

135 FERC ¶ 61,117
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Richard Blumenthal, Attorney General for the State of
Connecticut, the Connecticut Department of Public
Utility Control and the Connecticut Office of Consumer
Counsel

v.

Docket Nos. EL09-47-000
and
EL09-48-000

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

OPINION NO. 513

ORDER AFFIRMING INITIAL DECISION

(Issued May 6, 2011)

1. This case is before the Commission on exceptions to an Initial Decision issued on September 29, 2010.¹ The Initial Decision addressed consolidated complaints filed by the 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) (collectively, Complainants) alleging that Brookfield Energy Marketing Inc. (Brookfield), Constellation Energy Commodities Group, Inc. (Constellation), and Shell Energy North America (US), L.P.

¹ *Richard Blumenthal, Att’y Gen. for the State of Connecticut v. ISO New England Inc.*, 132 FERC ¶ 63,017 (2010) (Initial Decision).

(Shell) (collectively, Respondents) engaged in market manipulation in violation of section 222 of the Federal Power Act (FPA)² and section 1.c.2 of the Commission's regulations,³ with respect to obligations under their installed capacity (ICAP) import contracts for which they received capacity payments from ISO New England Inc. (ISO-NE). The Commission herein affirms the Initial Decision's finding that Complainants failed to support their allegations of market manipulation against Respondents). In particular, we agree with the Initial Decision that Respondents fully 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.⁴

I. Background

2. The allegations in this proceeding are set against the backdrop of capacity prices and conditions in the 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.⁵ 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),⁶ fixed monthly capacity payments made by ISO-NE were significantly higher than the fixed monthly capacity payments made by NYISO.⁷ This made it economically attractive for capacity suppliers, including Respondents, to export capacity from New York to New England to take advantage of this price differential and receive capacity payments from ISO-NE.

² 16 U.S.C. § 824v (2006).

³ 18 C.F.R. § 1.c.2 (2010).

⁴ Initial Decision, 132 FERC ¶ 63,017 at P 113.

⁵ Because of the forward 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).

⁶ 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).

⁷ 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.

3. Under ISO-NE's market rules at the time, market participants with ICAP import contracts (sometimes called "capacity importers" or "capacity resources") were required to make day-ahead 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 condition is known as the "must offer" requirement. During the partial Transition Period, ISO-NE's Transmission, Markets and Services Tariff expressly imposed a \$1,000/MWh price cap on these offers but contained no other specific pricing restrictions.⁸

4. An additional pricing restriction was introduced by ISO-NE on March 20, 2009, when it submitted in Docket No. ER09-873-000 proposed Tariff revisions imposing explicit "competitive" offer requirements for energy transactions associated with ICAP import contracts, as well as reforms to the existing penalty structure with respect to non-delivery of energy when requested by ISO-NE. In support of the proposed Tariff revision requiring capacity suppliers to submit competitive offers, ISO-NE averred 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 alleged non-delivery.

5. On May 6, 2009, however, ISO-NE 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. ISO-NE further stated that it had not confirmed next-hour delivery of these transactions, and therefore they were not dispatched.

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.⁹

A. The Complaints

7. In April 2009, prior to ISO-NE amending its March 20, 2009 filing, the Connecticut Attorney General and, jointly, CT DPUC and CT OCC filed two separate

⁸ See *ISO New England Inc.*, 127 FERC ¶ 61,235, at P 2, 3 (2009); 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.

⁹ *ISO New England Inc.*, 127 FERC ¶ 61,235 (2009) (June 11, 2009 Order).

complaints calling for an investigation into the 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 March 20, 2009 filing and the millions of dollars in transmission capacity payments allegedly made to those who failed to deliver.

8. More 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, prices which Respondents allegedly never intended to be accepted, for energy they allegedly never intended to deliver. Arguing that Respondents' alleged conduct "plainly involves the requisite scienter and intent to find market manipulation"¹⁰ in violation of section 222 of the FPA¹¹ and section 1c.2 of the Commission's regulations,¹² the Connecticut Attorney General sought 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 unit.

¹⁰Connecticut Attorney General Complaint at 7-8.

¹¹ 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 Act, section 10-b]), in contravention of such rules and regulations as the Commission may prescribe

¹² 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. Setting forth similar allegations in their complaint, CT DPUC and CT OCC contended that Respondents entered into ICAP import contracts and accepted capacity payments but never intended to perform the obligations of capacity resources, even though such capacity payments require ICAP resources to provide energy when called upon by ISO-NE and when needed for reliability.¹³ CT DPUC and CT OCC averred that, by offering and receiving payment for capacity-backed energy at “prices that would rarely, if ever, be accepted,”¹⁴ Respondents caused energy prices in New England to be higher and less competitive than if Respondents had submitted reasonable capacity-backed energy offers (that would have given ISO-NE first call on their energy). CT DPUC and CT OCC sought retroactive refunds, including disgorgement of unjust profits; the disclosure of critical information; and substantial reforms to ISO-NE’s market monitoring structure.

10. On May 22, 2009, all of the Complainants filed a single, amended complaint, continuing to seek a hearing and investigation into Respondents’ alleged market manipulation during the Transition Period. Specifically, Complainants contended that Respondents were paid at least \$50.9 million for capacity over the Northern New York AC interface, energy which Respondents purportedly never intended to provide.

B. Hearing and Clarification Orders

11. By order issued August 24, 2009 (the Hearing Order), the Commission consolidated the complaints and set for hearing issues concerning Respondents’ capacity bidding strategies, including their intent behind the allegedly high-priced offers.¹⁵

12. On rehearing, the Commission clarified that it intended to set for hearing whether Respondents’ submission of energy supply offers at or near the \$1,000/MWh price cap satisfied all three elements required to establish market manipulation. These three elements ask whether Respondents: (1) used a fraudulent device, scheme or artifice, or made a material misrepresentation or a material omission as to which there was a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engaged 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; and (3) in connection with the

¹³ CT DPUC & CT OCC Complaint at 14.

¹⁴ *Id.* at 15.

¹⁵ Hearing Order, 128 FERC ¶ 61,182 at P 53-54.

purchase or sale of electric energy subject to the jurisdiction of the Commission.¹⁶ The Commission emphasized that the three elements do not include effects of the alleged behavior on market prices or applicable remedies.¹⁷

II. Initial Decision

13. The Initial Decision concludes that Complainants failed to prove their allegations of market manipulation under section 222 of the FPA and section 1c.2 of the Commission's regulations. Consistent with the Clarification Order, the Initial Decision analyzes whether any of Respondents' energy supply offers at or near the \$1,000/MWh price cap constituted: (1) a fraudulent device, scheme, or artifice; or (2) a material misrepresentation or a material omission as to which there was a duty to speak under a Commission-filed tariff, Commission order, rule, or regulation; or (3) any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity. The Initial Decision acknowledges that seminal to any of these determinations is a finding that Respondents acted with the necessary level of intent (*scienter*). The Initial Decision concludes that Respondents did not.¹⁸ Moreover, citing substantial record evidence, the Initial Decision finds that Brookfield, Constellation, and Shell fully 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.¹⁹

14. The Initial Decision begins its inquiry by defining *scienter* as "knowing or intentional misconduct" or "conduct designed to deceive or defraud . . . by controlling or artificially affecting the price . . ."²⁰ The Initial Decision finds that *scienter* may be established by proving recklessness, and, often, must be inferred from a composite of the evidence—direct, indirect, and circumstantial.

¹⁶ Clarification Order, 129 FERC ¶ 61,057 at P 22; *see also Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, *order denying reh'g*, 114 FERC ¶ 61,300 (2006).

¹⁷ Clarification Order, 129 FERC ¶ 61,057 at P 22.

¹⁸ Initial Decision, 132 FERC ¶ 63,017 at P 85-87, 107; *see also id.* P 89.

¹⁹ *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).

²⁰ *Id.* P 108 (quoting Order No. 670, FERC Stats. & Regs. ¶ 31,202, 114 FERC ¶ 61,047, at P 52 (2006)).

15. Applying these principles, the Initial Decision first explains that the fact that Respondents submitted capacity offers at or near the \$1,000/MWh price cap does not alone evidence fraudulent intent. The Initial Decision finds that submitting bids at that level is exactly what the Tariff – as accepted by the Commission – allowed. The Initial Decision rejects arguments that the Tariff additionally imposed some type of “reasonable price” threshold that Respondents exceeded by submitting capacity offers near the price cap.²¹ The Initial Decision finds no such explicit requirement within the four corners of the Tariff, a finding that is undisputed.²²

16. The Initial Decision further rejects Complainants’ argument that the Tariff imposed some type of implicit reasonable price restraint on Respondents’ capacity-backed energy offers, dismantling Complainants’ claim that Respondents violated Section III.8.3.7.2.2(e) of the Tariff which required capacity importers to “submit [] Supply Offers, in both ISO [New England] and the [New York Independent System Operator, Inc. (NYISO)] External Control Area in such a manner that the Energy associated with the ICAP Import Contract could actually be delivered.”²³ The Initial Decision explains that, contrary to Complainants’ argument, this provision did not, in effect, require that Respondents submit New York energy export bids at prevailing NYISO prices in order to assure that their capacity-backed energy offers to ISO-NE “could actually be delivered.” The Initial Decision explains that Complainants’ argument confuses energy and energy markets with capacity products and capacity markets. The Initial Decision further finds that, while the record establishes Respondents submitted New York energy bids at prices designed to ensure they would not be accepted under normal circumstances, the record also shows that each of the Respondents was prepared to ensure that energy would flow if ISO-NE actually called on it.

17. Having found that the Tariff itself imposes no explicit or implicit “reasonable price” requirement, the Initial Decision went on to reject Complainants’ argument that the “just and reasonable” standard in the FPA imbues an implicit reasonable price threshold into the Tariff. The Initial Decision explains that the FPA requires jurisdictional *tariffs* to be just, reasonable, and not unduly discriminatory, whereas the reasonableness inquiry is not probative in resolving allegations of market manipulation against an entity. The Initial Decision notes that this was the very reason the

²¹ *Id.* P 100-102.

²² *Id.* P 102.

²³ First Rev. Sheet Nos. 7251-52.

Commission found Complainants' market manipulation claims to have been improperly filed under section 206 of the FPA, which applies only to tariff rate changes.²⁴

18. The Initial Decision next determines that, rather than constituting any type of Tariff or FPA violation, Respondents' behavior "clearly evidences legitimate business and economic objectives," rather than scienter required to find market manipulation.²⁵ The Initial Decision's analysis on this point is as follows. Respondents Brookfield, Constellation, and Shell were New England capacity importers. The product they offered Respondent ISO-NE was capacity, not energy. Capacity is a reliability product. It follows that the primary purpose of the relevant capacity-backed energy offers to ISO-NE was to provide reliability, not energy.²⁶ By definition, reliability is a hedge against some contingency--either anticipated or unanticipated. A contingency, in turn, implies some probability it will occur. The pertinent contingency in the instant context was that internal New England energy supply prices (or demand) could have risen high enough to make it economically attractive (or necessary) for ISO-NE actually to call on Brookfield's, Constellation's, and Shell's capacity. The probability this contingency would occur was relatively low due to the comparatively low energy prices and the surplus capacity conditions prevailing in New England throughout the partial Transition Period. As a consequence, it was "completely reasonable/economically rational" for Brookfield, Constellation and Shell purposefully to offer their capacity to ISO-NE in a

²⁴ Initial Decision, 132 FERC ¶ 63,017 at P 102 n.115 (citing Hearing Order, 128 FERC ¶ 61,182 at P 55). The Initial Decision further states that the lack of a "reasonable price" requirement in the Tariff during the relevant Transition Period is supported by the Commission's order accepting ISO-NE's subsequent proposal to include a "competitive offer" price obligation in the Tariff. *Id.* at P 101 (citing *ISO New England Inc. and New England Power Pool*, 131 FERC ¶ 61,147, at P 2 (2010) ("When the [ICAP] transition period began, Market Rule 1 did not include a requirement for market participants to submit energy offers associated with capacity imports at competitive prices.")).

²⁵ *Id.* P 112.

²⁶ The Initial Decision finds there is substantial record evidence for this conclusion: Brookfield, Constellation, and Shell contemporaneously sold energy to ISO-NE (using separate North American Electric Reliability Corporation or NERC e-tags) in recognition of New England market design incentives favoring energy-only transactions. These energy-only transactions involved purchases from the NYISO at prevailing market prices, and ISO-NE did not distinguish them from capacity-backed energy transactions in determining which transactions would clear its market. *Id.* P 112 n.30.

manner which provided reliability, but assured the associated energy would not ordinarily be called on.²⁷

19. The Initial Decision further states that the record confirms the following: Brookfield, Constellation, and Shell faced price spread risk when flowing energy between New York and New England. The “seam” between NYISO and ISO-NE compelled them to absorb any hourly price spread between the two systems and markets. A wide positive price spread between NYISO and ISO-NE in a given hour could largely eliminate an external capacity supplier’s incremental monthly capacity sales revenues. An external capacity supplier obligated to flow capacity-backed energy from NYISO to ISO-NE in every hour of every day during the partial Transition Period would have sustained day-ahead market losses in approximately 60 percent of those hours. And according to the Initial Decision, the record “overwhelmingly confirms” that Brookfield, Constellation, and Shell purposefully offered their capacity-backed energy to ISO-NE at or near the price cap to minimize these risks.²⁸ The record similarly confirms, according to the Initial Decision, 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.²⁹ As stated in the Initial Decision and noted above, the record also confirms that Brookfield, Constellation, and Shell fully 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.³⁰

20. Finally, having found that Respondents’ apparent conduct does not evidence the requisite scienter, the Initial Decision also finds no evidence that Respondents made a material omission or misrepresentation concerning information as to which there was a duty to speak under a Commission-filed tariff, Commission order, rule, or regulation. Respondents’ capacity-backed energy offers were, of course, not concealed, and the

²⁷ *Id.*

²⁸ *Id.* P 113.

²⁹ *Id.* Negative \$999.70/MWh was the lowest bid price allowed under the NYISO tariff. *Id.* P 27 & n.33.

³⁰ *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).

Initial Decision points out that Complainants' own witness was unable at hearing to identify any pertinent regulatory or tariff provision that imposed on Respondents a duty to disclose the details of the strategies behind these offers or their New York energy export bids. The Initial Decision explains that, absent a duty to disclose, silence is not misleading as a matter of law.³¹ Based upon the foregoing, the Initial Decision finds that Complainants produced "scant evidence" that Respondents acted, or failed to act, with the requisite scienter to support a claim of fraudulent omission – or any other type of market manipulation -- under the FPA and Commission regulations.³²

III. Discussion

A. Brief on Exceptions

21. Complainants dispute the Initial Decision's finding that the FPA's just and reasonable standard is inapplicable to analysis of market manipulation allegations. Complainants assert that Congress granted the Commission authority to prosecute conduct that interferes with well-functioning markets to further the Commission's ability to ensure just and reasonable rates and charges. To that end, Complainants argue that the Initial Decision's finding that the Tariff contains only one pricing limitation, i.e., the \$1,000 per MWh cap, and no "reasonable price" requirement, ignores the market monitoring and mitigation procedures (that explicitly apply to internal capacity suppliers, but not external capacity suppliers such as Respondents) and unreasonably discriminates between internal and external capacity suppliers.³³

22. Moreover, Complainants argue that the special circumstances of the Transition Period demonstrate that the Commission expected Respondents to submit offers that were reasonable, in addition to falling below the price cap. According to Complainants, these circumstances include the lack of a limit on the amount of capacity to be purchased during that period and a fixed price for all capacity suppliers, even if that meant purchasing significantly more capacity than required.

23. Complainants further contend that not requiring reasonable energy offers would vitiate the "must offer" requirement imposed by the market rules on Respondents' capacity-backed energy offers. Arguing that the "must offer" requirement "compels every generating capacity resource to offer its energy every hour of every day in both the

³¹ *Id.* P 115 (citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 (1988)).

³² *Id.*

³³ Complainants Brief on Exceptions at 33.

Day-Ahead and Real-Time energy markets,”³⁴ Complainants contend that, if every capacity supplier followed Respondents’ offer approach, no unmitigated capacity-backed energy would be available except at the price cap, which would render the “must offer” requirement meaningless.

24. Complainants further question the Initial Decision’s finding that Respondents could have increased their export bids in NYISO if ISO-NE had requested their capacity-backed energy offers, thereby satisfying the Tariff requirement that energy associated with ICAP Import Contracts “could actually be delivered.” Complainants maintain that the checkout process itself contradicts the Initial Decision’s finding.³⁵ They contend that while ISO-NE begins its checkout procedure 60 minutes before the hour, capacity importers cannot modify their (NYISO) export bids less than 75 minutes before the hour. Thus, Complainants contend that Respondents’ last chance to increase export bids occurs 35 to 45 minutes before ISO-NE attempts to schedule the corresponding capacity-backed energy.³⁶ They allege that ISO-NE was persistently frustrated with its inability to access Respondents’ capacity-backed energy; that ISO-NE expected different pricing of the export bids; and that ISO-NE’s operators stopped requesting such offers because the energy was “never available.”³⁷

25. Complainants further argue that it is the Initial Decision, not Complainants, that confuses capacity and energy. Referring to Tariff language that specified that “[a]n ICAP Import Contract represents a commitment by the submitting party to offer and supply firm energy to the ISO-NE Control Area,”³⁸ Complainants argue that “Respondents executed their high-offer strategy in the energy (*not* capacity) market and their capacity obligations imposed a must-offer requirement on their energy (*not* capacity) offers.”³⁹

³⁴ *Id.* at 36.

³⁵ The checkout process refers to the procedures relating to clearing the capacity importer’s export bid in the NYISO Hour-Ahead Market and a corresponding energy import supply offer in ISO-NE. Both sides of the transactions must clear to “check out.”

³⁶ Complainants Brief on Exceptions at 48 (quoting May 17 Tr. 995:2-7).

³⁷ *Id.* at 38.

³⁸ *Id.* (quoting Market Rule 1, § III.8.3.7.2).

³⁹ *Id.* at 41.

26. Complainants additionally argue that having legitimate business objectives does not automatically absolve market participants of manipulative conduct.⁴⁰ They contend that the Initial Decision's finding that it was "completely reasonable/economically rational" for Respondents to submit offers that assured the associated energy would not ordinarily be called on is based on the erroneous presumption that capacity during the Transition Period was only a reliability product.⁴¹ Complainants maintain that capacity also enhances competition and, therefore, customers should have benefited from the so-called competitive enhancements that procuring excess capacity was expected to provide, when instead, energy prices were higher than they should have been.

27. Finally, Complainants maintain that Respondents had a duty to disclose to ISO-NE that energy associated with their ICAP import contracts could not, according to Complainants, actually be delivered. Arguing that ISO-NE must know at all times what capacity-backed energy is available to satisfy its load, Complainants aver that "this is why ISO-NE required capacity suppliers to provide notice when their generators were not online."⁴² Complainants allege that a duty to speak arises when there is "a relationship of trust and confidence between parties to a transaction," and that such a relationship existed between ISO-NE and Respondents.⁴³ Thus, Complainants conclude that Respondents were obligated to inform ISO-NE that the only way they could guarantee delivery of their energy was if ISO-NE provided at least 75 minutes advance notice to Respondents. By failing to so inform ISO-NE, according to Complainants, Respondents made a material misrepresentation or material omission.

B. Briefs Opposing Exceptions

28. Enforcement Staff and Respondents generally assert that Complainants' brief on exceptions offers no new arguments that were not already rejected by the Initial Decision. Accordingly, in response to Complainants' continued argument that Respondents' never intended to deliver energy to ISO-NE if called upon, Brookfield states that it instructed its personnel to raise the bids to buy in New York when prices were higher in New England than in New York and during emergency conditions.⁴⁴ Brookfield further avers

⁴⁰ *Id.* at 54.

⁴¹ *Id.* at 55 (quoting Initial Decision, 132 FERC ¶ 63,017 at P 112).

⁴² *Id.* at 52 (citing Ex. CT-002 at 3 and 14, which reference Market Rule 1, § III.8.3.1(c) and *id.*, § III.8.3.7.1(d)).

⁴³ *Id.* at 53 (quoting *Chiarella v. United States*, 445 U.S. 222, 230 (1980)).

⁴⁴ Brookfield Brief Opposing Exceptions at 18-19 (citing witness depositions), 21. Brookfield states that it raised its bids on 234 occasions. *Id.* at 19.

that its “energy-only sales are indicative of an intent of [Brookfield] personnel to deliver energy to ISO-NE when economic to do so.”⁴⁵

29. On this point, Constellation maintains that, when ISO-NE called for delivery of its capacity-backed energy, Constellation “intended to raise its bid in the NYISO market to \$999.70, the highest level, in order to provide the greatest opportunity possible for such bids to be accepted in economic merit.”⁴⁶ Constellation further states that ISO-NE knew of the timing constraints involved in exporting energy from New York and that ISO-NE would have communicated with Constellation and NYISO so that Constellation could take the necessary steps to deliver its capacity-backed energy. Constellation bases this argument on NYISO technical bulletin (TB 096), which reads in part:

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. [⁴⁷]

30. Constellation also refutes Complainants’ arguments regarding the impossibility of delivery due to ISO-NE’s and NYISO’s different scheduling of bids and offers, stating that the argument is only correct with respect to Constellation’s “ability to unilaterally change its bid price . . . and ignores the potential for manual intervention to allow [Constellation’s] NYISO energy bids to be accepted and for the energy to flow.”⁴⁸ Constellation points to the NYISO technical bulletin TB 096 for support, explaining that in certain cases the “NYISO Operator will input the transaction.”⁴⁹

⁴⁵ *Id.* at 40; *see also id.* at 41.

⁴⁶ *Id.* at 49-50 (citation omitted), 53-54.

⁴⁷ *Id.* at 55 (quoting Ex. CON-032 at 1-2 (NYISO TB 096)); *see also 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”); 60-62 (distinguishing June 2006 e-mail that purportedly affirms that ISO-NE informed Constellation that it would not notify in advance of a need for capacity-backed energy).

⁴⁸ *Id.* at 58.

⁴⁹ *Id.* (citing Ex. CON-032 at 2 (NYISO TB 096)).

31. In response to Complainants' continued argument that Respondents' capacity-backed energy offers were subject to a reasonable price requirement, Enforcement Staff and Respondents largely reiterate discussion in the Initial Decision (summarized above) that neither the Tariff nor the FPA imposed such a standard during the partial Transition Period.⁵⁰ Enforcement Staff and Respondents agree that Complainants' assertions on this issue concern the reasonableness of market prices (not Respondents' offers) and are largely aimed at market forces that existed during the partial Transition Period, but do not evidence wrongdoing on the part of Respondents themselves.⁵¹ While noting that an effect on market prices is not relevant to a finding of market manipulation, Enforcement Staff contends that, regardless, Respondents' offer levels did not interfere with ISO-NE's market outcomes, because: (1) their offers did not impede energy dispatch between New York and New England; and (2) Respondents in fact sold significant quantities of energy from NYISO to ISO-NE during the Transition Period, even while making high capacity-backed energy offers due to "natural economic incentives."⁵²

32. With respect to Complainants' assertion that the Tariff's bid mitigation provisions (and, therefore, some type of competitive or reasonable price requirement) should apply by implication to external, as well as internal, capacity suppliers, Enforcement Staff adds that applying the bid mitigation provisions only to internal capacity suppliers is not discriminatory, as Complainants argue. Enforcement Staff states that internal and external capacity suppliers are "not similarly situated with regard to the economic risks they confront in selling to ISO-NE" ⁵³ Enforcement Staff points out that Complainants' own witness testified that external capacity resources face greater economic risks than internal capacity resources, stemming from the seam between ISO-NE and NYISO and a market participant's inability to predict costs in advance of

⁵⁰ Brookfield Brief Opposing Exceptions at 4.

⁵¹ Constellation Brief Opposing Exceptions at 42 (citation omitted). Brookfield Brief Opposing Exceptions at 31-32, 35-36; *see also id.* at 38 (admitting and explaining instances of not raising bids); Constellation Brief Opposing Exceptions at 42-43, 68-70; Shell Brief Opposing Exceptions at 8-9. Brookfield argues that "[k]nowledge that capacity-related energy offers would not be accepted 'often' is not evidence of fraudulent intent, it is just a realistic assessment." Brookfield Brief Opposing Exceptions at 52.

⁵² Enforcement Staff Brief Opposing Exceptions at 20, 21; *see also* Constellation Brief Opposing Exceptions at 39-40.

⁵³ Enforcement Staff Brief Opposing Exceptions at 26.

submitting ISO-NE offers.⁵⁴ Enforcement Staff explains that internal generators can recover their hourly costs by offering in ISO-NE at a level greater than their marginal costs, but external generators cannot know their costs until after the NYISO market clears.⁵⁵

33. Enforcement Staff also argues that Respondents' offers were consistent with their obligation to provide a reliability product. Enforcement Staff argues that Respondents were not further obligated to provide "competitive" energy in every hour, as Complainants argue; otherwise, this reliability product would be changed to an energy supply product.⁵⁶ Enforcement Staff further emphasizes that Respondents' capacity-backed energy offers had value, noting ISO-NE's testimony that capacity "assure[s] that sufficient energy is available at the time of system peak."⁵⁷ As such, this option to call on energy has "the most value when both New England and the neighboring control area are short of capacity."⁵⁸

34. Enforcement Staff and Respondents further reiterate the Initial Decision's finding that the capacity-backed energy offers and placeholder bids at issue were rational responses to risks related to price spread, false dispatch, and de-rating when flowing energy from New York to New England. Enforcement Staff explains that, in any given hour, Respondents could not know until after the fact whether the amounts ISO-NE would pay them for flowing energy would exceed their cost to purchase energy in NYISO.⁵⁹ To emphasize this point, Enforcement Staff points out that Complainants' own witness agreed that such transactions over the NYISO/ISO-NE seam "give[] rise as

⁵⁴ *Id.* (citing Complainants' witness, Mr. Cadwallader's testimony that, "[g]enerally, it's probably easier to predict the operating costs of a unit than trying to predict the clearing price in New York." May 24 Tr. 1337:18 to 1338.9.)

⁵⁵ *Id.* (citing Ex. S-001, Collins Test. at 104:1-12).

⁵⁶ *See* Enforcement Staff Brief Opposing Exceptions at 29-30. Constellation also defines "capacity" as a reliability product, explaining that "a capacity supplier provides ISO-NE the right to call for the delivery of energy from a designated resource when the energy is needed for system reliability." *Id.* (footnote omitted).

⁵⁷ Enforcement Staff Brief Opposing Exceptions at 28 (quoting Ex. CT-007 at 6 (ISO-NE Answer)).

⁵⁸ *Id.* at 29 (quoting Ex. CT-007, Attachment 1 at 9 (ISO-NE Answer, Joint Test. of LaPlante and O'Connor)).

⁵⁹ *Id.* at 32 (citing Ex. S-001(Collins Test. at 101:5-15)).

to the uncertainty of what the actual cost will be.”⁶⁰ According to Enforcement Staff, this economic justification suggests the lack of a fraudulent device, while “[n]o evidence suggests [R]espondents sought to affect the market with their capacity-backed energy offers.”⁶¹

35. Finally, with regard to Complainants’ allegation that Respondents failed to state or misrepresented material information, Enforcement Staff points out that Respondents’ offers and bids were transparent, not concealed,⁶² and that “ISO-NE was aware of the offer levels.”⁶³

C. Commission Determination

36. The Commission affirms the Initial Decision’s determination that Complainants failed to support their allegations of market manipulation against Respondents.⁶⁴ We further agree with the Initial Decision that sufficient record evidence supports finding that Respondents fully 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.⁶⁵ As the Initial Decision also finds, there is a dearth of evidence to the contrary.

⁶⁰ *Id.* (quoting May 24 Tr. 1322:25 to 1323:5).

⁶¹ *See id.* at 34-35.

⁶² Enforcement Staff Brief Opposing Exceptions at 51 (quoting Initial Decision, 132 FERC ¶ 63,017 at P 115).

⁶³ *Id.* at 47 & n.136. “[ISO-NE] likely knew—and certainly should have known”: “ISO New England was the Tariff author/administrator, the New England market operator/administrator, and the counterparty to all of the underlying ICAP import contracts.” *Id.* (quoting Initial Decision, 132 FERC ¶ 63,017 at P 116); *see also id.* at 48 n.137.

⁶⁴ We note that the Initial Decision preliminarily questioned Complainants’ standing in this proceeding, and Complainants’ Brief on Exceptions challenge the Initial Decision on this issue. Even a finding in Complainants’ favor on this point, however, requires them to support the substantive allegations in their complaints—a burden that, for the reasons articulated herein, we find they did not meet.

⁶⁵ Initial Decision, 132 FERC ¶ 63,017 at P 113.

37. We begin by emphasizing that our analysis is governed by section 222 of the FPA and section 1c.2 of the Commission's implementing regulations,⁶⁶ which prohibit market manipulation. While Complainants have asserted throughout this proceeding that the just and reasonable standard set forth in sections 205 and 206 of the FPA⁶⁷ are applicable to this case, they are incorrect. The requisite elements of market manipulation in FPA section 222 and the Commission's regulations assess conduct; the just and reasonable standard in FPA sections 205 and 206 applies to tariff rates. Complainants blur these two discrete standards together by arguing that Respondents engaged in market manipulation, which interfered with the well-functioning and competitiveness of ISO-NE's markets, which in turn, resulted in customers paying unjust and unreasonable rates. Fraud, however, is not measured by whether, in fact, unjust and unreasonable rates resulted. The Commission previously stated in Order No. 670 that allegations of market manipulation may be actionable without showing an effect of the alleged behavior on rates,⁶⁸ and, conversely, as noted in the Clarification Order in this case, a claim that a rate is unjust and unreasonable is not probative of whether market manipulation occurred.⁶⁹ In fact, the Clarification Order specifically excluded from hearing the issue of whether Respondents' alleged behavior affected market prices.⁷⁰

38. Moreover, in the Hearing Order, the Commission found that Complainants erroneously filed their market manipulation claims under section 206 of the FPA, noting that section 206 applies to rate changes for public utility tariffs. As stated in the Hearing Order, Complainants should have submitted their market manipulation allegations pursuant to section 306 of the FPA,⁷¹ which provides for complaints regarding a violation of the FPA,⁷² including, as relevant here, section 222's prohibition against market manipulation. For these reasons, the just and reasonable standard is not applicable to this proceeding, and the Initial Decision correctly rejected Complainants' argument to the contrary.

⁶⁶ See 16 U.S.C. § 824v (2006); 18 C.F.R. § 1c.2(a) (2010).

⁶⁷ 16 U.S.C. §§ 824d, 824e (2006).

⁶⁸ Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 48.

⁶⁹ Clarification Order, 129 FERC ¶ 61,057 at P 22.

⁷⁰ *Id.*

⁷¹ 16 U.S.C. §§ 825e, 825f (2006).

⁷² A complaint alleging a violation of the FPA is distinguishable from a complaint seeking modification of a filed tariff rate.

39. Turning next to the applicable standard governing Complainants' allegations, section 222 of the FPA and section 1c.2 of the Commission's implementing regulations prohibit any entity from, either directly or indirectly and in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission: (1) using or employing any device, scheme, or artifice to defraud; (2) making any untrue statement of a material fact or omitting 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) engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.⁷³ The Commission has explained that there can be no violation of section 1c.2 absent a showing of the requisite scienter,⁷⁴ which may include knowing and intentional or reckless conduct.⁷⁵ Additionally, the Commission has determined that a duty to state a material fact exists where imposed by a Commission-filed tariff, Commission order, rule or regulation. Considering all of these criteria, as stated in Order No. 670, the Commission will act in cases 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 electric energy or transmission of electric energy subject to the jurisdiction of the Commission.⁷⁶

40. Bearing the foregoing criteria in mind, we affirm the Initial Decision's finding that Complainants failed to demonstrate that Respondents engaged in market manipulation, primarily due to an inadequate showing of the requisite scienter. As summarized by the Initial Decision,⁷⁷ Complainants have relied on a mix of the scienter benchmarks, including knowing and intentional conduct, as well as recklessness, in arguing that

⁷³ 18 C.F.R. § 1c.2(a) (2010).

⁷⁴ Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 45.

⁷⁵ *Id.* P 53. An entity may engage in reckless conduct through willful blindness or ignorance of the effect of its actions. *Amaranth Advisor, L.L.C.*, 120 FERC ¶ 61,085, at P 112 (2007).

⁷⁶ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

⁷⁷ Initial Decision, 132 FERC ¶ 63, 017 at P 109.

Respondents consciously designed high-offer “schemes,” by intentionally making capacity-backed energy offers at or near the \$1,000 per MWh price cap, and which were not “reasonable” or based on “market conditions, their costs of procuring and delivering energy, or any other legitimate basis.”⁷⁸ Continuing Complainants’ argument, Respondents submitted these high offers so that ISO-NE would not accept them, and NYISO would not accept the corresponding energy export bids.⁷⁹ According to Complainants, Respondents benefitted by collecting capacity payments, while avoiding both the attendant obligations to deliver capacity-backed energy and the failure-to-deliver penalties. By extension, Complainants argue, this repeated pattern of capacity sales when Respondents knew or should have known the accompanying energy would never in fact be available to New England customers was reckless, because Respondents acted with willful blindness to the effects of their transactions on New England customers, who purportedly paid tens of millions of dollars for capacity that would at best be available in extremely rare circumstances.⁸⁰ For the reasons below, we affirm the Initial Decision’s determination that Complainants’ argument does not demonstrate that Respondents engaged in market manipulation.

41. As an initial matter, we affirm the Initial Decision’s finding that Respondents’ capacity-backed energy offers were not bound—either under the Tariff or the FPA—by a “reasonable price” requirement below the \$1,000 per MWh price cap. Complainants’ argument to the contrary is unpersuasive. It is undisputed that ISO-NE’s Tariff expressly imposed no “reasonable price” requirement,⁸¹ and while Complainants have argued throughout this proceeding 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.⁸² Additionally, Complainants’ argument concerning a reasonable

⁷⁸ Complainants’ Brief on Exceptions at 4-5.

⁷⁹ *Id.*

⁸⁰ *See* Initial Decision, 132 FERC ¶ 63, 017 at P 109.

⁸¹ Indeed, as recognized by the Initial Decision, the fact that ISO-NE eventually proposed, and the Commission accepted, tariff revisions imposing a competitive offer requirement supports the argument that, during the partial Transition Period, Respondents were not bound by any type of “reasonable” price requirement. Initial Decision, 132 FERC ¶ 63,017 at P 101.

⁸² In any case, having reviewed the record as whole, and for the reasons detailed in the Initial Decision, we find no reason to dispute the Initial Decision’s finding that Respondents did not engage in any Tariff violations.

price requirement confuses offers with rates and incorrectly seeks to apply the just and reasonable standard in this market manipulation case.⁸³

42. Moreover, we agree with the Initial Decision that although Respondents did submit 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 Initial Decision's analysis in this regard, which we hereby affirm, is as follows. Respondents were capacity importers, and, as such, the product they offered ISO-NE was capacity, not energy. Capacity is offered as a hedge against some contingency occurring. Relevant here, whether ISO-NE would have called upon Respondents' offers was contingent on whether New England energy supply prices (or demand) would have risen high enough to make it economically attractive (or necessary) to do so; the probability this contingency would occur was relatively low due to the comparatively low energy prices and the surplus capacity conditions prevailing in New England throughout most of the Transition Period.

43. Nevertheless, Respondents' higher-priced capacity offers had value; Complainants' allegations incorrectly presume that the offers had none. Complainants' own witness conceded that ISO-NE could require capacity-backed energy at \$999/MWh under certain conditions, and that the capacity-backed energy then would have value at that price.⁸⁴ That these circumstances did not arise due to New England's excess capacity market does not alter the potential value of Respondents' offers for reliability purposes. We agree with the Initial Decision that, in the context of the New England market at the time, it was legitimate—and does not alone evidence recklessness or intent to deceive—for Respondents, in business as capacity importers, to have purposefully offered their capacity-backed energy to ISO-NE in a manner which provided reliability but assured the associated energy would not ordinarily be called on.⁸⁵

⁸³ For the same reason, we disagree that the Tariff's bid mitigation provisions that explicitly bound internal capacity resources should have also implicitly bound Respondents, as external capacity resources, to make "reasonable" or competitive offers; failing to bind both resources, Complainants have argued, is unduly discriminatory and counter to ensuring just and reasonable rates. Again, the Tariff bid mitigation provisions did not explicitly apply to Respondents, and relying on the just and reasonable standard in the FPA confuses Respondents' offers with tariff rates.

⁸⁴ See Initial Decision, 132 FERC ¶ 63,017 at P 112 n.131 (citing May 25 Tr. 1376:3-16); see also Enforcement Staff Brief Opposing Exceptions at 31.

⁸⁵ Initial Decision, 132 FERC ¶ 63,017 at P 112.

44. Furthermore, as described in the Initial Decision, the record demonstrates that Respondents faced various economic risks, and their capacity-backed energy offers were designed to provide reliability to ISO-NE while minimizing their own risks. For example, Respondents faced price spread risk when flowing energy between New York and New England. The “seam” between NYISO and ISO-NE compelled Respondents to absorb any hourly price spread between the two systems and markets. Moreover, a wide positive price spread between NYISO and ISO-NE in a given hour could largely eliminate an external capacity supplier’s incremental monthly capacity sales revenues.⁸⁶ As stated in the Initial Decision, the record shows 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.⁸⁷ On this point, Constellation 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.”⁸⁸ We agree with the Initial Decision and Respondents’ arguments that limiting such risk was “a reasonable approach,” and a “hedge to preserve profitability,”⁸⁹ given the conditions and pricing incentives existing in ISO-NE’s market at the time.⁹⁰ Indeed, Complainants’ own witness supports this conclusion: “A rational actor would attempt to minimize the risk and uncertainty while trying to take advantage of those spreads.”⁹¹

⁸⁶ Shell explains that energy-only sales could be managed hourly in response to price fluctuations, whereas energy offers associated with capacity imports from NYISO (i.e., capacity-backed energy offers) were not as flexible: such offers “had to be committed monthly, scheduled well in advance of potential deliveries, bid and offered in every hour of the commitment period, and be deliverable when and if scheduled.” Shell Brief Opposing Exceptions at 15.

⁸⁷ Initial Decision, 132 FERC ¶ 63,017 at P 113; *see also* Constellation Brief Opposing Exceptions at 71-72.

⁸⁸ Constellation Brief Opposing Exceptions at 50-51.

⁸⁹ *Id.* at 74, 75; Brookfield Brief Opposing Exceptions at 11-12; *see also* Shell Brief Opposing Exceptions at 15. Enforcement Staff and Brookfield also aver that this strategy avoids false dispatch, de-rating, and failure-to-deliver penalties. *See* Enforcement Staff Brief Opposing Exceptions at 38, 39, 41; Brookfield Brief Opposing Exceptions at 17 & n.54, 18.

⁹⁰ Constellation Brief Opposing Exceptions at 74.

⁹¹ Brookfield Brief Opposing Exceptions at 12 & n.26.

45. Moreover, as noted by Enforcement Staff, Respondents did not create the price spread risk their capacity-backed energy offers sought to minimize.⁹² The risk was a natural outgrowth of the market design and the need to clear two organized electric markets. Respondents' high-priced offers were geared toward minimizing economic risk.⁹³

46. The record also supports that Respondents faced various risks associated with transaction de-ratings, false dispatch, and failure-to-deliver penalties, and that Respondents submitted their corresponding New York energy export bids at negative \$999.70 to serve as "placeholders," in an effort to minimize these risks.⁹⁴ Like the Initial Decision, we do not interpret the Tariff requirement that capacity importers "submit [] Supply Offers, in both the [ISO-NE] and [NYISO] external control area in such a manner that the Energy associated with the ICAP Import Contract could actually be delivered"⁹⁵ as requiring Respondents to make New York energy export bids at prevailing NYISO energy market prices, because, as Complainants argue, such bids were the only way Respondents could have assured their capacity-backed energy offers to ISO-NE could actually be delivered if called upon. Complainants' argument overlooks the difference between "capacity(-backed)" and "energy(-only)" products.⁹⁶ We agree with the Initial Decision that throughout the Transition Period ISO-NE's market design incented Respondents to use energy-only transactions to sell energy, while reserving capacity-backed energy offers for reliability. Energy-only offers, not capacity-backed energy offers, were the appropriate vehicle for making any type of competitive energy supply offers to ISO-NE.⁹⁷ Complainants' argument that Respondents had an obligation to peg their ISO-NE capacity-backed energy offers or their corresponding New York energy

⁹² Enforcement Staff Brief Opposing Exceptions at 35.

⁹³ *See id.* at 47-49.

⁹⁴ *See, e.g., id.* at 39.

⁹⁵ ISO-NE Tariff § III.8.3.7.2.2(e).

⁹⁶ *See* Shell Brief Opposing Exceptions at 15; Brookfield Brief Opposing Exceptions at 36. "Requiring that the two products be priced the same would be completely irrational and uneconomical because of the potential price spread risk" Shell Brief Opposing Exceptions at 16.

⁹⁷ *See* Enforcement Staff Brief Opposing Exceptions at 29.

export bids to prevailing NYISO energy prices “effectively would have transmuted [R]espondents’ capacity offers [into] energy offers.”⁹⁸

47. Furthermore, the record reveals that Respondents’ approach in the NYISO market was intended to avoid imposing costs on other NYISO customers resulting from false dispatch or de-rating.⁹⁹ As Constellation explains, in New York, if a bid is accepted in merit but New England does not need the energy, the export transaction would look like load to NYISO, which would cause NYISO to commit additional generation resources to meet that load. Consequently, if the power does not flow, the associated costs are assessed to load in NYISO. Respondents’ approach was an attempt to avoid that result.

48. Importantly, the Initial Decision finds sufficient record evidence that Respondents fully intended to deliver their capacity if called on. For example, as evidence of Respondents’ intent to engage in capacity-backed energy transactions when economically reasonable—or when such transactions were principally reliability-related, Brookfield instructed its personnel to raise the bids to buy in New York when prices were higher in New England than in New York, as well as during emergency conditions.¹⁰⁰ Similarly, Constellation “intended to raise its bid in the NYISO market to \$999.70, the highest level, in order to provide the greatest opportunity possible for such bids to be accepted in economic merit.”¹⁰¹

49. In an attempt to refute evidence that Respondents intended to raise their bids in the NYISO market if necessary, Complainants argue that the scheduling procedures in NYISO and ISO-NE make Brookfield’s and Constellation’s strategies unworkable due to the different closing times for each market in the checkout process.¹⁰² Complainants’ contention is correct, only with respect to a Respondent’s ability to unilaterally change its

⁹⁸ Initial Decision, 132 FERC ¶ 63,017 at P 104.

⁹⁹ See Constellation Brief Opposing Exceptions at 52-53; see also Brookfield Brief Opposing Exceptions at 17-18.

¹⁰⁰ Brookfield Brief Opposing Exceptions at 18-19 (citing witness depositions), 21. Brookfield states that it raised its bids on 234 occasions. *Id.* at 19.

¹⁰¹ Constellation Brief Opposing Exceptions at 49-50 (citation omitted), 53-54.

¹⁰² See *supra* P 24 & n.33. Specifically, Complainants point out that the NYISO market closes approximately half an hour prior to the ISO-NE market, so, as a practical matter, Respondents’ would not have had a chance to raise their bids in the NYISO market if ISO-NE called upon their capacity-backed energy offers.

bid price. Their argument ignores the potential for manual intervention to allow the Respondent's NYISO energy bids to be accepted and for the energy to flow.¹⁰³

50. Constellation further submits evidence, as noted above, that ISO-NE knew of the timing constraints involved in exporting energy from New York to New England and, consequently, that ISO-NE would be in communication with Constellation and NYISO so that Constellation could take the necessary steps to deliver its capacity-backed energy.¹⁰⁴ Constellation cites a NYISO technical bulletin (TB 096), which reads in part:

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. [¹⁰⁵]

51. Based upon the foregoing, we affirm the Initial Decision's finding of persuasive evidentiary support that Respondents could and would have raised their bids in NYISO's market if ISO-NE had called upon their capacity-backed energy offers. Complainants have not demonstrated that, as a practical matter, Respondents could not have timely raised their bids. Accordingly, Complainants' argument that Respondents submitted capacity-backed energy offers into ISO-NE knowing they could not fulfill them is unpersuasive.

52. Having found adequate record evidence that Respondents purposefully, but legitimately, offered their capacity-backed energy to ISO-NE at or near the price cap in consideration of various risks and could and would have delivered on those offers if called upon, the Initial Decision found Complainants did not support their allegations of

¹⁰³ Constellation Brief Opposing Exceptions at 58. Constellation points to the NYISO technical bulletin TB 096 for support, explaining that in certain cases the "NYISO Operator will input the transaction." *Id.* (citing Ex. CON-032 at 2 (NYISO TB 096)).

¹⁰⁴ *Id.* at 55; *see also* Shell Brief Opposing Exceptions at 6.

¹⁰⁵ Constellation Brief Opposing Exceptions at 55 (quoting Ex. CON-032 at 1-2 (NYISO TB 096)); *see also id.* at 57 (discussing coordination agreement between ISOs); *see also id.* at 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"); 60-62 (distinguishing June 2006 e-mail that purportedly affirms that ISO-NE informed Constellation that it would not notify in advance of a need for capacity-backed energy).

market manipulation, and, most specifically, did not show the requisite scienter.¹⁰⁶ For the reasons set forth above, we agree.

The Commission orders:

The Initial Decision is hereby affirmed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁰⁶ Initial Decision, 132 FERC ¶ 63,017 at P 113.