.R. § 385.102(b)(2) (2009) (noting staff's participation in litigation).

³⁴ Brookfield Request for Rehearing at 19.

³⁵ Hearing Order, 128 FERC ¶ 61,182 at P 53.

³⁶ Brookfield Request for Rehearing at 19.

³⁷ *See supra* note 33 (Commission discretion to manage its procedural affairs).

³⁸ 18 C.F.R. § 385.206(b) (2009).

submitted in support of an alleged tariff violation or market manipulation.³⁹ In this case, although Brookfield points out that complainants have not satisfied the three specific elements of a manipulation claim as specified in Order No. 670 (the final rule prohibiting market manipulation),⁴⁰ the allegations the Connecticut Representatives have put forward warrant a closer examination of the capacity importers' bidding strategy.

4. Scope of Hearing

22. On rehearing and clarification, Constellation and Brookfield contend that the Hearing Order identified intent as the sole hearing issue. Although the Hearing Order did refer to "the capacity importers' intent behind their high-priced offers,"⁴¹ this description of the issues set for hearing is incomplete. As noted elsewhere in the order, the Commission intended to "set the market manipulation allegations for hearing."⁴² We clarify, therefore, that the Commission intended to set for hearing inquiry into the three requisite elements to establish market manipulation. Thus, we grant rehearing, in part, and clarify here that the scope of the hearing is whether capacity importers' submission of energy supply offers at or near the \$1,000 per MWh price cap satisfy the three elements required to establish market manipulation. These three elements do not include effects of the alleged behavior on market prices or applicable remedies.⁴³

The Commission orders:

(A) Brookfield's request for rehearing is hereby granted in part and denied in part, as discussed in the body of this order.

³⁹ See, e.g., *Allegheny Elec. Coop., Inc. v. PJM Interconnection, L.L.C.*, 120 FERC ¶ 61,254, at P 27-30 (2007) (considering evidence outside the four corners of the complaint to evaluate alleged tariff violation); cf. *San Diego Gas and Elec. Co.*, 101 FERC ¶ 61,186 (2002) (providing parties in California refund proceeding opportunity to develop further evidence of tariff violations and market manipulation).

⁴⁰ Brookfield Request for Rehearing at 19-20.

⁴¹ Hearing Order, 128 FERC ¶ 61,182 at P 53 and Ordering Paragraph (A).

⁴² *Id.* P 55; see also *id.* P 54 (setting "the issues related to the allegations regarding the capacity importers' bidding strategy for hearing").

⁴³ See, e.g., Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 48.

(B) Constellation's request for clarification is hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission. Commissioner Kelly is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.