

120 FERC ¶ 61,281
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

DC Energy, LLC

v.

H.Q. Energy Services (U.S.) Inc.

Régie de l'énergie
DOSSIER: R-3669-2008 Phase 2
DÉPOSÉE EN AUDIENCE
Date: 7/02/2008
Pièces n°: C.6.75 EB7

Docket No. EL07-67-000

ORDER OF INVESTIGATION

(Issued September 26, 2007)

1. On June 11, 2007, as amended on June 22, 2007, DC Energy, LLC (DC Energy) filed a complaint against H.Q. Energy Services (U.S.), Inc. (H.Q. Energy), alleging that H.Q. Energy manipulated the New York Independent System Operator, Inc. (NYISO) energy and Transmission Congestion Credit (TCC) markets. For the reasons discussed below, the Commission will initiate an investigation, to be conducted by the Office of Enforcement, under 18 C.F.R. § 1b.5 (2007).

I. Background

2. DC Energy states that it operates under a Commission-accepted market-based rate tariff and provides financial liquidity and hedging products in the electricity markets administered by the NYISO, including the TCC market.

3. H.Q. Energy states that it is the marketing arm in the United States of Hydro-Québec, a large hydro electric generator located in Québec, Canada and owned by the government of Québec. It states that Hydro-Québec buys and sells energy and sells capacity into New York and purchases transmission services between the Chateauguay substation in Québec, Canada (Zone M) and the Marcy substation in New York (Marcy).

II. The Complaint

4. DC Energy contends that H.Q. Energy, through its control of the Zone M to Marcy pathway, designed and implemented an integrated plan to manipulate energy prices, while shielding itself from competition, and profiting unjustly from congestion costs.

According to DC Energy, H.Q. Energy initially acted so as to decrease congestion prices on the Zone M to Marcy pathway, and then, after purchasing the maximum amount of inexpensive TCCs, bid its energy into the Zone M day-ahead market at a price much lower than the Marcy price, thereby increasing congestion and maximizing return on its TCCs. DC Energy asserts that, since May 1, 2007, H.Q. Energy has reaped a 9,870 percent return on its TCC position at the start of the second month of this investment and that it has caused DC Energy financial harm equal to approximately \$2 million for the period May 1, 2007 through June 9, 2007.¹

5. DC Energy contends that, in its totality, this behavior not only harms individual market participants but also impairs the TCC market, means H.Q. Energy does not have to compete at the interface, and results in H.Q. Energy setting the Zone M price during many hours. DC Energy asserts, therefore, that H.Q. Energy has been, and currently is, engaging in a course of business that operates as a fraud on NYISO market participants in violation of the Commission's anti-market manipulation rule, 18 C.F.R. § 1c.2 (2007), and Order No. 670.² DC Energy includes the verification of its Managing Director, Dr. Andrew J. Stevens. In its amended complaint, DC Energy asserts that it discovered new relevant facts since filing its complaint and includes those alleged facts in narrative form and appendices with the verification of its Managing Director, Matthew Tate. DC Energy states that it has discovered evidence it believes demonstrates that H.Q. Energy's course of business has impeded competition for sales of energy into the NYISO energy market by impairing certain power supply arrangements between an H.Q. Energy affiliate and competitive suppliers in NYISO.

6. DC Energy requests relief in the form of disgorgement of profits, refunds for overcharges, penalties, and suspension of H.Q. Energy's participation at the Zone M node, with compensation to be applied first to those who were directly harmed. In the alternative, DC Energy requests that the Commission rescind its Marcy to Zone M TCCs effective May 1, 2007. DC Energy also requests that the Commission grant any other relief it deems appropriate including, but not limited to, instituting an investigation into H.Q. Energy's conduct.

¹ DC Energy states that, in NYISO's spring 2007 auction, DC Energy acquired TCCs between Marcy and Zone M, in the direction of Zone M, entitling it to receive congestion costs when congestion exists in the direction of Zone M but obligating it to make congestion payments when congestion exists in the direction of Marcy. In contrast, H.Q. Energy states that it acquired TCCs in the direction of Marcy, entitling it to receive congestion payments when congestion exists in the direction of Marcy.

² *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. and Regs. ¶ 31,202, *reh'g denied*, 114 FERC ¶ 61,300 (2006).

III. Notice of Filing and Responsive Pleadings

7. Notice of DC Energy's June 11, 2007 filing was published in the *Federal Register*, 72 Fed. Reg. 33,752 (2007), with interventions and protests due on or before June 2, 2007. Notice of DC Energy's June 22, 2007 amendment was published in the *Federal Register*, 72 Fed. Reg. 36,696 (2007), with interventions and protests due on or before July 12, 2007. On July 12, 2007, in response to a motion for extension of time by the NYISO, the due date for responses was extended to July 23, 2007.

8. The following parties filed timely motions to intervene: Powerex Corporation (Powerex); NRG Energy, Incorporated; Mirant Corporation; Niagara Mohawk Power Corporation (Niagara Mohawk); Keyspan-Ravenswood, LLC; Coral Power, LLC; Interconnection Rights Holders Management Committee; New York Transmission Owners;³ Ontario Power Generation Inc.; NYISO; Brookfield Power, Inc.; TransCanada Power Marketing Ltd.; PSEG Energy Resources & Trade, LLC; and Strategic Energy, LLC. The New York Public Service Commission filed a notice of intervention. Sempra Energy Trading Corporation (Sempra Energy) filed a motion to intervene out-of-time.

9. On July 23, 2007, H.Q. Energy filed an answer in opposition to the complaint, in both public redacted form and non-public unredacted form, requesting summary denial of the complaint. H.Q. Energy included a motion for approval of a form of protective agreement for parties to use to obtain non-public copies of its answer. On July 23, 2007, the New York Transmission Owners, NYISO, and Niagara Mohawk filed comments. On July 27, 2007, DC Energy filed an answer to H.Q. Energy's motion for approval of protective agreement. On July 30, 2007, H.Q. Energy filed a revised protective agreement. On August 16, 2007, DC Energy filed an answer to H.Q. Energy's July 30, 2007 answer. On August 15, 2007, Powerex filed a motion to compel H.Q. Energy to provide its unredacted answer and accompanying workpapers. On August 22, 2007, H.Q. Energy filed an answer to the motion. On August 24, 2007, DC Energy filed a response to H.Q. Energy's August 22, 2007 answer. On August 31, 2007, H.Q. Energy filed an answer to DC Energy's August 16, 2007 answer.

A. H.Q. Energy's Answer and Subsequent Answers

10. In its answer, H.Q. Energy states that it has followed all market rules, including the Commission's rule against market manipulation, and that its commercial conduct reflects legitimate hedging activity. H.Q. Energy states that its market strategy evolved

³ New York Transmission Owners refers to Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation, individually and collectively.

with changing market conditions, including the addition of two new plants by late 2005. H.Q. Energy further asserts that DC Energy knew or should have known that DC Energy was taking a unique and extraordinarily risky trading position in essentially betting that there would not be significant congestion on imports into New York, a position for which it received \$114,000 in up-front payments.

11. H.Q. Energy contends that DC Energy's allegations fail to state a claim of market manipulation. That claim, according to H.Q. Energy, rests on two assertions: (1) H.Q. Energy has market power at Zone M and can dictate the clearing price there at will; and (2) H.Q. Energy used its market power to manipulate the value of TCCs. H.Q. Energy disputes that it has exercised market power, but argues that, even if it had, simply contending that it has typically set the Zone M clearing price does not establish market manipulation. Further, it contends that DC Energy fails to show any fraud or artifice associated with H.Q. Energy's acquisition of TCCs, asserting that H.Q. Energy's acquisitions of TCCs in the fall 2006 auctions and the spring 2007 auctions were public information and that DC Energy could reasonably be expected to know that market participants, and H.Q. Energy in particular, were accumulating a large TCC position in the opposite direction from DC Energy's position. In support of its contentions, H.Q. Energy presents, among other things, the affidavit of Dr. Roy Shanker, who concludes, *inter alia*, that H.Q. Energy's behavior was consistent with NYISO market rules, and both economically rational and predictable.

12. In its answer, DC Energy responds, *inter alia*, with the affidavit of Dr. Peter Cramton, who concludes, *inter alia*, that the alleged business justification offered by H.Q. Energy strains economic rationality and is not plausible. DC Energy asserts that H.Q. Energy's answer actually raises more issues of fact and that formal discovery, pursuant to a protective order, and hearing procedures are required. In its answer to DC Energy's answer, H.Q. Energy replies, *inter alia*, with supplemental affidavits, including one from Dr. Shanker.

B. Comments

13. NYISO states that it found no violations of any NYISO tariff provision or market rules; nor did NYISO identify any Market Mitigation Measures that were triggered by H.Q. Energy's actions. NYISO asserts that DC Energy knowingly accepted the risk, the financial harm was both predictable and preventable, and granting DC Energy's request would open the door for other entities that take a risk and suffer a loss to come to the Commission for relief. NYISO also states that DC Energy's amended complaint suggests that H.Q. Energy's efforts to recover the Marcy price for its power, including H.Q. Energy's acquisition of TCCs to achieve this purpose, are somehow inappropriate, improper or manipulative, but NYISO states that NYISO has found no basis to support DC Energy's claim.

14. NYISO states that the Hydro-Québec affiliated companies have market power at Zone M, but states that as a whole the New York Control Area gains both reliability and economic benefits from the participation of the Hydro-Québec companies in New York markets. NYISO states that H.Q. Energy received no more than the Marcy Locational Based Marginal Price for its imports in the day-ahead market, and that, since H.Q. Energy acquired a full TCC hedge against congestion, NYISO has accepted more imports from Zone M at prices below or equal to the Marcy price. NYISO asserts that these additional purchases from Québec displace more expensive options and reduce the price of serving New York loads.

15. In their respective comments, the New York Transmission Owners and Niagara Mohawk object to DC Energy's request that, as an alternative form of relief, the Commission rescind the TCCs that DC Energy purchased with a point of injection at the Marcy node and a point of withdrawal at Zone M. The New York Transmission Owners and Niagara Mohawk assert that this would harm them because it would create shortfalls in congestion rents, which they, as the parties responsible for fully funding TCCs, would have to make up. They argue that DC Energy should not be allowed to seek relief at their expense; rather, any damages should be collected solely from H.Q. Energy.

IV. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214(d) (2007), the Commission will grant Sempra Energy's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. The Commission will otherwise defer action on the various pleadings filed in this proceeding until after the conclusion of the investigation initiated herein.

B. Commission Determination

17. Based on the pleadings alone, the Commission does not have sufficient information to grant or deny the complaint. Accordingly, the Commission finds that it should gather additional facts through a non-public investigation into the allegations raised by DC Energy under 18 C.F.R. § 1c.2 (2007), as explained in Order No. 670. The Commission will therefore institute an investigation under 18 C.F.R. § 1b.5 (2007). The Commission directs the Office of Enforcement to conduct the investigation. At the conclusion of the investigation, the Office of Enforcement is directed to report its findings to the Commission. Following that report, the Commission expects to issue a further order on the complaint.

The Commission orders:

The Commission hereby initiates an investigation under 18 C.F.R. § 1b.5 (2007), to be conducted by the Office of Enforcement, into the allegations raised by DC Energy in its complaint.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

