HinckleyAllenSnyderLLP
ATTORNEYS AT LAW

50 Kennedy Plaza, Suite 1500
Providence, RI 02903-2319
TEL: 401.274.2000
FAX: 401.277.9600
www.haslaw.com

Brent R. Canning
bcanning@haslaw.com

September 8, 2008

Via Electronic and First Class Mail

Luly Massaro, Clerk
Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: The Narragansett Electric Company
v.
Constellation Energy Commodities Group, Inc.
C.A. No. 06-404S3818

Dear Ms. Massaro:

Please accept for filing the following documents:

1. National Grid's Request for Protective Treatment of Confidential Information; and

2. Redacted copies of the pre-filed testimony of Ronald T. Gerwatowski and supporting exhibits.

Nine copies will arrive by regular mail.

Pursuant to PUC Rule 1.2(g)(3), I will file an original, unredacted version of Mr. Gerwatowski's testimony and exhibits under seal by regular mail.

Thank you for your attention to this matter.

Very truly yours,

Brent R. Canning
Enclosures

cc: Service List

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

Petition and Request of the Narragansett Electric Company d/b/a National Grid	:	Docket No. 3969

THE NARRAGANSETT ELECTRIC COMPANY d/b/a NATIONAL GRID'S ("NATIONAL GRID") REQUEST FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION

I. INTRODUCTION

Pursuant to Rules 1.2 and 1.5 of the PUC Rules of Practice and Procedure, National Grid requests that the Commission provide confidential treatment to portions of the Direct Testimony of Ronald T. Gerwatowski and the supporting exhibits, which are being submitted contemporaneously, and make a finding that these portions are exempt from the mandatory disclosure requirements of the Access to Public Records Act. See R.I. Gen. Laws § 38-2-1 et. seq. National Grid also hereby requests that, pending entry of that finding, the Commission preliminary grant National Grid's request for confidential treatment pursuant to Rule 1.2(g)(2).

II. FACTUAL BACKGROUND

National Grid initiated this proceeding by filing a Fuel Adjustment Factor Tariff Filing (the "Petition") with the Rhode Island Public Utilities Commission (the "Commission"). The Petition sought to establish a fuel adjustment factor ("FAF") to be applied on a conditional basis to two Wholesale Standard Offer Supply Agreements ("WSOSAs") that National Grid has with Constellation Energy Commodities Group ("Constellation").

After filing the Petition, National Grid reached a conditional settlement with Constellation and the Division of Public Utilities and Carriers (the "Division") that would resolve this Petition and three related pieces of litigation pending between National Grid and Constellation. Accordingly, National Grid filed with the Commission a request to approve the settlement, where it described the settlement terms and the history of the underlying litigation.

In support of its request for approval of the settlement, National Grid has submitted with this Motion the direct, pre-filed testimony of Ronald T. Gerwatowski, which includes several exhibits. (One copy of the original, un-redacted testimony is being submitted and nine additional redacted versions are also being filed pursuant to Rule 1.2(g)(3) of the PUC Rules.)

Mr. Gerwatowski's testimony discusses National Grid's litigation strategy and risk assessment and it assesses evidentiary and procedural legal issues. It also provides settlement considerations and analysis. These portions of the testimony are highly confidential and sensitive and if made public it would cause substantial harm to the position of National Grid in the pending litigations, which would affect the prices paid by National Grid's customers. The contracts between National Grid and Constellation also contain highly sensitive commercial and financial information that should be given confidential treatment.

Because of the highly sensitive nature of these portions of Mr. Gerwatowski's testimony, National Grid now seeks confidential treatment and a finding by the Commission that the highlighted portions of Mr. Gerwatowski's testimony are exempt

from the disclosure provisions of the Rhode Island Access to Public Records Act. R.I. Gen. Laws § 38-2-1 et seq.

III. ARGUMENT

The Commission's Rule 1.2(g) provides that access to public records shall be granted in accordance with the Access to Public Records Act ("APRA"). See R.I. Gen. Laws § 38-2-1 et. seq. Under APRA, all documents and materials submitted in connection with the transaction of official business by an agency are deemed to be a "public record," unless the information contained in such documents and materials falls within one of the exceptions specifically identified in R.I. Gen. Laws § 38-2-2(4). Therefore, to the extent that information provided to the Commission falls within one of the designated exceptions to APRA, the Commission has the authority under the terms of APRA to deem such information to be confidential and to protect that information from public disclosure.

In that regard, R.I. Gen. Laws § 38-2-2(4)(i)(B) provides that the following types of records shall not be deemed public:

> Trade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature.

The Rhode Island Supreme Court has held that this confidential information exemption applies where disclosure of information would likely be either (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. Providence Journal Company v. Convention Center Authority, 774 A.2d 40 (R.I. 2001).

The first prong of that test is satisfied when information is voluntarily provided to the governmental agency and that information is "of a kind that customarily would not be released to the public by the person from whom it was obtained." Id. at 774 A.2d at 47. In the instant case, it is clear that National Grid is voluntarily producing pre-filed testimony to the Commission. It contains highly confidential litigation strategy and settlement analysis of a type that a party would not customarily release to the public. Thus, the testimony is protected under the first prong.

With respect to the second prong of the confidential information test, it is clear that the disclosure of National Grid's litigation strategy and settlement analysis would substantially affect National Grid's competitive position in the pending litigation with Constellation. Thus, the pre-filed testimony is protected under both prongs of the analysis under § 38-2-2(4)(i)(B) and the Commission should so find.

In addition, the Court has held that agencies making determinations as to the disclosure of information under APRA may apply the balancing test established under Providence Journal v. Kane, 577 A.2d 661 (R.I. 1990). Under that balancing test, the Commission may protect information from public disclosure if the benefit of such protection outweighs the public interest inherent in disclosure of information pending before regulatory agencies. In our case, for the reasons described above, any public interest in the redacted portions of the pre-filed testimony does not outweigh National Grid's interest and the interest of its customers, in keeping the information confidential.

Finally, the highlighted portions of Mr. Gerwatowski's pre-filed testimony are exempt under § 38-2-2(4)(i)(E) of APRA, which protects from public disclosure "[a]ny records which would not be available by law or rule of court to an opposing party in

litigation." Here, the pre-filed testimony relate to settlement negotiations in ongoing litigation and, as the settlement agreement itself specifically recognizes, these negotiations are protected by Rule 408 of the Federal Rules of Evidence, which applies to compromises or attempts to compromise claims.

IV. CONCLUSION

The highlighted portions of the pre-filed testimony of Ronald T. Gerwatowski and the contracts between National Grid and Constellation should be exempt from disclosure under APRA and should be granted confidential treatment. Accordingly, National Grid respectfully requests that the Commission grant the instant request.

NARRAGANESTT ELECTRIC
COMPANY d/b/a NATIONAL GRID
By its Attorneys,

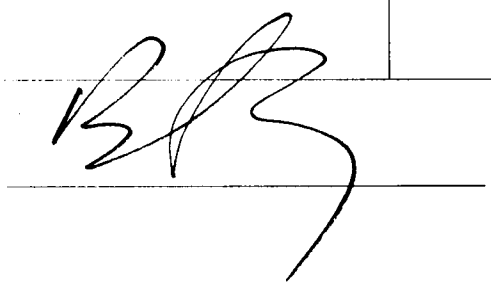
Gerald J. Petros (#2931)
Hinckley, Allen & Snyder LLP
50 Kennedy Plaza, Suite 1500
Providence, RI 02903
(401) 274-2000
(401) 277-9600 (fax)

Dated: September 8, 2008

CERTIFICATION

I hereby certify that I mailed a copy of the within Motion to Approve Settlement Agreement to counsel of record, as set forth below, on August __, 2008.

Name/Address	E-mail Distribution	Phone/FAX
Thomas R. Teehan, Esq. National Grid. 280 Melrose St. Providence, RI 02907	Thomas.teehan@us.ngrid.com Joanne.scanlon@us.ngrid.com Ronald.gerwatowski@us.ngrid.com	401-784-7667 401-784-4321
Gerald Petros, Esq. Hinckley, Allen & Snyder 50 Kennedy Plaza, Suite 1500 Providence RI 02903	gpetros@haslaw.com	401-274-2000
Paul Roberti, Esq. (for Division) Dept. of Attorney General 150 South Main St. Providence, RI 02903	Proberti@riag.ri.gov Steve.scialabba@ripuc.state.ri.us Mtobin@riag.ri.gov Kzelano@riag.ri.gov	401-222-2424 401-222-3016
Original & nine (9) copies file w/: Luly E. Massaro, Commission Clerk Public Utilities Commission 89 Jefferson Blvd. Warwick RI 02889	Lmassaro@puc.state.ri.us Plucarelli@puc.state.ri.us Anault@puc.state.ri.us	401-780-2107 401-941-1691
Kenneth W. Irvin, Esq. McDermott, Will & Emery LLP 600 13th Street, NW Washington, DC 20005	kirvin@mwe.com	202-756-8116 202-756-8087
Charles Henderson, Esq. Stacey Nakasian, Esq. Duffy Sweeney & Scott, Ltd. One Turks Head Plaza, Suite 1200 Providence, RI 02903	chenderson@duffysweeney.com snakasian@duffysweeney.com	401-455-0700



DIRECT TESTIMONY

OF

RONALD T. GERWATOWSKI

Table of Contents

EXHIBITS

Exhibit 1 – 36% Wholesale Standard Offer Service Agreement – December 21, 1998

Exhibit 2 – 20% Wholesale Standard Offer Service Agreement – December 21, 1998

Exhibit 3 – April 14, 2008 Complaint (FAF Action)

Exhibit 4 – March 26, 2008 Memorandum and Order (Saylor, J.) (TransCanada Litigation)

Exhibit 5 – Power Supply Agreement - October 5, 2001

Exhibit 6 – Power Supply Agreement - August 23, 2002 and amended August 23, 2002

Exhibit 7 – March 1, 2007 FERC Decision

Exhibit 8 – December 10, 2007 Opinion and Order (Smith, J.) (FCM Action)

I INTRODUCTION

Q. PLEASE STATE YOUR FULL NAME AND BUSINESS ADDRESS.

A. My name is Ronald T. Gerwatowski and my business address is 201 Jones Road, Waltham, Massachusetts.

Q. PLEASE STATE YOUR POSITION.

A. I am Deputy General Counsel for National Grid USA Service Company. In this capacity I have responsibility for regulatory matters in the legal department relating to each of the jurisdictions in which the National Grid companies do business as regulated entities. These jurisdictions include Rhode Island, Massachusetts, New Hampshire, New York, and the Federal Energy Regulatory Commission.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND.

A. I graduated from Westfield State College in 1978. I also attended the University of Puerto Rico for one year in 1976-77. I received a Masters of Education degree from Fitchburg State College in 1982. I then went to law school and received a Juris Doctor, magna cum laude, from Boston College Law School in 1985, where I served on the Law Review.

Q. PLEASE DESCRIBE YOUR PROFESSIONAL EXPERIENCE.

A. Before going to law school, I was a public school teacher in the Springfield, Massachusetts school system. After graduating from law school, I was an associate at the

Boston law firm of Testa, Hurwitz & Thibealt in 1985 and 1986. I left the firm and joined the legal department of New England Electric System ("NEES") in 1987, a predecessor to National Grid USA. In 1990, I was regulatory counsel for The Narragansett Electric Company, where I practiced before the Rhode Island Public Utilities Commission ("Commission") until mid-1994. At that time, I returned to the corporate headquarters for NEES and worked in the legal department on fuel-related regulatory matters pertaining to the generation plants that were owned by NEES at the time. In 1998, after industry restructuring in Rhode Island, I returned to Narragansett as General Counsel and continued in that position until the spring of 2002. I then became General Counsel of Niagara Mohawk Power Corporation in Syracuse, New York, after National Grid USA acquired Niagara Mohawk. I served in that capacity until May 1, 2005, when I took the position of Vice President of Distribution Regulatory Services in New England. As of December 1, 2007, I assumed my current position back in the legal department.

Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE COMMISSION?

A. Yes.

II. PURPOSE OF THE TESTIMONY

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to explain why it is in the best interests of our customers for the Commission to approve the proposed settlement agreement entered into among The Narragansett Electric Company d/b/a National Grid ("National Grid" or

"Company"), Constellation Energy Commodities Group, Inc. ("Constellation"), and the Rhode Island Division of Public Utilities and Carriers ("Division"). If the settlement agreement is approved, it will resolve this proceeding (Commission Docket No. 3969) and three related pieces of litigation that are pending in federal court in Rhode Island and Massachusetts: The Narragansett Electric Company v. Constellation Energy Commodities, Inc., (C.A. No. 06-404) (the "FCM Action"); Constellation Energy Commodities, Inc. v. The Narragansett Electric Company, (C.A. No. 08–40068) (the "FAF Action") and Constellation Energy Commodities, Inc. v. The Narragansett Electric Company, (Appeal No. 08-1080) (the "First Circuit Appeal") (collectively, the "Civil Actions").

As more fully described below, the settlement serves the best interests of National Grid's customers by settling claims that could result in significant costs to National Grid's customers in Rhode Island if the Company and the Division are not successful in defending against the claims of Constellation. A copy of the settlement agreement was previously filed with the Commission in connection with National Grid's request for its approval.

III. THE FAF ACTION

Q. CAN YOU PLEASE PROVIDE SOME BACKGROUND REGARDING THE CIVIL ACTIONS?

A. Yes. First let me describe the FAF Action pending in the U.S. District Court for the District of Massachusetts.

The FAF Action is a dispute about whether National Grid owes Constellation, a wholesale supplier of electricity, fuel adjustment factor ("FAF") payments under two

Wholesale Standard Offer Supply Agreements ("WSOSAs") that were executed on December 21, 1998 and amended on January 27, 2003. Copies of the WSOSAs are attached as **Exhibit 1** and **Exhibit 2** to my testimony. The WSOSAs are the agreements under which Constellation (as successor by name change to Constellation Power Source, Inc.) delivers Wholesale Standard Offer Service to National Grid (as successor to Blackstone Valley Electric Company ("Blackstone") and Newport Electric Company ("Newport")). In the WSOSAs, Constellation is obligated to provide Standard Offer Service through December 31, 2009.

Constellation filed an action in federal court in Worcester, Massachusetts claiming that it is owed FAF payments. Constellation claims that National Grid breached the WSOSAs and the implied covenant of good faith and fair dealing by not seeking an FAF in its rate filings with the Commission and by not making FAF payments to Constellation. [PRIVILEGED INFORMATION - REDACTED] A copy of the complaint is provided as **Exhibit 3**.

Q. IS CONSTELLATION'S CLAIM SIMILAR TO THE CLAIM ADVANCED BY TRANSCANADA POWER MARKETING LTD. IN PUC DOCKET NO. 3959?

A. Yes, it is similar. As the Commission knows, TransCanada, another wholesale supplier of electricity, filed a civil action against National Grid in federal court in Worcester, Massachusetts and claimed that National Grid was liable for FAF payments. In that case, the court agreed with TransCanada and entered a decision on March 26, 2008 that found that National Grid had the obligation to make FAF payments after 2004. A copy of that

decision is provided as **Exhibit 4**. After the decision, National Grid entered into a settlement agreement with TransCanada, which was approved by the Commission earlier this year in Docket 3959.

Constellation filed the FAF Action on April 14, 2008 after it learned of the court's decision in the TransCanada federal court litigation. Constellation has taken the position in court papers that the TransCanada litigation and the FAF Action involve identical issues.

Q. WHAT IS NATIONAL GRID'S ASSESSMENT OF THE FAF ACTION?

A. [PRIVILEGED INFORMATION - REDACTED]

IV. THE FCM ACTION

Q. WOULD YOU PLEASE DESCRIBE THE FCM ACTION AND THE FIRST CIRCUIT APPEAL?

A. Yes, the FCM Action is pending in the United States District Court for the District of Rhode Island. The FCM Action is about Constellation's claim that it is entitled to additional compensation from National Grid for the cost of providing electricity reserves known as unforced capacity pursuant to the WSOSAs and two subsequent Power Supply Agreements ("PSAs") executed in 2001 and 2002. The Power Supply Agreements are attached as **Exhibit 5** and **Exhibit 6** to my testimony. The FCM Action arose after the Federal Energy Regulatory Commission ("FERC") on June 16, 2006 approved a settlement that created a fixed rate schedule for payments to be made to generators in New England in the forward capacity market ("Federal Settlement") for a "Transition Period" until the auction system is in place. Prior to the Federal Settlement being approved, the price of capacity was market based, but the price was relatively low and being completely absorbed by Constellation under its contracts. The Federal Settlement approved fixed pricing for the Transition Period that happens to extend beyond the end of the Standard Offer contracts. The Federal Settlement also contained a provision which the Company and Division believe assigned cost responsibility to all Rhode Island Standard Offer Suppliers (including Constellation), through the end of the contracts. The Rhode Island Attorney General's office, representing the Division, also signed the Federal Settlement, in reliance on this interpretation of the provision. Constellation did not object to or appeal the order approving the Federal Settlement after it was approved. Nevertheless, on August 1, 2006 Constellation sent a letter to the Company asserting an

entitlement to have the contract pricing adjusted to cover forward capacity costs on the grounds that it was a market change under the contracts. Narragansett, joined by the Rhode Island Attorney General who was representing the Division, filed an action on September 11, 2006 against Constellation seeking a declaratory ruling that Constellation is bound by the Federal Settlement terms and, thus, is precluded from its claim for a pricing adjustment. Constellation sought relief at FERC on March 1, 2007, but FERC rejected Constellation's petition on June 21, 2007 and left the issue to be decided by the federal court in Rhode Island. A copy of the decision is provided as **Exhibit 7**. The federal court in Rhode Island on December 10, 2007 also denied a motion of Constellation to dismiss the Company's claim and arbitrate a pricing adjustment. A copy of that decision is provided as **Exhibit 8**. This decision has been appealed by Constellation to the First Circuit Court of Appeals and was pending when the parties reached the settlement which is the subject of this proceeding.

Q. WHY DOES CONSTELLATION CLAIM IT IS ENTITLED TO ADDITIONAL COMPENSATION FOR FCM PAYMENTS?

A. Constellation claims that it is owed these additional payments because of regulatory changes implemented by the Federal Energy Regulatory Commission ("FERC") in 2006. The terms of the WSOSAs and the PSAs obligate Constellation to bear responsibility for capacity payments. Constellation claims, however, that FERC-approved regulatory changes triggered certain provisions in the 1998 WSOSAs and the 2002 and 2002 PSAs so that Constellation is entitled to an upward "equitable adjustment" for the cost of bearing the responsibility for the FCM payments.

Q. WHAT ARE THE POSITIONS OF THE PARTIES?

A. [PRIVILEGED INFORMATION - REDACTED]

V. THE TERMS OF THE SETTLEMENT

Q. WOULD YOU PLEASE DESCRIBE THE TERMS OF THE PROPOSED SETTLEMENT?

A. Under the proposed settlement, National Grid will make a lump sum payment of $20,000,000 to Constellation within 30 days. National Grid and Constellation would also amend the WSOSAs so that National Grid would be obligated to pay monthly contract reservation charges in the year 2009 equal to $2,516,164 per month, paid on last day of each month, beginning January 31, 2009 and ending on December 31, 2009. In exchange for these payments, all of the Civil Actions would be dismissed with prejudice and the parties would execute mutual releases.

Q. WHY WOULD THE COMPANY SETTLE IF THERE ARE GOOD DEFENSES TO CONSTELLATION'S CLAIMS?

A. [PRIVILEGED INFORMATION - REDACTED]

Q. WHAT OPTIONS ARE IN FRONT OF THE COMMISSION AT THIS TIME?

A. There are two options. The first option is to approve the proposed settlement agreement. It would put an end to the litigation and would provide some finality and certainty for National Grid's customers. [PRIVILEGED INFORMATION - REDACTED] The second option is to reject the settlement. Rejection of the settlement would be a signal from the Commission that the Commission believes it is worth taking the risks described in my testimony in order to try to win the Civil Actions. [PRIVILEGED INFORMATION - REDACTED]

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

EXHIBIT 1

CONTAINS PRIVILEGED INFORMATION

FILED UNDER SEAL

EXHIBIT 2

CONTAINS PRIVILEGED INFORMATION

FILED UNDER SEAL

EXHIBIT 3

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
(Central Division)

CONSTELLATION ENERGY COMMODITIES GROUP, INC.	)	
Plaintiff,	)	
v.	)	C.A. No. 08-40068 FDS
THE NARRAGANSETT ELECTRIC COMPANY	)	
Defendant.	)	

COMPLAINT
FOR DECLARATORY RELIEF AND DAMAGES

Plaintiff Constellation Energy Commodities Group, Inc. ("Constellation") as and for its complaint against The Narragansett Electric Company ("NEC") alleges as follows:

INTRODUCTION

1. This is an action for declaratory relief and breach of contract with regard to two wholesale power purchase agreements entitled Wholesale Standard Offer Service Agreements (collectively, the "WSOSAs") between NEC and Constellation, which were originally executed in 1998. Under the WSOSAs, Constellation agreed to supply wholesale electric power to NEC for NEC's retail customers in exchange for which NEC agreed to pay Constellation a fixed price where "Price = Standard Offer Wholesale Price + Fuel Adjustment Factor." The Fuel Adjustment Factor is an adjustment made to account for increases in the price of the fuel used to generate electricity. NEC breached these two contracts by purposely not seeking the Fuel Adjustment Factor in its rate filings with the Rhode Island Public Utilities Commission

("RIPUC"). Through this manipulation, NEC tried to lower the price it would have to pay Constellation.

2. The issue before the Court is NEC's breach of its obligation under the WSOSAs with respect to the Fuel Adjustment Factor. The WSOSAs between NEC and Constellation are identical with respect to the Fuel Adjustment Factor in all material respects to the wholesale standard offer service agreement between NEC and TransCanada, in C.A. No. 05-40076-FDS, pending before this Court.

PARTIES

3. Plaintiff Constellation is a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business at 111 Market Place, Suite 500, Baltimore, Maryland, and the successor by name change to Constellation Power Source, Inc.

4. NEC is a corporation organized and existing under the laws of the State of Rhode Island with its principal place of business at 280 Melrose Street, Providence, Rhode Island. NEC is a retail electric distribution company engaged in the transmission and distribution of electricity to retail end-use customers in Rhode Island. NEC's predecessors include the retail electric distribution companies in Rhode Island formerly known as Blackstone Valley Electric Company ("Blackstone") and Newport Electric Company ("Newport"), which merged into NEC in 2000. NEC and its predecessors Blackstone and Newport have, at all relevant times and for all relevant purposes, acted through, and been managed and operated by, representatives at affiliated service companies (National Grid USA Service Company ("National Grid") and EUA Service Corporation) based in Northborough and Bridgewater, Massachusetts, respectively.

JURISDICTION AND VENUE

5. This Court has jurisdiction under 28 U.S.C. § 1332, as the amount in controversy exceeds $75,000. Venue is proper in this Court under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claim occurred in Massachusetts in that the WSOSAs were negotiated, signed, and subsequently administered in Massachusetts.

FACTS

Industry Background: The URA

6. In 1996, Rhode Island enacted legislation titled Utility Restructuring Act (the "URA") that restructured the regulatory structure governing public utilities serving customers in Rhode Island. The general objectives of the URA were to deregulate electric power supply and to develop a competitive retail market for electricity in Rhode Island. During the same period, Massachusetts was undergoing a similar electricity deregulation process.

7. The URA required that electric distribution companies in Rhode Island divest ownership of their electricity generation facilities, and offer "Retail Access" to Rhode Island retail customers. R.I.G.L. § 39-1-27.3 (1997) (which legislation has since been amended and revised). Retail Access required that each retail electric distribution company allow its customers to purchase electricity from non-affiliated retail suppliers. Retail Access also required each retail distribution company transport that purchased electricity over the retail distribution company's own lines from the alternative supplier to the customer.

8. The URA also required that, during the transition to Retail Access, the retail distribution companies provide a standard power supply ("Standard Offer Service") at regulated prices to Rhode Island retail customers through 2009. R.I.G.L. § 39-1-27.3(d) (1997). The purpose of Standard Offer Service was to provide a stable, competitively priced source of

electricity for those Rhode Island retail customers who had not yet obtained an alternative electricity supplier during the transition to a competitive Retail Access market.

9. Under the URA, the Standard Offer Service was to be priced to account for several factors reasonably beyond the control of power suppliers, including "extraordinary fuel costs." R.I.G.L. § 39-1-27.3(d) (1997). The URA required that retail distribution companies file tariffs with the RIPUC to implement Standard Offer Service through 2009, for the benefit of wholesale and retail customers and their suppliers. R.I.G.L. § 39-1-27(a) (1997). Thus, the protection offered by the Fuel Adjustment Factor was an important consideration for Constellation's agreement to enter into long term (12-year) electric supply contracts as the parties understood that fuel prices could significantly and unpredictably increase over the life of the WSOSAs.

Implementation of the URA

10. At the time of enactment of the URA, Blackstone and Newport were retail electric distribution companies in Rhode Island and wholly-owned subsidiaries of Eastern Utilities Associates ("EUA"), a Massachusetts-based public utility holding company. EUA also owned a retail electric company in Massachusetts, Eastern Edison Company ("Eastern" and, collectively with Blackstone and Newport, the "EUA Companies").

11. At the time of enactment of the URA and its Massachusetts counterpart, the EUA Companies, purchased their electricity, which they then supplied to their retail customers, from an affiliated wholesale electricity supplier in Massachusetts, Montaup Electric Company ("Montaup"). To comply with the URA (and the Massachusetts state law counterpart), the Companies were required to terminate their wholesale supply contracts with Montaup, and allow

their retail customers to have Retail Access to alternative suppliers. Montaup also was required to divest its generation facilities.

12. On October 17, 1997, in order to implement the URA, Blackstone, Newport, and Montaup entered into a Stipulation and Agreement with the RIPUC, as well as the Rhode Island Division of Public Utilities and Carriers ("Division") (hereinafter, the "RI Settlement Agreement"). The Federal Energy Regulatory Commission ("FERC") approved the RI Settlement Agreement. The same entities entered into a similar Stipulation and Agreement, executed in Massachusetts and approved by FERC (the "MA Settlement Agreement" and, collectively with the RI Settlement Agreement, the "Settlement Agreements").

13. In order to ensure a steady supply of Standard Offer Service, the RI Settlement Agreement required that Montaup provide Blackstone and Newport with a guaranteed "Backstop" supply of Standard Offer Service through 2009. Blackstone and Newport were in turn required to seek alternative wholesale suppliers for Standard Offer Service during that term, and were to release Montaup from its Backstop obligation to the extent Blackstone and Newport were able to obtain replacement contracts. In order to ensure a Standard Offer Service to Rhode Island retail customers through 2009, Montaup's Backstop obligation required that it provide Standard Offer Service to Blackstone and Newport through 2009, to the extent that those companies did not obtain alternative wholesale Standard Offer Service supply contracts.

14. The RI Settlement Agreement required Montaup and its successors to provide Standard Offer Service to Blackstone and Newport in exchange for a stipulated set of base prices rising over time, subject to a "fuel index" to account for future extraordinary fuel costs, through 2009. That fuel index is the crux of this litigation. The purpose of the fuel index, as envisioned by the URA and Settlement Agreements, was to protect wholesale Standard Offer Service

suppliers against the risk of future extraordinary increases in fuel costs, so that suppliers would agree to the desired long-term Standard Offer Service supply contracts for the benefit of Rhode Island retail customers.

Constellation's WSOS Agreements

15. On or about December 21, 1998, Constellation and Montaup entered into an agreement whereby Constellation purchased certain wholesale power purchase agreements from Montaup. The Settlement Agreements required that Constellation assume a percentage share of Montaup's Backstop obligation to provide Standard Offer Service to Blackstone, Newport, and Eastern.

16. Constellation and the EUA Companies entered into the two WSOSAs on or about December 21, 1998. Each of the WSOSAs state at Article 14 that "[t]he interpretation and performance of this Agreement shall be in accordance with and shall be controlled by the laws of the Commonwealth of Massachusetts, without regard to Massachusetts conflict of law principles." In those WSOSAs, Constellation agreed to provide wholesale Standard Offer Service to Blackstone and Newport through December 31, 2009 (the term of the Standard Offer Service in Rhode Island) and to Eastern through February 28, 2005. (*See* WSOSAs, § 3 & App. A.) Upon information and belief, the EUA Companies negotiated, signed, and subsequently administered the WSOSAs in and from their offices in Massachusetts.

17. Under the WSOSAs, the Settlement Agreements and the URA, Constellation was to receive a price for delivering Standard Offer Service consisting of the stipulated set of base prices rising over time (the "Standard Offer Wholesale Price"), plus a fuel index (the "Fuel Adjustment Factor") to account for future extraordinary fuel costs. Under the WSOSAs, the Fuel

Adjustment Factor is calculated based upon the tariffs that the URA and Settlement Agreements require Blackstone and Newport to file. Specifically, Article Five of the WSOSAs provides that:

> For each kilowatt-hour of Delivered Energy that Supplier [Constellation] provides in each month . . ., the Companies shall pay Supplier the applicable Price for the month in cents per kilowatt-hour calculated as follows:
>
> Price = Standard Offer Wholesale Price + Fuel Adjustment Factor
>
> Where: Standard Offer Wholesale Price in cents per kilowatt hour is as defined in Article 1 and shown in Appendix A, and
>
> Fuel Adjustment Factor is a cents per kilowatt-hour adder based on the incremental revenues collected, if any, attributed to the operation of the Retail Standard Offer Fuel Index ("Fuel Index") mechanism in the Companies' Standard Offer Service tariffs .... The Fuel Index, and the resulting Fuel Adjustment Factor to be paid to Supplier, will be made subject to regulatory approval and only to the extent that the Companies are allowed to collect such revenues from their retail customers taking Standard Offer Service.

18. The WSOSAs thus imposed upon Blackstone and Newport (and in turn upon NEC as their successor) the duty and good faith obligation to make the required Standard Offer Service Tariff filings with the RIPUC, and to use reasonable efforts to obtain regulatory approval for a Fuel Adjustment Factor by Blackstone and Newport to Constellation over the 2009 term of the WSOSAs.

19. The WSOSAs also provided Constellation with termination rights and damages rights, in the event that NEC failed to perform any of their obligations under the WSOSAs. Specifically, the WSOSAs provide that, upon an uncured default by any of the Companies (now, NEC), Constellation has the right to recover direct damages resulting from the default; to pursue all other remedies and damages provided for by law; and to terminate the WSOSAs upon sixty (60) days notice. (WSOSAs § 8.) Finally, the WSOSAs provide that Constellation is entitled to recover interest on any improperly withheld payments. (*Id.* § 6.)

20. NEC and Constellation are litigants before the United States District Court for the District of Rhode Island in a dispute concerning the change in law or market rules provisions of the WSOSAs (and two subsequent wholesale power purchase agreements between the parties), Civil Action C.A. No. 06-404S. The action in Rhode Island district court concerns a separate and distinct provision of the parties' contracts in the two 1998 WSOSAs, plus the parties' 2001 and 2002 agreements, and the factual and legal issues before that court do not relate to the issues asserted in this Complaint. The Rhode Island action concerns whether Constellation has the right under the change in law or market rules provisions of the party's contracts to an amendment in those contracts following regulatory changes mandated by FERC, and the issues in that dispute are subject to mandatory arbitration provisions in the parties' 2001 and 2002 agreements. In this case, there is no mandatory arbitration clause applicable to the dispute, and there is no Fuel Adjustment Factor dispute under the parties' 2001 and 2002 agreements.

The NEC Merger

21. From the signing of the WSOSAs in April 1998 through early 2000, Blackstone and Newport filed the required Standard Offer Service Tariffs with the RIPUC on a periodic basis. Blackstone, Newport and Eastern thereby obtained approval of the Standard Offer Wholesale Prices and a Fuel Adjustment Factor for 1999 and 2000, as required by the WSOSAs. Upon information and belief, Blackstone, Newport and Eastern's representatives planned and prepared the Tariff filings in EUA's offices in Massachusetts.

22. In 2000, Blackstone and Newport merged into NEC. At the same time, Eastern merged into Massachusetts Electric Company ("Mass. Electric").

23. NEC and Mass. Electric were at the time (and still are, upon information and belief), wholly-owned subsidiaries of National Grid, a Massachusetts-based public utility holding

company. Upon information and believe, at all relevant times National Grid exercised dominion and control over NEC with respect to the allegations herein from National Grid's offices in Massachusetts. Through the comprehensive merger, each of the EUA Companies' former retail distribution companies in Rhode Island and Massachusetts (Blackstone, Newport, and Eastern),[1] merged into the corresponding Rhode Island and Massachusetts retail distribution companies of National Grid, consisting of NEC and Mass. Electric.

24. By way of the Rhode Island portion of the merger, NEC became the retail electric distribution company both for the previous retail customers of Blackstone and Newport in Rhode Island (hereinafter the former "EUA Zone"), as well as its own previous retail customers in its former area (hereinafter the old "Narragansett Zone"). That distinction was for the benefit of NEC and its affiliates and was not intended to, and did not have the effect of, modifying any rights with regard to the Fuel Adjustment Factor that Constellation enjoyed under the WSOSAs.

25. The RIPUC approved the NEC merger in March 2000. At the request of NEC, the RIPUC cancelled the Blackstone and Newport Standard Offer Service Tariffs and ruled that NEC could continue to obtain payment for Standard Offer Service in both its new EUA Zone and in its old Narragansett Zone through NEC's own and future Standard Offer Service Tariffs and related filings.[2]

---

[1] Eastern Edison Company merged into an affiliate of NEC and the portion of the WSOSAs concerning Eastern Edison ended in 2005.

[2] NEC, like Blackstone and Newport, had entered into its own Settlement Agreement with the RIPUC in 1997, which also required Retail Access and divestiture of generation assets. NEC's Settlement Agreement required NEC to provide Standard Offer Service at the same set of stipulated prices and fuel adjustment triggers as in Blackstone's and Newport's RI Settlement Agreement. Like Blackstone and Newport, NEC also subsequently entered into Standard Offer Service supply contracts with a number of wholesale Standard Offer Service suppliers. NEC was required, like Blackstone and Newport, to file tariffs under the URA to implement the Standard Offer Service for the benefit of its customers and suppliers.

NEC's Breach and Wrongful Conduct

26. In April 2000, NEC notified Constellation of the merger and asserted that NEC would succeed to and assume the obligations of Blackstone and Newport under the WSOSAs. That notice assured Constellation that the obligations of the parties "are not affected by the merger and assignments." NEC's notice further stated that NEC would continue to make Fuel Adjustment Factor payments to Constellation "after 1999," according to the mechanism previously established in the RI Settlement Agreement and in the Blackstone and Newport Standard Offer Service Tariffs.

27. It was to NEC's benefit not to pay a Fuel Adjustment Factor, particularly in times of rising fuel prices, in order to reduce its overall expenses and costs, among other reasons. Fuel prices began rising at the time of NEC's merger, which price increases triggered the Fuel Adjustment Factors in NEC's and Blackstone's and Newport's wholesale Standard Offer Service supply contracts.

28. From 2000 and through the end of 2004, NEC continued to pay Constellation for Standard Offer Service as required under the WSOSAs, including both the base Wholesale Standard Offer Price and a Fuel Adjustment Factor. Fuel prices continued to rise, however, and Fuel Adjustment Factor payments to Constellation and other wholesale Standard Offer Service suppliers became a regular, material component of the price NEC paid to its suppliers for Wholesale Standard Offer Services.

29. In May 2003, upon information and belief, NEC's Massachusetts representatives began to assert before the RIPUC (based on filings planned and prepared in Massachusetts) that its suppliers in the former EUA Zone should not be paid a Fuel Adjustment Factor after 2004.

30. In December 2004, NEC filed with the RIPUC its proposed Standard Offer Service Tariffs and rates for 2005. NEC specified that no Fuel Adjustment Factor should be

granted to Constellation (or any other EUA Zone suppliers) in 2005. As a result of that filing, and NEC's arguments, the RIPUC approved Standard Offer Service Tariffs and rates for 2005 that provide no allocation for a Fuel Adjustment Factor for Constellation. At the same time, NEC continued to request and to obtain approval for a Fuel Adjustment Factor in 2005 for its suppliers in the old Narragansett Zone. NEC also paid another supplier in the EUA Zone (TransCanada) a Fuel Adjustment Factor subject to NEC's contention that no liability was owed.

31. NEC's breaches of its obligations under the WSOSAs to file Standard Offer Service rates that include a fuel adjustment mechanism and, if allowed, to pay that higher fuel-adjusted price to Constellation, have deprived Constellation of its contractual rights to payment of a Fuel Adjustment Factor under the WSOSAs.

32. Constellation never waived any of its rights with regard to the Fuel Adjustment Factor, and NEC's breaches have caused and are continuing to cause Constellation substantial and ongoing damages.

33. On March 26, 2008, Judge F. Dennis Saylor IV issued a Memorandum and Order on Cross Motions for Summary Judgment ("TransCanada Order") in 05-40076-FDS, a case TransCanada filed in this district, against NEC, and involving identical issues in all material respects with regard to the Fuel Adjustment Factor. The TransCanada Order addressed the same provision of the WSOSAs between Constellation and NEC:

> The [TransCanada v. Narragansett] dispute essentially involves whether a wholesale contract for electric power between the parties required Narragansett (1) to include a fuel adjustment mechanism in its retail rate filings with the PUC for the period 2005 to 2009, permitting it to collect higher revenues if fuel costs went up, and thus (2) to pay a higher fuel-adjusted price to TransCanada.

TransCanada Order at 1. The court held that it did, and explained that

> [T]here is no indication anywhere in the contract that [NEC's] obligations as to the Fuel Adjustment Factor expire in 2004. The

> contract is an unambiguous, integrated agreement, negotiated and executed by sophisticated corporate entities. If the parties intended that [NEC's] obligations were to change in 2004, it would have been simple enough to say so. The parties elected not to. Accordingly, [NEC's] obligations ... remain in place until December 31, 2009.

Id. at 15.

Count I
(Declaratory Relief)

34. Constellation repeats and incorporates by reference paragraphs 1 through 33 above.

35. An actual controversy exists as to whether NEC breached the WSOSAs with respect to NEC's duty owed to Constellation under the WSOSAs to (a) file for or make a reasonable effort to obtain regulatory approval of a Fuel Adjustment Factor, and (b) to pay a Fuel Adjustment Factor to Constellation as required under the WSOSAs. A further actual controversy exists regarding whether Constellation has the right to terminate the WSOSAs, including under Articles 5 and/or 8, for NEC's failure to abide by its duties with respect to the Fuel Adjustment Factor.

36. Constellation requests a declaratory judgment that NEC breached the terms of the WSOSAs; that NEC failed to cure the breach (to the extent cure was applicable); that Constellation had and has the unconditional right, in addition to the right to recover damages and interest, to terminate the WSOSAs because of such breaches; and that Constellation's is entitled to damages for NEC's breaches.

Count II
(Breach of Contract)

37. Constellation repeats and incorporates by reference paragraphs 1 through 36 above.

38. NEC has breached the WSOSAs through the acts described above, including (a) its failure to file for or make a reasonable effort to obtain regulatory approval of a Fuel Adjustment Factor after 2004; and (b) its failure to pay a Fuel Adjustment Factor to Constellation as required under the WSOSAs.

39. Because of these breaches, Constellation has suffered and will continue to suffer monetary damages. Constellation was and is entitled to terminate the WSOSAs, and to an award of its damages and interest in such amount as to be proven at trial.

Count III
(Breach of the Implied Covenant of Good Faith and Fair Dealing)

40. Constellation repeats and incorporates by reference paragraphs 1 through 39 above.

41. The WSOSAs contain an implied covenant of good faith and fair dealing.

42. NEC has breached the covenant of good faith and fair dealing implied in the WSOSAs through its conduct described above, including but not limited to its various contractual breaches of the WSOSAs, its behavior before the RIPUC regarding the WSOSAs Fuel Adjustment Factor, and its expropriation to its own benefit of Constellation's rights under the WSOSAs.

43. As a result of these breaches, Constellation has suffered and will continue to suffer substantial monetary damages. Constellation was and is entitled to terminate the WSOSAs, and to an award of damages and interest.

WHEREFORE, Constellation requests the following relief against NEC:

1. Judgment in its favor on all counts.

2. A declaratory judgment that NEC has breached the terms of the WSOSAs and the implied covenant of good faith and fair dealing; that NEC has failed to cure its breach; and that Constellation has the unconditional right, in addition to the right to recover damages and interest, to terminate the WSOSAs immediately.

3. An award of specific performance and/or damages, including interest, in an amount to be determined at trial.

4. An award of costs and such further relief as this Court deems just and proper.

Respectfully submitted,

CONSTELLATION ENERGY COMMODITIES GROUP, INC.

By its attorneys,

Michael Kendall
McDERMOTT WILL & EMERY LLP
28 State Street
Boston, MA 02109-1775
Tel. 617.535.4085
Fax. 617.535.3800
Email: mkendall@mwe.com

-and-

Kenneth W. Irvin
McDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 20005
Tel. (202) 756-8116
Fax (202) 756-8087
Email: kirvin@mwe.com

WDC99 1553591-3 070626 0036

EXHIBIT 4

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TRANSCANADA POWER MARKETING LTD.,	)	
Plaintiff,	)	Civil Action No. 05-40076-FDS
v.	)	
NARRAGANSETT ELECTRIC COMPANY,	)	
Defendant.	)	

-

MEMORANDUM AND ORDER
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

SAYLOR, J.

This is an action by plaintiff TransCanada Power Marketing Ltd., a wholesale electricity supplier, against Narragansett Electric Company, a retail electric distribution company. Narragansett is a regulated utility that is required to obtain approval from the Rhode Island Public Utilities Commission ("RIPUC") for the retail rates that it charges to consumers. The dispute essentially involves whether a wholesale contract for electric power between the parties required Narrangansett (1) to include a fuel adjustment mechanism in its retail rate filings with the RIPUC for the period 2005 to 2009, permitting it to collect higher revenues if fuel costs went up, and thus (2) to pay a higher fuel-adjusted price to TransCanada. Jurisdiction is based on diversity of citizenship.

In substance, this is a declaratory judgment action, as Narragansett has been paying all disputed amounts to TransCanada pending resolution of this matter. The complaint asserts claims

for breach of contract (Count 1), contractual indemnification (Count 2), breach of the implied covenant of good faith and fair dealing (Count 3), rescission or reformation of contract (Count 4), declaratory relief (Count 5), and unfair and deceptive acts and practices in violation of Mass. Gen. Laws ch. 93A § 11 (Count 6). Narragansett has filed a counterclaim, asserting claims for breach of contract (Count 1), declaratory relief (Count 2), and breach of the implied covenant of good faith and fair dealing (Count 3).

TransCanada has moved for summary judgment as to Counts 1, 3, and 5 (or, in the alternative, as to Count 4) of the complaint, and as to all three counts of the counterclaim. Narrangansett has cross-moved for summary judgment as to Count 2 of the complaint. For the following reasons, summary judgment will be granted in part in favor of TransCanada as to the claims for declaratory relief, granted in favor of Narragansett as to the claim for contractual indemnification, and otherwise denied.

I. Statement of Facts

The following facts are undisputed unless otherwise noted.

A. The URA and Restructuring of the Electric Industry in Rhode Island and Massachusetts

Prior to 1996, electric utility companies in New England were generally vertically integrated monopolies—that is, one utility company controlled (through its affiliate subsidiaries) the generation, transmission, and distribution functions for a given area. Before 1996, essentially only two electric utilities operated in Rhode Island: Eastern Utilities Association ("EUA") and the New England Electric System ("NEES"). EUA's power generation affiliate was Montaup Electric Company, and its retail distribution affiliates were Blackstone Valley Electric Company

and Newport Electric Company in Rhode Island and Eastern Edison Company in Massachusetts. NEES's power generation affiliate was New England Power Company ("NEP"), and its retail distribution affiliates were Narrangansett Electric Company in Rhode Island and Massachusetts Electric Company in Massachusetts.[1]

The power generation companies (Montaup and NEP) were regulated by the Federal Energy Regulatory Commission ("FERC"). The distribution companies (in Rhode Island, Blackstone, Newport, and Narragansett) were regulated by state public utility commissions (in Rhode Island, the RIPUC).

As regulated entities, the distribution companies are not free to charge their retail customers whatever the market might bear. Instead, they are required make filings with the utility commissions to obtain approval of the rates they intend to charge. In simple terms, the utilities file tariffs, or schedules listing the rates they intend to charge, with the commissions, which may approve, modify, or reject the rates after a hearing. *See* R.I. Gen. Laws § 39-3-10.

The cost of fuel—such as oil and natural gas—is a significant component of the cost of generating power. Before 1996, the retail distribution companies paid their power generation affiliates pursuant to contracts for their fuel costs. In turn, the Rhode Island distribution companies filed retail tariffs with the RIPUC that included fuel-adjustment mechanisms that permitted the companies to charge consumers a higher rate if fuel costs rose beyond certain points.

In 1996, Rhode Island enacted the Utility Restructuring Act (the "URA"), and

---

[1] NEES supplied power to approximately three-quarters of Rhode Island, and EUA supplied it to most of the remaining quarter.

Massachusetts enacted a similar counterpart. The URA was intended to restructure the utility market in an effort to create a competitive market for power supply and ultimately to provide lower prices to consumers. The URA (and its Massachusetts counterpart) also mandated a transition supply of electricity to consumers called Standard Offer Service ("SOS"). Standard Offer Service was intended to be a guaranteed power supply to consumers who did not elect, or had not yet elected, to obtain their supply from a competitive marketer.

The URA required the retail distribution companies to provide SOS power to retail customers through 2009 and to arrange with wholesale power suppliers to provide the necessary power. R.I. Gen. Laws § 39-1-27.3(d). The URA established a pricing scheme for SOS that allowed the retail distribution companies to charge customers up to a price cap to be determined by a formula. The price cap was determined by (1) a rising stipulated annual price, adjusted upwards for (2) ". . . factors reasonably beyond the control of the electric distribution company and its former wholesale power supplier including but not limited to changes in federal, state or local taxes or extraordinary fuel costs . . . ." *Id.*

In 1997, in order to comply with the URA, the utility holding companies (NEES and EUA) negotiated "Settlement Agreements" with state and federal authorities. Among other things, the Settlement Agreements described public bid processes that the retail distribution companies would use initially to solicit wholesale suppliers for their SOS needs.[2]

B. The WSOSA

[2] In order to ensure a steady supply of power for SOS customers, the Settlement Agreements required the generation companies to provide a guaranteed "backstop" supply of power to the retail distribution companies through 2009 in the event that the latter were unable to obtain such a supply in the wholesale market. Thus, the EUA Settlement Agreement required Montaup to provide a guaranteed supply to Blackstone and Newport. In addition, the EUA Settlement Agreement required Montaup to assign to any purchaser of its generation assets a proportional share of its "backstop" obligation.

In November 1997, EUA and TransCanada began to negotiate an agreement under which TransCanada would purchase certain Montaup power generation assets. As a part of that process, TransCanada and EUA also negotiated a wholesale power supply contract. Eventually, on April 7, 1998, TransCanada and EUA's retail distribution affiliates (Blackstone and Newport) entered into a Wholesale Standard Offer Service Agreement ("WSOSA").[3] Under the WSOSA, TransCanada agreed to supply power to Blackstone and Newport for distribution to their customers for a certain number of years.

The price to be paid to TransCanada for the power supplied under the WSOSA had two components: a "Standard Offer Wholesale Price" and a "Fuel Adjustment Factor." Thus, Article 5 of the WSOSA states as follows:

> For each kilowatt-hour of Delivered Energy that Supplier Provides in each month, . . . the Companies shall pay Supplier the applicable Price for the month in cents per kilowatt-hour calculated as follows:
> Price= Standard Offer Wholesale Price
> + Fuel Adjustment Factor
>
> Where: . . . Fuel Adjustment Factor is a cents per kilowatt-hour adder based on the incremental revenues collected, if any, attributed to the retail Rate Fuel mechanism in the Companies' Standard Offer Service tariffs. The incremental revenues attributed to the retail Fuel Adjustment will be fully allocated to Suppliers in proportion to the Standard Offer Service energy provided by each Supplier for the applicable billing month through the Fuel Adjustment Factor. The retail Fuel Adjustment, and the resulting Fuel Adjustment Factor to be paid to Supplier, will be made subject to regulatory approval and only to the extent that the Companies are allowed to collect such revenues from their retail customers taking Standard Offer Service.

[3] EUA's Massachusetts retail distribution affiliate, Eastern Edison, was also a party to the agreement.

No further mention of the Fuel Adjustment Factor is made in the WSOSA.[4]

As noted, Narragansett contends that any obligation it may have had to file Standard Offer Service rates with a fuel adjustment mechanism, and thus to pay a higher fuel-adjusted price to TransCanada, expired in 2004. The WSOSA states that the "term of this agreement shall begin on the Commencement Date of Service and end at 12:00 midnight on December 31, 2009, unless terminated sooner . . . ." The only specific mention of the year 2004 in the WSOSA is set forth in Appendix A, where (1) Standard Offer Wholesale Prices are listed for every year from 1999-2009, including 2004, and (2) a footnote states that "Standard Offer Service for Eastern Edison [i.e., in Massachusetts] terminates at 12:00 midnight on December 31, 2004."

The WSOSA contains an integration clause. *See* Art. 19(d) ("This Agreement shall constitute the entire understanding between the Parties and shall supersede all prior correspondence and understandings pertaining to the subject matter of this Agreement").

C. The Narragansett Merger

In March 2000, Blackstone and Newport were merged into Narragansett. As a result, Narragansett assumed the obligations of Blackstone and Newport under the WSOSA.

In April 2000, Narragansett's power supply manager informed TransCanada via letter of the merger. The letter stated that

---

[4] Article 8(3) of the WSOSA, also at issue in this case, states:

> In the event that the Standard Offer Service or the Terms and Conditions for Suppliers are terminated, amended or replaced by any governmental or regulatory agency having jurisdiction over the provision of Standard Offer Service in a manner which materially increases costs or obligations to provide Standard Offer Service, the Companies shall promptly reimburse Supplier for any such costs or increased obligations or otherwise provide relief reasonably acceptably to supplier to or indemnify the Supplier from such changes . . . .

Id.

> [Narragansett] will assume the obligations of the former EUA subsidiaries pursuant to Article 11 of the [WSOSA]. . . . The obligations of the parties or their successors and the terms of the [WSOSA] are not affected by the merger and assignments. The following actions will be taken in order to continue to facilitate the administration of the [WSOSA]. These actions are not intended and in no way constitute nor should be deemed to constitute a modification of the terms of the [WSOSA].

It went on to state:

> **2. Application of the Fuel Adjustment Factor**. Article 5 of the [WSOSA] entitles [TransCanada] to receive additional monies based on revenues collected from retail customers pursuant to Fuel Adjustment mechanisms [contained] in . . . Blackstone's and Newport's Standard Offer Service tariffs. . . . Narragansett will continue to make such Fuel Adjustment payments, if applicable, according to Attachment 2. Attachment 2 replaces the retail fuel adjustment mechanisms contained in the EUA Companies' respective Standard Offer Service tariffs. Said payments will be made by . . . Narragansett in the month immediately following service.

Attachment 2 was a "standard offer fuel adjustment provision" sheet that listed fuel trigger points and fuel adjustment values for the years 2000-2004. Attachment 2 did not set forth a fuel adjustment provision for the years 2005-2009.

D. Activities of TransCanada and Narragansett between 2000 and 2004

It is undisputed that Blackstone and Newport, and their successor Narragansett, filed tariffs with the RIPUC that included a fuel adjustment mechanism in their Standard Offer Service rates for the years 1999 to 2004. It is also undisputed that the companies received higher revenues from retail customers as a result, and that during those years they paid a higher fuel-adjusted price to TransCanada pursuant to the "Fuel Adjustment Factor" component of the contract pricing formula.

As noted, this dispute concerns whether Narragansett was required to do the same from 2005 to 2009. Narragansett contends that it has consistently taken the position, before the

RIPUC and elsewhere, that the Fuel Adjustment Factor component of the price expired in 2004.[5] TransCanada contends that Narragansett initially took the position that the Fuel Adjustment Factor was in operation through 2009, and that it subsequently changed its position. TransCanada also contends that Narragansett witnesses, in public proceedings before the RIPUC, made false statements about what TransCanada had been told. As a result, TransCanada contends that from 2000 to 2005, Narragansett engaged in "improper and misleading conduct" as to its interpretation of the contract.

E. Activities of TransCanada and Narragansett from 2005 to Present

Narragansett did not request a fuel adjustment mechanism in the Standard Offer Service tariff that it filed with RIPUC for January 2005, and the retail rates as approved did not contain such a mechanism. The payment to TransCanada in February 2005 therefore included only the Standard Offer Wholesale Price, without additional payments based on the Fuel Adjustment Factor.

TransCanada objected in writing on March 1, 2005, stating that it was providing "notice of default under Article 7(1)(b) of the [WSOSA], based upon [Narragansett's] failure to comply with Article V of the [WSOSA]."[6] The letter stated that Narragansett had thirty days to cure or

---

[5] Narragansett contends that during the post-merger integration period, its employees reviewed past tariff filings and concluded that the Fuel Adjustment Factor obligation terminated in 2004. Narragansett also contends that EUA representatives advised it that the FAF was payable only until 2004 and was not applicable in subsequent years of the contract.

[6] Article 7(1)(b) provides as follows:

> (1) Unless excused . . . each of the following events shall be deemed to be an Event of Default hereunder:
>
> . . .
>
> (b) Failure of the Companies, in a material respect, to comply with, observe, or

rectify the default.

In order to forestall a disruption in power supply to its customers, Narragansett agreed on March 31, 2005, to pay under protest all amounts to which TransCanada claimed it was entitled, subject to refund if it prevails in this litigation. Narrangansett's protest payments have since been included in the approved rates charged by Narragansett to consumers, again subject to refund. TransCanada commenced this action in May 2005.[7]

II. Analysis

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue is "one that must be decided at trial because the evidence, viewed in the light most flattering to the nonmovant . . . would permit a rational fact finder to resolve the issue in favor of either party." *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

In substance, TransCanada contends that the WSOSA unambiguously requires Narragansett to file Standard Offer Service rates that include a fuel adjustment mechanism, and, if approved, to pay a higher fuel-adjusted price to TransCanada, and to do so through 2009. In

---

> perform any covenant, warranty or obligation under this Agreement, and such failure is not cured or rectified within thirty (30) days after notice thereof from the Supplier.

[7] Article 12 of the WSOSA contains dispute resolution provisions applicable to "all disputes between the Companies and Supplier resulting from or arising out of performance under this Agreement," other than certain disputes arising out of an Event of Default. The dispute resolution section, in substance, requires mandatory settlement discussions and provides that any dispute that cannot be resolved "may" be submitted to arbitration. Neither party has argued that Article 12 has been violated, or that the present dispute is subject to mandatory arbitration.

support (and opposition) to the motions for summary judgment, the parties have submitted thousands of pages of depositions, declarations, regulatory filings, and internal corporate documents. The text of the contract itself, however, disposes of most of the issues in this dispute.

A. General Principles of Contract Interpretation

Under Massachusetts law, interpretation of a contract is ordinarily a question of law for the court. *Edmonds v. United States*, 642 F.2d 877, 881 (1st Cir. 1981); *accord Fairfield 274-278 Clarendon Trust v. Dwek*, 970 F.2d 990, 993 (1st Cir. 1992).[8] Where the wording of the contract is unambiguous, it must be enforced according to its terms. *Id.* A triable issue of fact exists only if the contract is ambiguous. Evidence of prior or contemporaneous oral agreements cannot be considered to vary or modify the terms of an unambiguous, integrated contract. *Fairfield*, 970 F.2d at 993, *citing New England Financial Resources v. Coulouras*, 30 Mass. App. Ct. 140, 145 (1991).

B. The Language of the Contract

1. Narragansett's Obligation to File Retail Rates Generally

Article 5 of the WSOSA describes the price to be paid by Narragansett to TransCanada for wholesale power. That price has two components: a "Standard Offer Wholesale Price" and a "Fuel Adjustment Factor." The Fuel Adjustment Factor is defined as "a cents per kilowatt-hour adder based on the incremental revenues collected, if any, attributed to the retail Rate Fuel mechanism in the Companies' Standard Offer Service tariffs." The WSOSA further states that

[8] The WSOSA states that "the interpretation and performance" of the agreement is governed by Massachusetts law. (WSOSA Art. 13).

"The retail Fuel Adjustment, and the resulting Fuel Adjustment Factor to be paid to Supplier, will be made subject to regulatory approval and only to the extent that the Companies are allowed to collect such revenues from their retail customers taking Standard Offer Service." It is thus clear that Narragansett has the obligation to pay some portion of any higher revenues received through a retail rate fuel adjustment mechanism. Before turning to the issue of the duration of Narragansett's obligation—that is, whether that obligation existed after 2004—it is useful to consider whether Narragansett is obliged to file *any* such retail rates with the RIPUC.

The WSOSA, somewhat surprisingly, contains no express term requiring Narragansett to file retail rates containing a fuel-adjustment component. Indeed, it contains no express term requiring Narragansett to file retail rates at all. Normally, such an omission might create an ambiguity, permitting the Court to consider parol evidence to ascertain the parties' intentions. Here, however, it is clear that there is only one possible reasonable interpretation, and there is thus no ambiguity that must be resolved.

First, Narragansett's obligation to file retail rates is necessarily implicit in the contract. As a regulated utility, Narragansett essentially has one principal source of revenue: the payments that it receives from its retail customers. If it did not make filings seeking approval of retail rates, it could not stay in business, much less pay TransCanada its contractual obligations for wholesale power. Put simply, the contract would make no sense if Narragansett simply had the option to file retail rates. It is thus implicit in the contract that Narragansett will make the necessary filings with the RIPUC to charge retail rates to its customers.

Second, it is well-established that when a contractual payment depends on one party's application for government approval, that party has an obligation to make the necessary

applications in a reasonable effort to obtain the required approval. *See, e.g., Sechrest v. Safiol*, 383 Mass. 568, 569-72 n.4 (1981) (where a party's obligation to purchase real estate was conditioned upon "obtaining from the proper public authorities all permits and other approvals reasonably necessary," "[n]ecessarily implied in the provision is an obligation to use reasonable efforts to obtain town approval"); *Stabile v. McCarthy*, 336 Mass. 399, 402-04 (1957) (where a party had an option to cancel a contract for purchase of real estate "in the event that he shall have been unable to obtain the approval of the [town planning board]," he was required to use reasonable efforts to obtain board approval).[9]

Third, if Narragansett elected for some reason not to file retail rates with the RIPUC, that would almost certainly have violated the implied covenant of good faith and fair dealing. The covenant provides that "neither party shall do anything that will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract." *Speakman v. Allmerica Financial Life Ins.*, 367 F. Supp. 2d 122 (D. Mass. 2005); *Anthony's Pier Four, Inc. v. HBC Associates*, 411 Mass. 451, 471 (1991). "[T]he purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed expectations of the parties in their performance." *Uno Restaurants*, 441 Mass. 376, 385 (2004). If Narragansett for some reason deliberately failed to file tariffs with retail rates sufficient to fulfill its obligations to TransCanada, it would have obviously destroyed the right of TransCanada to receive the fruits of the contract. *See Seaward Constr. Co. v. City of Rochester*, 118 N.H. 128, 383 A.2d 707 (1978) (where payment by city to a contractor was dependent on receipt of HUD funds from the federal

[9] It is unclear whether the obligation derives from the implied covenant of good faith and fair dealing or whether it exists as a separate doctrine of Massachusetts contract law. The difference, if any, is not material here.

government, "the city was under an obligation under the implied covenant of good faith and fair dealing to make a good-faith effort to obtain funds from HUD to pay the [contractor].").

The next question is whether—again putting to one side the issue of the duration of its contractual obligations—Narragansett's implied obligation to file retail rates included an obligation to file retail rates containing a fuel-adjustment component. Put another way, if Narragansett had an implied obligation to file retail rates as to the "Standard Offer Wholesale Price" component of the contract price, did it also have an implied obligation to file retail rates as to the "Fuel Adjustment Factor" component?

There is nothing in the contract to suggest that Narragansett's implied obligation to file rates as to one price component should be any different than its implied obligation to file rates as to the other. Both are treated essentially the same under Article 5; accordingly, if Narragansett had an implied obligation to file as to one, it necessarily had the same obligation to file as to the other.

The fact that the WSOSA uses the phrase "if any" to modify the phrase "incremental revenues collected" does not require a different result. The phrase "if any" is directed to the various contingencies upon which any additional revenues would depend, including the fact that the fuel adjustment mechanism (and thus the "Fuel Adjustment Factor") is triggered only under certain circumstances. Significantly, the phrase "if any" is placed after "incremental revenues collected," not "retail Rate Fuel mechanism," suggesting that the parties expected such a mechanism to be present in all the Standard Offer Service retail rates. Similarly, the fact that the "retail Fuel Adjustment, and the resulting Fuel Adjustment Factor to be paid to Supplier," was made "subject to regulatory approval" and "only to the extent" that Narragansett is "allowed to

collect such revenues from [its] retail customers," in no way suggests that the filing of retail rates with a fuel-adjustment mechanism was entirely optional.

Finally, although the parol evidence is not necessary to resolve the issue, clearly Narragansett and its predecessors acted at all times as if the contract created an obligation to seek retail rates with a fuel adjustment mechanism between 1999 and 2004. During that period, Narragansett filed tariffs containing such rates, and it paid a higher price to TransCanada, calculating that price according to the Fuel Adjustment Factor set forth in the contract. Indeed, Narragansett seems to concede that between 1999 and 2004 it was obligated to file rates with a fuel-adjustment mechanism, and to make higher fuel-adjusted payments as a result.

Accordingly, Narragansett was obligated, at a minimum, to file tariffs with the RIPUC that included a fuel-adjustment mechanism, and to pay a price under the WSOSA that included the Fuel Adjustment Factor component, through December 31, 2004. The question then becomes whether Narragansett's obligation ended in 2004, or whether it extends through the end of 2009. Put another way, if the contract imposed that obligation for the first five years, is there any reason to conclude that it did not do so for the last five years?

2. The Duration of the FAF Obligation

Article 2 of the WSOSA states that the contract expires on December 31, 2009, unless terminated sooner because of a party's default. As noted, Article 5 sets forth two components of the contract price: the Standard Offer Wholesale Price plus a Fuel Adjustment Factor. Nothing in Article 5 states or suggests that the duration of one price component is shorter or longer than the other. Nothing in any other article of the contract states or suggests anything to the contrary. The obvious conclusion is that the contract imposes the same obligations on Narragansett, at least

as to its service in Rhode Island, in 2005-2009 as it did in 1999-2004.

That conclusion is strongly underscored by Appendix A, which states that "Standard Offer Service for Eastern Edison [i.e., in Massachusetts] terminates at 12:00 midnight on December 31, 2004." Again, no such temporal limitation appears in Article 5, or indeed anywhere else in the contract. The parties obviously know how to draft language terminating a contractual obligation in 2004 when they intended such a result.[10]

Put simply, there is *no* indication *anywhere* in the contract that Narragansett's obligations as to the Fuel Adjustment Factor expire in 2004. The contract is an unambiguous, integrated agreement, negotiated and executed by sophisticated corporate entities. If the parties intended that Narragansett's obligations were to change in 2004, it would have been simple enough to say so. The parties elected not to. Accordingly, those obligations—like all of Narragansett's obligations under the contract, other than Standard Offer Service for Eastern Edison—remain in place until December 31, 2009.[11]

This Court's determination that the WSOSA is unambiguous renders most of the evidentiary record irrelevant. Narragansett argues vigorously that (1) EUA's settlement agreement with Rhode Island, and the November 1997 tariff filing with RIPUC, described SOS

---

[10] Narragansett notes that the EUA settlement agreement (to which TransCanada was not a party) contemplated standard offer pricing to retail customers through 2009, but a fuel adjustment mechanism only through 2004. The settlement agreement, however, neither expressly requires nor prohibits a fuel adjustment mechanism between 2005 and 2009. More importantly, even if the settlement agreement is taken as a contemporaneous expression of EUA's intentions when negotiating the WSOSA, it cannot be considered to vary or contradict the terms of an unambiguous and integrated contract.

[11] Narragansett further contends that Article 5 is ambiguous because it does not specify the mechanism or the "trigger points" to be used in calculating and applying the FAF. Even if true—and the Court expresses no opinion on the subject—any such ambiguity is not relevant to the issue whether the contractual obligation expires in 2004 or 2009.

through 2009 but a FAF only through 2004; (2) various EUA representatives intended that the FAF would continue only through 2004; and (3) EUA consistently understood that the FAF would expire in 2004. TransCanada argues vigorously to the contrary that EUA and Narragansett took inconsistent and misleading positions throughout the relevant period.

These disputes are irrelevant. Again, the contract is integrated and unambiguous. The intentions and understandings of the parties prior to or at the time of the execution of the contract may not be considered to vary its terms. *See Hallmark Institute of Photography, Inc. v. Collegebound Network, LLC*, 518 F. Supp. 2d 328, 331 (D. Mass. 2007); *ITT Corp v. LTX Corp.*, 926 F.2d 1258, 1261-1262 (1st Cir. 1991).

C. Whether the Contract Was Subsequently Modified

Evidence of the actions of the parties after execution of the contract may, however, be relevant to show a modification, whether written or oral, of an integrated agreement. *John Beaudette, Inc. v. Sentry Ins.*, 94 F. Supp. 2d 77, 139 (D. Mass. 1999) (citing *Cambridgeport Sav. Bk. v. Boersner*, 413 Mass. 432, 439 (1992)). Mutual agreement on modification may "be inferred from the conduct of the parties and from the attendant circumstances." *Cambridgeport*, 413 Mass. at 439 (*citing First Pa. Mortgage Trust v. Dorchester Sav. Bank*, 395 Mass. 614, 625 (1985)).

There is considerable disagreement between the parties as to whether Narragansett made known its interpretation of the contract, and whether TransCanada had "notice" of that interpretation of the contract, during the period between 2000 and 2004. Narragansett does not, however, allege that TransCanada ever *assented* to that interpretation, either orally or through a written instrument, nor has it alleged that any subsequent modification was supported by valid

consideration. *See John Beaudette*, 94 F. Supp. 2d at 139. Indeed, Narragansett does not even assert a theory of subsequent modification, contending instead that the original contract provided a 2004 expiration date for the FAF. *See Cambridgeport*, 413 Mass. at 440 (finding it "significant" in rejecting the theory of subsequent modification that defendants did not assert a subsequent agreement had been negotiated). Accordingly, any evidence concerning any party's understandings, intentions, or positions after execution of the contract do not create a genuine issue of material fact as to its terms.

In short, the contract unambiguously requires Narragansett to file Rhode Island Standard Offer Service tariffs with a fuel-adjustment mechanism through the full term of the contract, and to make higher payments to TransCanada as a result. Accordingly, TransCanada's notice on March 1, 2005, that it expected Fuel Adjustment Factor payments through 2009, and its subsequent position that it would exercise its contractual right to terminate the contract if FAF payments were not received, were entirely consistent with the terms of the contract.

D. Whether Narragansett Breached the Contract

The conclusion that Narragansett's interpretation of the contract is erroneous does not compel the conclusion that Narragansett is in material breach. The essential elements of a contract claim are "(1) an agreement, express or implied, in writing or oral, (2) for a valid consideration, (3) performance or its equivalent by the plaintiff *and breach by the defendant*, and (4) damage to the plaintiff." *Mass. Cash Register, Inc. v. Comtrex Systems Corp.*, 901 F. Supp. 404, 415 (D. Mass. 1995) (emphasis added).

As noted, Narragansett has made payment of the disputed amounts under protest. Article 7 of the WSOSA provides that an "Event of Default" occurs when there is a "[f]ailure of

[Narragansett], in a material respect, to comply with, observe, or perform any covenant, warranty or obligation under this Agreement, *and* such failure is not cured or rectified within thirty days (30) days after notice thereof from Supplier." (emphasis added).[12]

It is undisputed that TransCanada first gave notice to Narragansett of the alleged default on March 1, 2005. That notice specifically referred to the thirty-day cure or rectification requirement of the WSOSA. The first "protest payment" made to TransCanada was made on March 31, 2005. That payment was within the contract's thirty-day period for cure or rectification of alleged default. These payments have continued to the present day, and TransCanada has not alleged any deficiency as to their amount or timeliness.

In short, TransCanada has received every payment, and every other material benefit, that it contends that it is entitled to by contract. Accordingly, Narragansett has not breached the WSOSA.

E. Whether Either Party Breached the Implied Covenant of Good Faith and Fair Dealing

Both parties have asserted claims for breach of the implied covenant of good faith and fair dealing implicit in every contract. A party may breach the implied covenant without breaching any express term of the contract. *Speakman*, 367 F. Supp. 2d at 132 (citing *Fortune v. National Cash Register Co.*, 373 Mass 96, 101, 105 (1977)). The essential inquiry is whether "the challenged conduct conformed to the parties' reasonable understanding of performance obligations, as reflected in the overall spirit of the bargain, not whether the defendant abided by

[12] The contract also provides that if Narragansett commits any "Event of Default," TransCanada may unconditionally terminate the contract upon sixty days written notice. TransCanada never obtained the contractual right to provide sixty-day notice of termination.

the letter of the contract in the course of performance." *Speakman*, 367 F. Supp. 2d at 132 (citing *Larson v. Larson*, 37 Mass. App. Ct. 106, 110 (1994)).

1. Whether TransCanada Breached the Implied Covenant

Narragansett contends that TransCanada violated the implied covenant because it (1) "failed to object" to Narragansett's stated intention to not pay a FAF after 2004, (2) did not notify Narragansett that it expected to receive FAF payments from 2005-2009 until March 2005, and (3) [threatened] to terminate the WSOSA "as a pretext to avoid a contract that had become economically disadvantageous."

It is apparently undisputed that TransCanada did not object, formally or informally, to Narragansett's interpretation of the contract until March 2005.[13] Even if the Court credits Narragansett's contention that TransCanada had "notice" of its interpretation at some point between 2000 and 2004, none of TransCanada's subsequent acts or omissions rise to the level of a breach of the implied covenant of good faith and fair dealing.

The implied covenant does not apply when a party "has exercised an express contractual power in good faith." *Speakman*, 367 F. Supp. 2d at 132. Furthermore, the covenant may not be invoked to create rights and duties not contemplated by the provisions of the contract or the contractual relationship. *Uno Restaurants*, 441 Mass. at 385.

Here, the contract contains no explicit or implicit requirement that TransCanada "object" every time Narragansett expresses an opinion about the contract with which it disagrees. Furthermore, the March 2005 notice to Narragansett was expressly permitted under the

---

[13] TransCanada disputes, however, whether it was notified prior to March 2005of Narragansett's interpretation.

contract—the contract provides that TransCanada was to give notice after the occurrence of an event of default, so that Narragansett would have an opportunity to cure or rectify. TransCanada's statement that it would exercise its unconditional contract termination right if FAF payments were not resumed was similarly proper and did not violate the implied covenant.

2. Whether Narragansett Breached the Implied Covenant

TransCanada, for its part, contends that defendant has breached the implied covenant of good faith and fair dealing through a variety of misleading actions and representations. Its argument, however, is essentially an alternative argument: "[t]o the extent EUA (or Narragansett) maintained discretion under the Agreement as to whether to file a fuel adjustment in its Standard Offer Service tariffs through 2009, it was obligated to exercise that discretion consistent with the expectations of the contracting parties." (Pl. Mem. at 23). Because the Court has ruled that the contract in fact required Narragansett to make such a filing, TransCanada's claim for breach of the implied covenant is essentially moot.

F. Indemnification

Narrangansett has moved for summary judgment in its favor as to Count 2 of the complaint. Count 2 alleges that Narrangansett will be contractually obligated to indemnify TransCanada in the event of action by a "government or regulatory agency . . . which materially increases [TransCanada's] *costs or obligations* to provide Standard Offer Service" to Narrangansett. TransCanada contends that Narrangansett's failure to file rates with a fuel-adjustment mechanism after 2004 (and thus, the failure of Narrangansett to remit FAF payments to TransCanada) materially increases its "costs and obligations" under the WSOSA. TransCanada further contends that its "obligations" to provide Standard Offer Service increase in the absence

of a FAF, as it "is then obliged to cover on its own its higher supply costs due to extraordinary fuel costs."

The crux of TransCanada's argument is that because its *profits* may decrease, or because its *revenue* may decrease, it will suffer increased costs or obligations. An increase in "costs and obligations" is obviously not the same as a decrease in "profits" or "revenue." To conflate costs and obligations with reduced revenues or profit would run counter to elementary bookkeeping and accounting concepts. Furthermore, and in any event, TransCanada's fuel costs are determined by market forces, not by the action of any "government or regulatory agency." Accordingly, summary judgment will be granted in favor of Narragansett as to Count 2 of the complaint.

G. Rescission or Reformation

TransCanada alternatively seeks rescission or reformation of the contract on grounds of unilateral mistake. Because the WSOSA unambiguously requires Narragansett to make FAF payments through 2009, no rescission or reformation of the contract is necessary. Accordingly, the motion for summary judgment by TransCanada as to Count 4 will be denied.

H. Declaratory Relief

TransCanada requests declaratory judgment stating that (1) Narragansett breached the terms of the WSOSA, (2) Narragansett failed to cure that breach, (3) TransCanada had the unconditional right to terminate the WSOSA upon the breach, and (4) TransCanada is entitled to damages. Narragansett requests declaratory judgment stating that TransCanada had no right to terminate the WSOSA. The Court has determined that although the WSOSA unambiguously requires the filing of fuel-adjusted rates and payment of the FAF through 2009, Narragansett

never actually breached the contract and TransCanada therefore never had the right to terminate.

The Court may declare the rights and other legal relations of parties seeking declaratory judgment "whether or not further relief is or could be sought." 28 U.S.C. § 2201. The Court will grant summary judgment in part to TransCanada as to both declaratory judgment claims, but in a form to be determined consistent with this opinion, and not as to the specific declaratory relief sought.

III. Conclusion

For the foregoing reasons,

1. the motion of plaintiff TransCanada Power Marketing Ltd. for summary judgment is
   a. DENIED as to Counts 1 (breach of contract), 3 (breach of the implied covenant of good faith and fair dealing), and 4 (rescission or reformation of contract) of the complaint;
   b. GRANTED in part as to Count 5 (declaratory relief) of the complaint;
   c. GRANTED as to Counts 1 (breach of contract) and 3 (breach of the implied covenant of good faith and fair dealing) of the counterclaim; and
   d. GRANTED in part as to Count 2 (declaratory relief) of the counterclaim; and
2. the motion of defendant Narragansett Electric Company for summary judgment as to Count 2 (contractual indemnification) of the complaint is GRANTED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: March 26, 2008

EXHIBIT 5

CONTAINS PRIVILEGED INFORMATION

FILED UNDER SEAL

EXHIBIT 6

CONTAINS PRIVILEGED INFORMATION

FILED UNDER SEAL

EXHIBIT 7

119 FERC ¶ 61,292
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.

Constellation Energy Commodities Group, Inc. Docket No. EL07-42-000

ORDER DENYING DECLARATORY ORDER

(Issued June 21, 2007)

1. On March 1, 2007, Constellation Energy Commodities Group, Inc. (Constellation) filed a petition for a declaratory order requesting that the Commission declare that Section VIII (A) of the Forward Capacity Market (FCM) Settlement Agreement has no effect on Constellation's rights to renegotiate the prices in its four wholesale power purchase agreements with The Narragansett Electric Company (Narragansett).[1] As discussed below, we deny Constellation's petition.

Background

2. Constellation is a wholesale power supplier. Narragansett is a retail electric distribution company that delivers electricity to approximately 478,000 retail customers in Rhode Island.[2] Constellation supplies Narragansett with wholesale energy and capacity at fixed prices[3] under four separate power purchase agreements[4] negotiated under Constellation's market-based rate authority.[5]

---

[1] The Commission approved the FCM Settlement Agreement in *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (*Devon Power*).

[2] Narragansett Electric Company's Motion to Intervene and Protest at 3 (Narragansett's Protest).

[3] The power purchase agreements state that Constellation will supply Narragansett capacity at a stipulated base price plus a fuel adjustment factor covering the entire quantity that Constellation delivers under the purchase power agreements. *See* Petition for Declaratory Order of Constellation Energy Commodities Group, Inc. at 15 (Constellation's Petition).

3. Constellation claims that each power purchase agreement contains an "equitable adjustment clause" entitling it to renegotiate the price whenever any regulatory change materially alters the economic benefits and burdens contemplated by the parties at the time they executed the agreement.[6] Constellation states that these equitable adjustment clauses were intended to ensure that neither party is "forced to bear solely the risk of material regulatory changes."[7] Narragansett responds that these clauses appear in only three power purchase agreements,[8] and contests Constellation's description of their legal consequences. In Narragansett's view, Constellation must supply Narragansett with the

---

[4] Constellation identifies the four power purchase agreements, executed between 1998 and 2002, as follows:

(1) Wholesale Standard Offer Service Agreement between Blackstone Valley Electric Company, Eastern Edison Company, Newport Electric Corporation and Constellation Power Source, Inc. (the 20 percent contract). This agreement is dated December 21, 1998, and was amended on January 27, 2003 and June 3, 2003. It is in effect until midnight on December 31, 2009.

(2) Wholesale Standard Offer Service Agreement between Blackstone Valley Electric Company, Eastern Edison Company, Newport Electric Corporation and Constellation Power Source, Inc. (the 36 percent contract). This agreement is dated December 21, 1998, and was amended on January 27, 2003 and June 3, 2003. It is in effect until midnight on December 31, 2009.

(3) Power Supply Agreement between the Narragansett Electric Company and Constellation Power Source, Inc. (the 2001 contract). This agreement is dated October 5, 2001 and is in effect until December 31, 2009.

(4) Power Supply Agreement between the Narragansett Electric Company and Constellation Power Source, Inc. (the 2002 contract). This agreement is dated August 23, 2002 and is in effect until midnight on December 31, 2009.

[5] Constellation's Petition at 15.

[6] *Id.* at 7.

[7] *Id.*

[8] Narragansett's Protest at 5.

capacity required to serve Narragansett's retail load "at the fixed prices specified in the PPAs [power purchase agreements], regardless of the prices Constellation must pay to secure that capacity."[9]

4. Constellation alleges that its costs for securing capacity have increased as a result of the FCM Settlement Agreement.[10] The FCM Settlement Agreement establishes a capacity auction in New England beginning on June 1, 2010. In the interim, the FCM Settlement Agreement establishes a transition period during which capacity will be sold according to fixed prices. Constellation states that these fixed transition prices are "dramatically higher" than the prices that existed when Constellation and Narragansett agreed to the fixed prices in the power purchase agreements.[11] Constellation argues, therefore, that the FCM Settlement Agreement constitutes significant regulatory change triggering its renegotiation rights.

5. On August 1, 2006, Constellation attempted to invoke its alleged renegotiation rights. Narragansett terminated negotiations after one meeting. Narragansett thereafter filed an action in the United States District Court for the District of Rhode Island (District Court) seeking, inter alia, a declaratory judgment that Section VIII (A) of the FCM Settlement Agreement precludes Constellation from renegotiating the power purchase agreements.[12] Section VIII (A) deals with arrangements for unforced capacity (UCAP), which is the amount of installed capacity (ICAP) available for purchase after calculating a generating unit's forced outage rate. UCAP is the capacity required by a load serving entity (LSE), such as Narragansett, to serve its load. Section VIII (A) states that:

> The current UCAP products shall be retained for the period commencing on December 1, 2006 and ending on May 30, 2010 (the "Transition Period") as provided for in Part VIII. Payments will be made to UCAP entitlement holders, and made by UCAP obligation holders including wholesale standard offer suppliers in Rhode Island as under the current Market Rules and tariffs; it being understood that the agreement of wholesale standard

---

[9] *Id.* at 8.

[10] Constellation neither signed nor protested the FCM Settlement Agreement.

[11] Constellation's Petition at 3. All of the power purchase agreements terminate before the June 1, 2010 start of the capacity auction.

[12] Narragansett's Protest at 8.

> offer suppliers in Rhode Island to make UCAP payments is contingent upon the agreement of the state of Rhode Island utility regulatory authorities to support the settlement.[13]

On January 9, 2007, the Rhode Island Attorney General, on behalf of several Rhode Island agencies, filed a motion to intervene and join Narragansett's claim.

Petition for Declaratory Order

6. In the instant petition, Constellation is not asking the Commission to determine whether Constellation has renegotiation rights under the power purchase agreements, or to confirm Constellation's view that its renegotiation rights are triggered by the FCM Settlement Agreement. Rather, Constellation is asking the Commission to declare that Section VIII (A) does not preclude Constellation from exercising whatever renegotiation rights the District Court determines that Constellation has under the power purchase agreements.

7. As a threshold issue, Constellation argues that the Commission has exclusive jurisdiction over this case.[14] Constellation maintains that the Federal Power Act[15] grants the Commission exclusive jurisdiction to determine the rates for the sale of wholesale power,[16] and that the filed rate doctrine bars courts from entering any judgment that materially alters a contract provision affecting a rate filed with the Commission.[17] Constellation characterizes Narragansett's action before the District Court as an action for contract reformation, stating that Narragansett is seeking a declaration that the FCM Settlement Agreement has abrogated Constellation's right to negotiate equitable price adjustments in response to significant regulatory action.[18] Constellation claims that Narragansett is asking the court to exceed its authority by materially altering a contract provision directly affecting the rate on file with the Commission.

---

[13] *See* Constellation's Petition at 3-4.

[14] *Id.* at 13-16.

[15] 16 U.S.C. § 824-824(m) (2000).

[16] Constellation's Petition at 13-14.

[17] *Id.* at 14-16.

[18] *Id.* at 15.

8. In the alternative, Constellation argues that if the Commission determines that it shares concurrent jurisdiction with the District Court, the Commission should assert primary jurisdiction under *Arkansas Louisiana Gas Co. v. Hall.*[19] In that case, the Commission established three factors to consider when deciding whether or not to assert primary jurisdiction. These factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.[20]

9. Constellation argues that each of the *Arkla* factors supports the Commission asserting primary jurisdiction here. First, Constellation states that the Commission has special expertise concerning matters related to capacity markets and to settlement agreements managed, administered, and approved by the Commission.[21] Next, Constellation claims that uniformity of interpretation "is crucial" in this case, because this case raises the issue of whether a Commission-approved settlement agreement can implicitly and indirectly modify a non-signatory's bilateral contract rights.[22] Finally, Constellation argues that its petition presents several issues that are important to the Commission's regulatory responsibilities, including whether settlement agreements can modify bilateral contracts without the agreements explicitly identifying the contracts, and without the Commission making particularized findings regarding the contracts, and whether courts or the Commission should clarify and interpret Commission-approved settlement agreements.[23] Constellation speculates that permitting courts to clarify and interpret settlement agreements could "significantly compromise" the settlement privilege under Section 602 of the Commission's regulations because courts may allow discovery regarding how the settlement was reached and what it intended to accomplish.[24]

---

[19] *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (1979) (*Arkla*), *reh'g denied*, 8 FERC ¶ 61,031 (1979).

[20] *Arkla*, 7 FERC ¶ 61,175, at 61,322.

[21] Constellation's Petition at 17.

[22] *Id.* at 18.

[23] *Id.*

[24] 18 C.F.R. § 385.602 (2006).

Constellation also expresses concern that judicial interpretation of Commission-approved settlement agreements will undermine faith in the utility and efficacy of the Commission's settlement process.[25]

10. As to the merits of its petition, Constellation states that Section VIII (A) of the FCM Settlement Agreement "does not purport to amend Constellation's bilateral contract rights."[26] In Constellation's view:

> [T]he natural and reasonable construction of Section VIII (A) provides that, the obligation of load-serving entities to pay UCAP entitlement holders may be satisfied (where applicable) by allowing the LSE to contract with a wholesale standard offer supplier to procure the requisite capacity, as the then-current rules allowed. . . . [It] further identifies the parties from whom generators providing capacity may look for payment. . . . [It] does not address, in any way, bilateral contractual provisions allowing Constellation or Narragansett to return to the economic balance struck between the parties at the time of contract formation.[27]

Constellation further states that since it did not sign the FCM Settlement Agreement, the provision making wholesale standard offer suppliers' consent contingent on Rhode Island utility regulatory authorities agreeing to the Settlement does not apply to Constellation.[28] Constellation also notes that Section VIII (A) contains no language amending or waiving particular bilateral contract rights, that Constellation did not receive consideration in exchange for waiving or abrogating its rights, that no party to the FCM Settlement Agreement raised the issue of its impact on equitable adjustment rights, and that the Commission did not specifically find that abrogating Constellation's contractual rights is in the public interest.[29] Finally, Constellation maintains that its failure to protest the FCM Settlement Agreement may not be regarded as evidence that it waived or acquiesced to any change in its rights under the power purchase agreements.[30]

---

[25] Constellation's Petition at 18.

[26] *Id.* at 19.

[27] *Id.*

[28] *Id.* at 20.

[29] *Id.* at 20-21.

[30] *Id.* at 22-23.

Notice of Filing and Responsive Pleadings

11. Notice of Constellation's filing was published in the *Federal Register*, with interventions and comments due on April 2, 2007.[31] TransCanada Power Marketing Ltd. (TransCanada) filed a timely motion to intervene. Narragansett filed a timely motion to intervene and comments opposing Constellation's petition. The Attorney General of Rhode Island, on behalf of the State of Rhode Island and Providence Plantations Carriers and the Rhode Island Division of Public Utilities and Carriers (collectively, Rhode Island) filed a timely motion to intervene and comments opposing Constellation's petition. Constellation filed an answer to the protests. Narragansett and Rhode Island filed answers to Constellation's answer.

Narragansett's Protest

12. Narragansett characterizes its action in the District Court as an action to enforce the power purchase agreements and the FCM Settlement Agreement.[32] Narragansett argues that the filed rate doctrine has no applicability in the instant case because Narragansett is not challenging the justness or reasonableness of any provision in the power purchase agreements, not even the provision that Narragansett describes as "the limited renegotiation provision" it states is present in three of the four power purchase agreements.[33] Narragansett asserts that under these circumstances the Commission does not have exclusive jurisdiction under the filed rate doctrine.[34] In any event, Narragansett argues that it is for the District Court, not the Commission, to determine whether the filed rate doctrine precludes the District Court from exercising jurisdiction over this case.[35]

13. Narragansett next argues that the Commission should refrain from exercising primary jurisdiction in this case.[36] Narragansett states that the District Court is fully capable of resolving the contract interpretation and enforcement issues in Narragansett's

---

[31] *Federal Register*, 72 Fed. Reg. 11,856-11,857 (2007).

[32] Narragansett's Protest at 10.

[33] *Id.* Constellation contends that the provision is present in all four agreements.

[34] *Id.* at 13.

[35] *Id.* at 14.

[36] *Id.* at 15.

complaint, and notes that the District Court has not requested the Commission's assistance in resolving this case.[37] Narragansett further claims that the *Arkla* factors counsel against the Commission asserting primary jurisdiction.

14. Narragansett first argues that the Commission's special expertise is not needed to resolve this dispute. Narragansett states that the Commission and the courts have repeatedly held that "interpretation of wholesale power contracts is an appropriate and proper function of the courts,"[38] and that here, Constellation has failed to offer any reason why the Commission's special expertise is needed to interpret the power purchase agreements. Similarly, Narragansett maintains that the Commission's special expertise is not required to address Narragansett's claim that Constellation has waived its renegotiation rights or to interpret Section VIII (A).[39] Narragansett further claims that this case presents no occasion for the Commission to utilize its special expertise in interpreting its own orders because the Commission did not discuss Section VIII (A) in *Devon Power*.[40] Narragansett points out that neither Constellation nor any other party filed comments objecting to Section VIII (A). Narragansett maintains that Section VIII (A) is "clear and unambiguous"[41] and that "Constellation's failure to avail itself of its rights when the Settlement Agreement was before the Commission does not render the clear terms of Section VIII (A) so ambiguous as to require Commission clarification."[42]

15. Narragansett next argues that this dispute is merely a matter of significance between the parties and does not require the Commission to assert primary jurisdiction to ensure a unified outcome with a large number of similar cases.[43] In Narragansett's view, the issues Narragansett presented to the District Court in its complaint are "narrowly tailored to the specific facts of the case" and "turn on the particular contracts between Constellation and [Narragansett] and the provision of the Settlement Agreement directed specifically to the parties and the State of Rhode Island."[44] Narragansett asserts that

---

[37] *Id.*

[38] *Id.* at 16.

[39] *Id.* at 17.

[40] *Id.* at 18-19.

[41] *Id.* at 17.

[42] *Id.* at 19.

[43] *Id.* at 20.

[44] *Id.*

Commission intervention is "especially inappropriate" because Constellation has admitted that its petition only involves the relationship between the FCM Settlement Agreement and the power purchase agreements.[45]

16. Finally, Narragansett argues that this case does not implicate any of the Commission's important regulatory responsibilities.[46] Narragansett asserts that the policy issues Constellation raised to support its petition have no bearing on this case. Narragansett maintains that "this dispute does not implicate concerns of settlement agreements modifying bilateral contracts" because Section VIII (A) explicitly confirmed Constellation's obligation to supply Narragansett with capacity under the power purchase agreements.[47] According to Narragansett, the power purchase agreements require Constellation to supply capacity to Narragansett "with any modification in the price of capacity being a bargained-for-risk that Constellation assumed under the [power purchase agreements]."[48] Narragansett further claims that this case does not threaten the sanctity of Commission settlement agreements.[49] In Narragansett's view, this case "is nothing more than a contract dispute between two parties," and granting Constellation's petition "would be to condone Constellation's blatant attempt at forum-shopping."[50]

Rhode Island's Protest

17. Rhode Island likewise argues that the Commission does not have exclusive jurisdiction over this case because it involves "nothing more than [a] simple matter of contract interpretation, the outcome of which hinges upon the meaning of Section VIII (A)."[51] Rhode Island asserts that "[a]s long as the principal nature of the action is one of contract interpretation," Commission and court precedent dictate that "the filed rate

---

[45] *Id.*

[46] *Id.* at 21.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Motion to Intervene and Protest of the State of Rhode Island and Providence Plantations and the Rhode Island Division of Public Utilities and Carriers at 10 (Rhode Island's Protest).

doctrine does not divest the federal courts of jurisdiction."[52] Rhode Island further argues that the Commission does not possess primary jurisdiction under *Arkla*. Rhode Island cites Commission precedent stating that straightforward matters of contract interpretation do not require the Commission's special expertise and are better handled by a court.[53] Rhode Island next claims that this case does not implicate considerations of uniformity because "the unique circumstances giving rise to the inclusion of Section VIII (A) in the Settlement make it highly unlikely that a similar scenario will ever reoccur."[54] Rhode Island explains that:

> At a critical point in the negotiations [of the FCM Settlement Agreement], only two New England states supported the [FCM] Settlement. Without [Rhode Island's] agreement to become a Settling Party, ISO-New England would not recommend the FCM reflected in the Settlement to the Commission. The State, thus, became a "swing" settlement participant. Settlement participants, including Rhode Island standard offer wholesale suppliers, included Section VIII (A) in the Settlement to induce the State to become a Settling Party, thereby giving ISO-New England the three New England states that it needed to recommend the Settlement to the Commission.[55]

Rhode Island further maintains that it would not have supported the FCM Settlement Agreement had it known that Constellation opposed Section VIII (A), and that it agreed to the FCM Settlement Agreement in reliance on Constellation's failure to inform both the Settlement Judge and the Commission about its objections.[56] Finally, Rhode Island claims that the issue of whether Section VIII (A) abrogates Constellation's rights under the power purchase agreements does not raise broad policy or regulatory issues because Section VIII (A) "represents a single, contractual inducement to one settling party… and does not implicate the FCM."[57]

---

[52] *Id.*

[53] *Id.* at 13-14.

[54] *Id.* at 15.

[55] *Id.*

[56] *Id.* at 5.

[57] *Id.* at 16.

18. Rhode Island makes two additional arguments urging the Commission to dismiss Constellation's petition on procedural grounds. First, Rhode Island argues that the Commission should not exercise its discretion to issue a declaratory order because Rhode Island has additional claims that will not be resolved even if the Commission grants Constellation's petition for a declaratory order.[58] Second, Rhode Island offers several theories asserting that Constellation has either waived its right to challenge the FCM Settlement Agreement, is precluded or estopped from challenging the FCM Settlement Agreement, or implicitly supported the FCM Settlement Agreement by failing to articulate opposition at appropriate times in the settlement process.[59]

19. Addressing the merits of Constellation's petition, Rhode Island maintains that Section VIII (A)'s "plain and unambiguous" language precludes Constellation from renegotiating the prices in the power purchase agreements.[60] Rhode Island also claims that this interpretation is consistent with the intentions of the parties responsible for drafting and including Section VIII (A) in the FCM Settlement Agreement.[61] Narragansett and Rhode Island assert that Section VIII (A) was added, at Rhode Island's specific request, with the express intention of preventing Constellation and other wholesale capacity providers from passing on increased costs resulting from the FCM Settlement Agreement.

Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[62] the timely, unopposed motions to intervene serve to make TransCanada, Narragansett, and Rhode Island parties to this proceeding.

---

[58] *Id.* at 8-9.

[59] *Id.* at 22-30.

[60] *Id.* at 18-19.

[61] *Id.* at 19-20.

[62] 18 C.F.R. § 385.214 (2006).

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,[63] prohibits an answer to a protest unless otherwise ordered by a decisional authority. We are not persuaded to accept Constellation's answer to Narragansett's and Rhode Island's protests, and will, therefore, reject it. Rule 213(a)(2) also prohibits an answer to an answer unless otherwise ordered by a decisional authority. We are not persuaded to accept either Narragansett's or Rhode Island's answer to Constellation's answer, and will, therefore, reject them.

B. Constellation's Petition

22. We will deny Constellation's request for a declaratory order. As a preliminary matter, we find that this case does not fall within the Commission's exclusive jurisdiction. Constellation's dispute with Narragansett is a dispute over the meaning of Section VIII (A) of the FCM Settlement Agreement. It is well established that courts and the Commission have concurrent jurisdiction over cases interpreting contracts and settlement agreements.[64]

23. We will also decline to assert primary jurisdiction based on our evaluation of the case according to the factors set forth in *Arkla*. The issues here are the proper interpretation of Section VIII (A) and its relationship to the power purchase agreements. We find that we do not possess special expertise beyond that of the District Court in this matter. Construing contractual and settlement agreement provisions and inquiring into the parties' intent are straightforward matters of contract interpretation that in these circumstances are better left to the District Court.[65] Contrary to Constellation's assertion, there is no need for uniformity here. This is merely a dispute between Constellation and Narragansett over the effect that the FCM Settlement Agreement has on their power purchase agreements. Finally, while this is a matter of significance to the parties, the resolution of this contract interpretation dispute is not important in relation to the Commission's regulatory responsibilities.

24. We are satisfied that analysis of each *Arkla* factor leads to the conclusion that this dispute does not require the Commission to assert primary jurisdiction. Therefore, we deny Constellation's petition for a declaratory order.

---

[63] 18 C.F.R. § 385.213(a)(2) (2006).

[64] *See Portland General Elec. Co.*, 72 FERC ¶ 61,009 at 61,021 (1995); *Kentucky Utilities Co.*, 109 FERC ¶ 61,033 (2004), *reh'g denied*, 110 FERC ¶ 61,285 at P 10-11 (2005) (*Kentucky Utilities*).

[65] *Kentucky Utilities*, 109 FERC ¶ 61,033, at P 15.

The Commission orders:

Constellation's petition for a declaratory order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

EXHIBIT 8

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

Narragansett Electric Company, Plaintiff, v. Constellation Energy Commodities Group, Inc., Defendant.	)	C.A. No. 06-404S

OPINION AND ORDER

WILLIAM E. SMITH, United States District Judge.

Plaintiff Narragansett Electric Company ("Plaintiff" or "NEC"), a Rhode Island corporation, brings this case against Constellation Energy Commodities Group, Inc. ("Defendant" or "Constellation"), a Delaware corporation with its principal place of business in Maryland, seeking to enforce the provisions of four power purchase agreements, as well as a settlement agreement approved by the Federal Energy Regulatory Commission ("FERC"). In its Complaint, NEC advances claims for declaratory relief, breach of contract, and waiver. Constellation moved to dismiss all the claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. In the alternative, Constellation requests that the proceedings be stayed pending arbitration. Additionally, the State of Rhode Island and the Rhode Island Division of Public Utilities and Carriers

(collectively, "State") have moved to intervene as a party plaintiff and join Counts I and II of the Complaint, and to join a new count of estoppel against Constellation.

For the reasons set forth below, Constellation's Motion to Dismiss NEC's Complaint or, in the Alternative, to Stay proceedings in this case is denied, and the State's Motion to Intervene and to Join Claim is granted.

I. Constellation's Motion to Dismiss NEC's Complaint

A. Factual Background[1]

Accepting the facts as pleaded and inferences to be drawn therefrom in the light most favorable to Plaintiff, as this Court is obliged to do, the Court finds as follows.

Plaintiff NEC is an electric distribution company that delivers electricity to retail customers in Rhode Island. Defendant Constellation is a wholesale supplier of electricity. As a wholesale supplier, Constellation purchases electricity from the entities that produce it – known in industry parlance as "generators" – and sells that electricity to retail distributors like NEC.

NEC and Constellation have for years maintained a relationship for the sale and purchase of wholesale electricity. Relevant to

[1] The background information is limited to that necessary for disposition of Constellation's motion. For purposes of deciding the motion, this Court takes the facts as set forth in NEC's Complaint, and from related materials that this Court may properly consider at the motion to dismiss stage.

this proceeding are four "Power Purchase Agreements" ("PPAs"),[2] pursuant to which Constellation supplies wholesale power to NEC for distribution to NEC's retail customers who contract for so-called

---

[2] Although NEC did not attach the PPAs to its Complaint, this Court may, as explained elsewhere in this opinion, consider undisputed documents alleged or referenced in the Complaint. See, e.g., Young v. Lepone, 305 F.3d 1, 11 (1st Cir. 2002) (district court entitled to consider letters not attached to complaint when complaint contained extensive excerpts from letters and references to them; when factual allegations of complaint revolved around document whose authenticity is unchallenged, the document effectively merges into pleadings).

The four PPAs, executed between 1998 and 2002, are:

(1) Wholesale Standard Offer Service Agreement between Blackstone Valley Electric Company, Eastern Edison Company, Newport Electric Corporation and Constellation Power Source, Inc. (Dated December 21, 1998, and amended on January 27, 2003 and July 3, 2003) (the "20% Contract");

(2) Wholesale Standard Offer Service Agreement between Blackstone Valley Electric Company, Eastern Edison Company, Newport Electric Corporation and Constellation Power Source, Inc. (Dated December 21, 1998, and amended on January 27, 2003 and July 3, 2003) (the "36% Contract");

(3) Power Supply Agreement between the Narragansett Electric Company and Constellation Power Source, Inc. (Dated October 5, 2001) (the "2001 Contract"); and

(4) Power Supply Agreement between the Narragansett Electric Company and Constellation Power Source, Inc. (Dated August 23, 2002, and amended August 23, 2002) (the "2002 Contract").

Blackstone Valley Electric Company, Eastern Edison Company, and Newport Electric Corporation were predecessor companies of NEC. Constellation Power Source, Inc. was the predecessor company of Constellation.

"Standard Offer Service."[3] As part of its Standard Offer Service, NEC is obligated by ISO New England, an entity known as an "independent system operator" that establishes requirements and markets for electricity in New England,[4] to obtain a sufficient supply of electricity to ensure that it can meet fluctuating demand from its retail customers. This required supply is called "capacity," and sometimes "installed capacity" or "unforced capacity" ("UCAP").[5] In a sense, UCAP serves as the functional equivalent of a call option held by NEC that allows it to quickly

---

[3] Generally speaking, "Standard Offer Service" is a standard form of electric service provided to customers who have not elected to obtain their electricity from a non-regulated power producer. A more technical definition provided in the 20% Contract and 36% Contract provides that Standard Offer Service is:

> firm all-requirements electric service (minute by minute, hour by hour, day by day) including, but not limited to, the following products: energy, installed capability, operable capability, reserves, and associated losses necessary to fulfill all NEPOOL and ISO obligations as they may change from time to time associated with providing firm all requirements power to [NEC's] retail customers taking Standard Offer Service in accordance with the Settlement Agreements. Such Standard Offer Service shall include changes in customer demand for any reason, including, but not limited to, seasonal factors, daily load fluctuations, increased or decreased usage, demand side management activities, extremes in weather, and other similar events.

20% Contract, Art. 1; 36% Contract, Art. 1.

[4] The requirements and markets established by ISO New England operate subject to rules and regulations promulgated by FERC.

[5] For the purposes of this opinion, the Court shall use interchangeably the terms "capacity" or "UCAP."

procure more energy supplies when faced with increasing demand from its customers. In the context of this case, NEC meets its obligation to maintain sufficient UCAP by contracting with Constellation to supply Standard Offer Service, of which UCAP is a component.

Thus, Constellation obtains UCAP from generators and pays for it at rates approved by FERC. NEC then pays Constellation for the energy required to provide its retail customers with Standard Offer Service, i.e., NEC buys Standard Offer Service from Constellation. Subject to the approval of the Rhode Island Public Utilities Commission ("RIPUC"), NEC's cost for power purchased from Constellation is passed through to Rhode Island ratepayers in the rate for Standard Offer Service under retail electric service rates.[6]

The Complaint also alleges that under the PPAs, Constellation, in providing Standard Offer Service, "has the obligation to provide and pay for reserves or ASM." ASM is the abbreviated form of "ancillary services market" and, while it is not entirely clear

---

[6] The Court notes here an apparently tensed thread running between NEC's Complaint and its memorandum of law supporting the State's intervention. In its Complaint, NEC alleges, or at least suggests, that the Rhode Island Public Utilities Commission has the discretion whether to allow NEC to pass on increased costs to ratepayers. However, in supporting the State's intervention, NEC claims that any capacity costs passed through to NEC will ultimately be absorbed by ratepayers without the benefit of any review by the Public Utilities Commission. The Court takes no position on this question as it is not necessary to the disposition of these motions.

from the Complaint how ASM differs from UCAP, according to the Complaint, the ASM obligation requires Constellation to provide electricity reserves that are ready to meet power demands in a relatively short period of time.

In early 2003, FERC expressed concern that New England's deregulated electricity market was not providing enough revenue to generators, and therefore not providing sufficient incentive for investment in new capacity. Although there was at the time, and still is, a sufficient amount of capacity in New England, FERC believed that ever increasing demand for electricity eventually would overwhelm the available supply. To head off the expected shortfall, FERC requested that ISO New England develop a market mechanism that would encourage investment in new capacity. In 2004, ISO New England proposed what it called a "Locational Installed Capacity" market ("LICAP"). While the details are beyond the scope of the present motion, the idea behind LICAP was that ISO New England would allocate capacity payments to power generators based on a complex formula that valued capacity more highly when supply was scarce. LICAP was opposed by every New England state, their congressional delegations, and many others involved in the electricity market because, in part, it was believed that LICAP would result in excessive payments to generators. In the face of this widespread opposition, FERC delayed implementation of LICAP pending the negotiation of an alternative framework to address the

New England region's future electricity requirements. Therefore, in 2005-06, with the active participation of a FERC Administrative Law Judge, representatives of all six New England states, transmission owners, power generators, power traders and marketers, and suppliers, among others,[7] negotiated a settlement (the "Settlement Agreement") that proposed a "Forward Capacity Market" ("FCM") as an alternative to LICAP.

In contrast to LICAP, the FCM establishes a process whereby capacity resources will be auctioned off three years before it is anticipated they will be needed, thus providing generators with reliable price signals with which to evaluate investments in new capacity. The initial auction is expected to be held in early 2008 for a one to five-year commitment period beginning in 2010. At each annual auction, generators of electricity will bid the amount of capacity that they will be willing to supply in the future.

Because the FCM will not result in the actual purchase of capacity until at least 2010, the Settlement Agreement includes provisions for a transitional capacity market. From December 2006 to May 2010 (the "Transition Period"), suppliers of electricity must purchase capacity, or UCAP, from generators under a schedule

---

[7] Among the parties that participated in the Settlement Agreement negotiations were: Constellation, the State of Rhode Island, NEC's parent company National Grid USA, and FPL Energy, LLC, whose affiliate Florida Power & Light Company was, claims NEC, pursuing a merger with Constellation. The State of Rhode Island, National Grid USA, and FPL Energy, LLC are signatories to the Settlement Agreement.

of fixed prices, in lieu of the negotiated terms allowed previously, for each year of the Transition Period.[8] Under the fixed schedule the cost charged for capacity is higher than it likely otherwise would be under market conditions.

Although the transitional price schedule increases the cost of energy sold to wholesalers such as Constellation, NEC claims that Constellation is contractually bound by the PPAs to cover any increased cost for capacity, i.e., in effect, to supply UCAP to NEC, as part of Standard Offer Service, at prices below those set for the Transition Period. Constellation, on the other hand, contends that each of the PPAs, by its express terms, provides Constellation with a right to an "equitable adjustment" that should allow it to recover at least some of the increased costs through negotiations with NEC.

Since FERC established the settlement process largely in response to the concerns about LICAP expressed by the New England states, support for the Settlement Agreement from those states was recognized to be critical to FERC's acceptance of the Settlement Agreement. Consequently, Rhode Island conditioned its support of the Settlement Agreement on confirmation that Constellation would continue to meet its UCAP obligations during the Transition Period in the manner provided under the PPAs, and further that

---

[8] The PPAs terminate just prior to the end of the Transition Period.

Constellation and other Standard Offer Service wholesale suppliers would not shift the burden of such costs to Rhode Island ratepayers.

Therefore, the settlement participants, including Rhode Island standard offer wholesale suppliers, in order to induce the State to become a signatory, included the following language in Section VIII(A) of the Settlement Agreement:

> The current UCAP products shall be retained for the period commencing on December 1, 2006 and ending on May 30, 2010 (the "Transition Period") as provided for in Part VIII.I. Payments will be made to UCAP entitlement holders, and made by UCAP obligation holders including wholesale standard offer suppliers in Rhode Island as under the current Market Rules and tariffs; it being understood that the agreement of wholesale standard offer suppliers in Rhode Island to make UCAP payments is contingent upon the agreement of the state of Rhode Island utility regulatory authorities to support the settlement.

On March 6, 2006, the Settlement Agreement was filed with FERC for its approval. Subsequently, Constellation was listed as a party "waiving any and all objections" under the April 5, 2006 New England Power Pool ("NEPOOL")[9] Participants Committee Reply Comments to the Settlement Agreement, which were also filed with FERC. On April 11, 2006, the Report of the FERC Settlement Judge noted that Constellation "did not in the end oppose [the Settlement]." On June 16, 2006, FERC approved the Settlement

---

[9] NEPOOL is an association of utility companies throughout New England that participates in the production and management of energy resources in the New England Region.

Agreement.[10] Constellation did not oppose, appeal, or seek rehearing on any part of the Settlement Agreement.

According to NEC, under the terms of the PPAs and the Settlement Agreement, Constellation is solely responsible for paying the cost of procuring capacity during the Transition Period, regardless of how much the cost of capacity increases or decreases. Nevertheless, on August 1, 2006, Constellation wrote to NEC and demanded that the parties initiate negotiations to determine "appropriate compensation" for Constellation in light of the Transition Period UCAP costs, as well as to offset higher costs arising from changes in the ancillary services market (ASM). NEC then filed this action, premised on diversity and federal question jurisdiction, alleging that Constellation had breached the PPAs. NEC also seeks a judgment declaring the rights of NEC and Constellation under the PPAs and the Settlement Agreement.[11] In short, NEC asks the Court to declare, in accordance with the terms of the PPA and the Settlement Agreement, that Constellation must pay Transition Period UCAP costs and ASM costs and that

---

[10] FERC approved the Settlement Agreement in Devon Power LLC, 115 FERC P 61,340 (2006).

[11] The two counts -- breach of contract and declaratory judgment -- seem to plow the same ground. While on one level it is unclear just what NEC says Constellation has done to breach, at bottom NEC is really seeking a declaration of the parties' rights and obligations under the PPAs and to foreclose Constellation from seeking additional compensation.

Constellation may not pass those additional costs through to NEC and, ultimately, Rhode Island ratepayers.

B. Legal Standard

In ruling on a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)"), a court must construe the complaint liberally, treat all well-pleaded facts as true, and indulge all reasonable inferences in favor of the plaintiff. Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996); Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995). It is the plaintiff's burden to prove the existence of subject matter jurisdiction. Murphy, 45 F.3d at 522.

In ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), a court must determine whether the complaint states any claim upon which relief can be granted. As with motions brought pursuant to Rule 12(b)(1), the court must construe the complaint in the light most favorable to the plaintiff, taking all well-pleaded factual allegations as true and giving the plaintiff the benefit of all reasonable inferences. Aybar v. Crispin-Reyes, 118 F.3d 10, 13 (1st Cir. 1997); Carreiro v. Rhodes Gill & Co., 68 F.3d 1443, 1446 (1st Cir. 1995).

In deciding a motion to dismiss, the Court is not limited to considering the plaintiff's complaint. The First Circuit Court of Appeals has adopted a "practical, commonsense approach" for

determining what materials may be properly considered on a motion to dismiss. Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 16 (1st Cir. 1998). A court may consider not only the complaint, but also the "facts extractable from documentation annexed to or incorporated by reference in the complaint and matters susceptible to judicial notice." Jorge v. Rumsfeld, 404 F.3d 556, 559 (1st Cir. 2005). In addition, when a "complaint's factual allegations are expressly linked to – and admittedly dependent upon – a document (the authenticity of which is not challenged), that document effectively merges into the pleadings." Beddall, 137 F.3d at 17. "Moreover, the district court appropriately may consider the whole of a document integral to or explicitly relied upon in a complaint, even if that document is not annexed to the complaint." Jorge, 404 F.3d at 559.

Although NEC's Complaint referenced several documents, none were attached as exhibits. Constellation, however, appended several documents to its Motion to Dismiss and contemporaneously filed Motion for Leave to File Under Seal. Exhibits A-D to the Motion for Leave to File Under Seal include the four PPAs executed by NEC, Constellation, or their predecessors. Exhibit E to the Motion to Dismiss is the Settlement Agreement and related documents. Exhibit F to the Motion to Dismiss is the Order of FERC approving the then-proposed Settlement Agreement. Exhibit G to the Motion to Dismiss is the August 1, 2006 letter from Constellation

to NEC in which Constellation invoked its purported right under the PPAs to negotiate appropriate compensation to Constellation in light of FERC's approval of the Settlement Agreement and the implementation of new ancillary services markets. None of NEC's Objection or Sur-reply, or Constellation's Reply, contained any additional attachments.

This Court may consider each of the exhibits attached to Constellation's Motion to Dismiss and Motion for Leave to File Under Seal. NEC's Complaint is replete with references to them, see, e.g., Compl. ¶¶ 6-7, 9-11, 15-30, 32-33, their authenticity has not been questioned, and allegations in the Complaint are expressly linked to and dependent upon them. See Beddall, 137 F.3d at 17 (agreement properly before the court on a Rule 12(b)(6) motion where the agreement was not attached to the complaint, but the complaint discussed the agreement at length, the agreement's authenticity was not challenged, and the agreement was appended to the 12(b)(6) motion).

C. Discussion

1. Constellation's 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction

As a threshold matter, the Court must consider Constellation's argument that this Court lacks subject matter jurisdiction over the instant case. If the Court lacks jurisdiction, it would be inappropriate to consider the other arguments advanced by the parties. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83,

94-95 (1998); see also Bell v. Hood, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law . . . [which] must be decided after and not before the court has assumed jurisdiction over the controversy.").

Constellation argues that the Federal Power Act, 16 U.S.C. §§ 824 - 824(m), grants FERC exclusive jurisdiction to determine the rates for the sale of wholesale power, and that the so-called "filed rate doctrine" bars this Court from entering any judgment that would materially alter a contract provision affecting a rate filed with FERC.[12] According to Constellation, "the gravamen of NEC's claim seeks contract reformation – i.e., a ruling that the Settlement Agreement and FERC Order abrogated Constellation's right [under the PPAs] to an equitable adjustment following the regulatory change at hand." In other words, Constellation claims

---

[12] Briefly, the filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981). A corollary of the filed rate doctrine is that a court may not enter a judgment that would effectively impose a different rate than the rate filed with the relevant federal regulatory authority. Id. at 578; see also Bryan v. Bellsouth Commc'ns, Inc., 377 F.3d 424, 429 (4th Cir. 2004) (filed rate doctrine prohibits "a court from entering a judgment that would serve to alter the rate paid by a plaintiff") (citing Hill v. BellSouth Telecomms., Inc., 364 F.3d 1308, 1316 (11th Cir. 2004)). The filed rate doctrine does not, however, preclude district courts from interpreting contracts or statutes to the extent that such interpretation does not amount to rate setting. See, e.g., United States v. Pac. Gas & Elec. Co., 714 F. Supp. 1039, 1054 (N.D. Cal. 1989).

that NEC's Complaint asks this Court to exceed its jurisdiction by materially altering a contract provision directly affecting a rate on file with FERC. Constellation's characterization of the Complaint misses the mark.

NEC's Complaint presents a dispute over the proper interpretation to be accorded to the PPAs and the Settlement Agreement. See, e.g., Compl. ¶¶ 11, 19, 23. On its face, the Complaint does not, as Constellation contends, request that the Court "abrogate [Constellation's] material rights" under the PPAs. The Complaint provides at its outset that it seeks to establish that "under" the PPAs and Settlement Agreement, "Constellation may not shift to NEC any increase in costs that it might incur to purchase certain wholesale electric market products."

It is well established that district courts and FERC share concurrent jurisdiction over cases interpreting contracts and settlement agreements.[13] See, e.g., Kentucky Utils. Co., 109 FERC P 61,033 (2004), reh'g denied, 110 FERC P 61,285 at ¶ 10-11 (2005); Portland Gen. Elec. Co., 72 FERC P 61,009 at 61,021 (1995). Further, the Federal Power Act authorizes district courts to

[13] Constellation admits as much in its Motion to Dismiss. See Mot. to Dismiss, at 15.

enforce FERC[14] orders. In relevant part, the Federal Power Act provides that:

> The District Courts of the United States ... shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

16 U.S.C. § 825p (emphasis added). While it appears that the First Circuit has not had the occasion to consider the jurisdictional boundaries afforded by 16 U.S.C. § 825p, there is ample authority from other circuits holding that district courts may hear actions arising out of FERC orders. See, e.g., City of Cleveland v. Cleveland Elec. Illuminating Co., 570 F.2d 123, 124-25 (6th Cir. 1978) (district court had jurisdiction to "entertain an action based on an order of the Federal Power Commission" requiring city to pay charges "pursuant to certain Federal Power Commission [] orders and a contract entered into between the parties"); State of California v. Oroville-Wyandotte Irrigation Dist., 411 F. Supp. 361, 367 (E.D. Cal. 1975), aff'd, 536 F.2d 304 (9th Cir. 1976) (16 U.S.C. § 825p empowers district courts to enforce violations of Federal Power Commission orders); Occidental Chem. Corp. v. Power Auth. of New York, 758 F.Supp. 854, 859, 861 (W.D.N.Y. 1991) (federal court had jurisdiction over declaratory judgment action

---

[14] The former Federal Power Commission's functions were transferred in 1977 to the Secretary of Energy and FERC. 42 U.S.C. §§ 7151(b), 7171(a), 7291, 7293.

concerning an alleged violation of Federal Power Commission license).

Indeed, Constellation has already been rebuffed by FERC on this very issue. On March 1, 2007, during the pendency of this action, Constellation filed with FERC a petition for a declaratory order requesting that the Commission declare that the Settlement Agreement has no effect on Constellation's purported right to renegotiate prices under the PPAs. Constellation Energy Commodities Group, Inc., 119 FERC P 61,292, 2007 WL 1791169, *1 (2007). FERC denied the petition and expressly rejected Constellation's argument that FERC has exclusive jurisdiction over the case. Id. at *7. The Court agrees with FERC's analysis; Constellation's Motion to Dismiss is therefore denied.

2. Constellation's 12(b)(6) Motion to Dismiss for Failure to State a Claim

Constellation further argues that NEC's Complaint must be dismissed because it "does not allege any explicit consent by Constellation to waive its right to an equitable adjustment [under the PPAs]." Again, however, as explained above, NEC's Complaint requests that this Court interpret and enforce the PPAs and Settlement Agreement (see, e.g., Compl. ¶¶ 11, 19, 23), not abrogate or alter any rights that Constellation may have under the agreements. For example, Constellation argues that NEC's Complaint is devoid of any allegation that Constellation "knowingly assented, for due consideration, to the modification of the PPAs involved

with abrogating the right to an equitable adjustment and any arbitration attendant to that right." To the extent that NEC's Complaint lacks such an allegation, however, the reason may be found in the Complaint's claim that the PPAs "provide for certainty in price and do not allow for price adjustments based on changes in the cost of meeting UCAP obligations." In other words, NEC's Complaint is not a request for a judgment modifying the PPAs, but rather a request for a judgment enforcing the PPAs.

At this stage of the proceedings, Constellation's argument is not properly before the Court. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court is charged only with determining whether the Complaint states any claim upon which relief can be granted. In order to succeed on its Motion to Dismiss, Constellation must show that NEC can prove no set of facts that could support its claims.

Constellation has instead argued that it possesses a contractual right, i.e., a right to an "equitable adjustment," that precludes the relief that NEC seeks.[15] This argument more resembles

---

[15] Constellation also implies, though does not argue directly, that its failure to sign the Settlement Agreement releases it from any obligation to comply with the terms thereof. However, as explained even in the materials appended as exhibits to Constellation's motion, see Mot. to Dismiss, Ex. E at 8-10, it is well settled that FERC "can approve contested settlements as long as it determines that the proposal will establish just and reasonable rates." See, e.g., New Orleans Pub. Serv., Inc. v. FERC, 659 F.2d 509, 511-12 (5th Cir. 1981) (citing Placid Oil Co. v. FPC, 483 F.2d 880, 893 (5th Cir. 1973), aff'd sub nom. Mobil Oil Corp. v. FPC, 417 U.S. 283, 312-13 (1974)). The approved

an affirmative counterclaim for breach of contract than a reason to dismiss the Complaint. Regardless, at this stage the court must construe the Complaint in the light most favorable to NEC, taking all well-pleaded factual allegations as true and giving NEC the benefit of all reasonable inferences. Aybar, 118 F.3d at 13; Carreiro, 68 F.3d at 1446. NEC has pleaded that the PPAs and Settlement Agreement, whether considered separately or together, obligate Constellation to pay the cost of obtaining capacity and preclude Constellation from passing that cost on to NEC. Constellation may well be able to show, at a later stage in this

---

settlement is thereafter treated as an agency decision on the merits. Mobil Oil, 417 U.S. at 312. As a decision on the merits, "the terms of the settlement form the substance of an order binding on all the parties, even though not all are in accord to the result." Pennsylvania Gas & Water Co. v. Fed. Power Comm'n, 463 F.2d 1242, 1246 (D.C. Cir. 1972). The rule is no different where a settlement participant, rather than actively contesting a proposed settlement, fails to join in the final settlement. Mobil Oil, 417 U.S. at 312; United Mun. Distribs. Group v. Fed. Energy Regulatory Comm'n, 732 F.2d 202, 209 (D.C. Cir. 1984); Fed. Energy Regulatory Comm'n v. Triton Oil & Gas Corp., 712 F.2d 1450, 1458-59 (D.C. Cir. 1983); Pennsylvania Gas, 463 F.2d at 1249. Any other result would "disrupt orderly procedures and permit parties . . . to avoid [FERC] decisions simply because they disagree." In re Nw. Cent. Pipeline Corp., 27 FERC P 61430, 1984 WL 56900, *5 (1984). In certain circumstances, FERC can sever parties or issues from a contested settlement and approve the settlement as uncontested among the settling parties. 18 C.F.R. § 385.602(h). Severance may enable a party to litigate contested issues while permitting FERC to approve uncontested matters to "bring needed stability to the industry, end protracted litigation and thereby benefit customers." In re Duke Energy Trading & Mktg. Co., 117 FERC P 61039, 2006 WL 2881647, *3 (2006). However, severance did not occur here and is not at issue before this Court. The upshot in this case, then, is that the Settlement Agreement may not have contractual force as between NEC and Constellation, but has legal authority because it has become in effect a binding order of FERC.

proceeding, that it is entitled to pass on the cost of obtaining capacity to NEC. At the motion to dismiss stage, however, an assertion that essentially claims the plaintiff is itself in breach of contract is insufficient grounds on which to grant Constellation's motion.

In an echo of its 12(b)(1) Motion to Dismiss, Constellation additionally argues that the Mobile-Sierra doctrine, as developed by United Gas Pipe Line Co. v. Mobile Gas Serv. Corp. (Mobile), 350 U.S. 332 (1956) and FPC v. Sierra Pac. Power Co. (Sierra), 350 U.S. 348 (1956) precludes any finding that the Settlement Agreement or the FERC Order approving it "can unilaterally modify or abrogate the PPAs" without an explicit finding by FERC that "the public interest so requires." As explained earlier, however, NEC has not made any claim to modify or abrogate the PPAs. The Mobile-Sierra doctrine is inapplicable on its face to the Complaint as filed. Constellation's motion therefore must be denied.

3. Arbitration

Constellation alternatively argues that the Court should stay the proceedings pending arbitration pursuant to the dispute resolution provisions in the PPAs.

Whether in the first instance a dispute is arbitrable is properly an inquiry for the Court and not an arbitrator. Municipality of San Juan v. Corporacion Para El Fomento Economico de la Ciudad Capital, 415 F.3d 145, 149 (1st Cir. 2005); DeFazio v.

Expetec Corp., 2006 WL 162327, *2 (D.R.I. Jan. 20, 2006). When deciding whether the parties agreed to arbitrate a certain matter, courts generally[16] apply ordinary state-law principles that govern the formation of contracts. See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63 (1995); Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 475-76 (1989); see also Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 19 (1st Cir. 1999). The relevant state law here,[17] for example, would require the Court to see whether the parties objectively revealed an intent to submit the instant dispute to arbitration. See, e.g., Ladd v. Scudder Kemper

---

[16] An exception to the rule provides that courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (quoting AT&T Techs., Inc. v. Communc'ns Workers of Am., 475 U.S. 643, 649 (1986)). However, the Court is not faced with that issue here.

[17] The parties selected Massachusetts law as the governing law for interpretation and performance of the 20% Contract, the 36% Contract, and the 2001 Contract, see 20% Contract, Art. 14; 36% Contract, Art. 14; 2001 Contract, Art. 15.1, and Rhode Island law as the governing law for interpretation and performance of the 2002 Contract, see 2002 Contract, Art. 16.1. Neither party has disputed the existence or effect of the choice of law provisions. "Where the parties have agreed to the choice of law, this court is free to forgo an independent analysis and accept the parties' agreement." In re NTA, LLC, 380 F.3d 523, 529 n.11 (1st Cir. 2004) (quoting Hershey v. Donaldson, Lufkin & Jenrette Sec. Corp., 317 F.3d 16, 20 (1st Cir. 2003). Therefore, Massachusetts law governs this Court's interpretation of the 20% Contract, 36% Contract, and 2001 Contract, while Rhode Island law governs the Court's interpretation of the 2002 Contract. In any event, with respect to the issue of arbitrability, the result apparently would be the same under either Massachusetts law or Rhode Island law.

Investments, Inc., 741 N.E.2d 47, 51 (Mass. 2001); State of Rhode Island Dept. of Corrections v. Rhode Island Broth. of Correctional Officers, 866 A.2d 1241, 1247 (R.I. 2005). Furthermore, a party cannot be compelled to submit a dispute to arbitration if it has not contractually agreed to do so. AT&T Techs., Inc., 475 U.S. at 648; United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

In the instant case, the question of arbitration is complicated because the four PPAs have different arbitration clauses. The 20% Contract and the 36% Contract each identically provide:

> [A]ll disputes between the Companies [NEC] and Supplier [Constellation] resulting from or arising out of performance under this Agreement shall be referred to a senior representative of the Companies with authority to settle, designated by the Companies, and a senior representative of Supplier with authority to settle, designated by Supplier, for resolution on an informal, face-to-face basis as promptly as practicable. The Parties agree that such informal discussion shall be conducted in good faith. ... In the event the designated senior representatives are unable to resolve the dispute within thirty (30) days, or such other period as the Companies [NEC] and the Supplier [Constellation] may jointly agree upon, such dispute may be submitted to arbitration and resolved in accordance with the arbitration procedure set forth herein if the Companies and Supplier jointly agree to submit it to arbitration. For any dispute or claim arising out of or relating to any charges incurred under this Agreement having a value less than or equivalent to $100,000 each, such arbitration shall be mandatory.

20% Contract, Art. 13; 36% Contract, Art. 13. In short, the 20% Contract and 36% Contract, on their face, do not require that the

parties arbitrate any dispute unless they jointly agree to do so or the value of the dispute is less than or equal to $100,000.

In contrast, the 2001 Contract provides:

> This Agreement must comply with all NEPOOL market rules and/or operating procedures ("Rules"). If, during the term of this Agreement, the NEPOOL Agreement is terminated or amended in a manner that would eliminate or materially alter a Rule affecting a right or obligation of a Party hereunder, or if such a Rule is eliminated or materially altered by NEPOOL, the Parties agree to negotiate in good faith in an attempt to amend this Agreement to incorporate a replacement Rule ("Replacement Rule"). The intent of the Parties is that any such Replacement Rule reflect, as closely as possible, the intent and substance of the Rule being replaced as such Rule was in effect prior to such termination or amendment of the NEPOOL Agreement or elimination or alteration of the Rule. If the Parties are unable to reach agreement on [an amendment to the Agreement], the Parties agree to submit the matter to arbitration under the terms of Appendix B, attached and incorporated herein by reference, and to seek a resolution of the matter consistent with the above stated intent.

2001 Contract, Art. 14.2.[18] Similarly, the 2002 Contract provides:

---

[18] As it happens, the arbitration clause in the 2001 Contract contains a latent error. Appendix B to the contract, which the arbitration clause refers to as providing the terms under which any arbitration will be conducted, has nothing to do with arbitration. Rather, Appendix B provides for adjustments in contract price consequent to changes in fuel prices. NEC argues that this error renders the entire arbitration clause so vague as to be invalid. The cases cited by NEC, however, do not support its argument. In In re Am. Rail & Steel Co. (India Supply Mission), 308 N.Y. 577 (Ct. App. 1955) and In re Emerson Radio & Phonograph Corp. (Illustrated Tech. Prod. Corp.), 178 N.Y.S.2d 277, 278 (1958), the determinative issue was whether the parties evidenced an intent to arbitrate. In those cases, an intent was lacking. Here, with respect to the 2001 Contract, the missing Appendix B relates only to the procedure under which arbitration is to be conducted, not whether the parties intended arbitration to be conducted at all. The language excerpted from Article 14.2 evidences the intent to arbitrate: "the Parties agree to submit the matter to arbitration

> If, during the term of this Agreement, any NEPOOL Rule, Rhode Island statute or other applicable law is terminated or amended in a manner that would eliminate or materially (including economically) alter any rights or obligations of a Party hereunder, the Parties agree to negotiate in good faith to amend this Agreement so as to maintain, as closely as possible, the intent and substance of the allocation of rights and obligations contemplated hereunder. If after a period of thirty (30) days from the date on which a Party provides written notice to the other Party of the need to amend this Agreement, the Parties are unable to reach agreement on such an amendment, the Parties agree to submit the matter to arbitration under the terms of Section 16.2 (regardless of the amount, if any, in controversy) and to seek a resolution of the matter consistent with the above stated intent.

2002 Contract, Art. 15.2. The 2001 Contract and 2002 Contract, unlike the 20% Contract and 36% Contract, plainly evidence an intent to arbitrate disputes related to certain regulatory events insofar as they affect a "right or obligation" of either party.

The language employed by each contract differs slightly, however. The 2001 Contract refers to circumstances in which "the NEPOOL Agreement is terminated or amended in a manner that would eliminate or materially alter a Rule affecting a right or obligation of a Party hereunder, or if such a Rule is eliminated or

---

. . . and to seek a resolution of the matter consistent with the above stated intent." If there is "clear contractual language" evidencing an intent to arbitrate a dispute, then the Court may compel the parties to arbitration. See, e.g., Ladd, 741 N.E.2d at 51; Maine Cent. R.R. Co. v. Bangor & Aroostook R.R. Co., 395 A.2d 1107, 1116 (Me. 1978). The 2001 Contract evidences an intent to arbitrate. This Court will not at this stage nullify the parties' bargained for agreement to arbitrate on account of what amounts to a scrivener's error. However, the Court will defer to a later time the question of what procedure is to be followed when - and if - arbitration is commenced.

materially altered by NEPOOL." The 2002 Contract, in comparison, more broadly encompasses circumstances in which "any NEPOOL Rule, Rhode Island statute or other applicable law is terminated or amended in a manner that would eliminate or materially (including economically) alter any rights or obligations of a Party hereunder." Thus, the 2001 Contract's arbitration clause appears to limit its scope to changes related to the "NEPOOL Agreement" and material alterations in any "Rule affecting a right or obligation" of the parties. The 2002 Contract's clause, on the other hand, may be triggered not only by changes to a NEPOOL Rule, but also to a Rhode Island statute, or "other applicable law," where the change would "eliminate or materially (including economically) alter any rights or obligations" of either party. The key language, however, appears to be "a right or obligation," in the case of the 2001 Contract, and "any rights or obligations," in the case of the 2002 Contract. If no right or obligation of either party has been affected, then the obligation to arbitrate is not triggered.

NEC has seized on the "rights and obligations" language, arguing that "[t]he Settlement Agreement does not alter Constellation's rights or obligations - Constellation was obligated to pay Capacity Costs before implementation of the Settlement Agreement, and it remains obligated to make those payments today." Therefore, argues NEC, even though the cost for capacity may have increased to Constellation's detriment, Constellation's obligation

to cover the cost for capacity has not changed and there is no basis to compel arbitration. Constellation argues that NEC's interpretation is overly constrained and that at least the 2002 Contract's apparent reference to "economic[]" alterations of rights or obligations shows that the arbitration clauses are triggered by regulatory changes that increase the cost of complying with existing obligations.

The Court believes that the contractually bargained-for expectations of the parties should be respected. However, the Court is also hard-pressed at this stage to determine resolutely whether a change has been effected in the rights or obligations assigned to either NEC or Constellation. Therefore, while the Court is cognizant of NEC's argument that the arbitration clauses - and indeed the PPAs in their entirety - are not implicated by a regulatory increase in capacity costs, and Constellation's argument to the converse, the Court cannot ascertain at this stage and on the briefing submitted whether the parties agreed, under any of the PPAs, to arbitrate disputes like that presented here. The Court will decline Constellation's request that this proceeding be stayed pending arbitration; however, it will not categorically foreclose such relief in the future, at least with respect to those PPAs that may eventually be determined to require arbitration of the present dispute.

II. State's Motion to Intervene and Join a Claim

The State seeks to intervene in Counts I and II for declaratory judgment and waiver, respectively, of NEC's Complaint either as a matter of right under Federal Rule of Civil Procedure 24(a)(2)[19] or by permission under Federal Rule of Civil Procedure 24(b)(2).

Rule 24(b)(2) provides that "[u]pon timely application anyone may be permitted to intervene in an action ... when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." See also Daggett v. Comm'n on Gov'tal Ethics & Election Practices, 172 F.3d 104, 113-14 (1st Cir. 1999); United States v. Pitney Bowes, Inc., 25 F.3d 66, 73 (2d Cir. 1994). A district court's ruling on permissive intervention is reviewable for abuse of discretion. Mangual v. Rotger-Sabat, 317 F.3d 45, 61 (1st Cir. 2003).

The State argues that its claims are substantially intertwined with questions of law and fact common to the claims made by NEC, in

---

[19] Federal Rule of Civil Procedure 24(a)(2) provides that "[u]pon timely application anyone shall be permitted to intervene in an action ... when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

that the State, like NEC, is seeking a declaration that the Settlement Agreement bars Constellation from recovering Transition Period UCAP costs or any similar costs from NEC. This Court agrees with the State's assessment, and does not find, as Constellation asserts, that the State's intervention is disruptive or that it "portends of future delays." The State is not seeking to inject any new issues into this already labyrinthine dispute. Rather, it appears possible and perhaps even likely that the State's entry into this action may actually hasten the resolution of the issues before the Court. The State was a participant in the negotiations leading up to the inclusion of the provision of the Settlement Agreement at issue and is possessed of expertise pertaining to public utility regulation in Rhode Island. Accordingly, the State's motion to intervene permissively is granted.

Having permitted the State to intervene, the Court must decide whether the State should be permitted to join an additional count for estoppel against Constellation. Under Federal Rule of Civil Procedure 18(a), "[a] party asserting a claim to relief as an original claim . . . may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party." Although joinder of claims under Rule 18(a) is permissive, it is "strongly encouraged" except where joinder would result in great unfairness or prejudice

to a party. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966).

In the instant case, the State alleges in Count III of its Proposed Complaint that Constellation is estopped from recovering the Transition Period UCAP costs as a result of the Settlement Agreement and related FERC Order, as well as Constellation's own conduct during the settlement process. This claim arises from the same transactions or occurrences as Counts I and II of NEC's Complaint (in which the State is intervening). While the addition of a party and a claim to this proceeding will result in some additional burden for all involved (including the Court), given that the State's proposed claim largely implicates the same facts as would otherwise be in issue between NEC and Constellation, it is apparent that the burden does not result in "great unfairness or prejudice" that would preclude joinder.

III. Constellation's Motion to Dismiss State's Proposed Complaint

As required by Federal Rule of Civil Procedure 24(c), the State attached a "Proposed Complaint" as an exhibit to its Motion to Intervene and to Join Claim. The Proposed Complaint restates in similar but not identical language the claims for declaratory relief and waiver (Counts I and II, respectively) found in NEC's Complaint, as well as the original claim for estoppel. Although the Proposed Complaint has not formally been filed with the Court, Constellation, presumably as a precaution, moved to dismiss it and

that motion has been fully briefed by Constellation and the State. In spite of this preliminary skirmishing, it is axiomatic that an intervenor does not become a party to an action until intervention is actually granted. See, e.g., White v. Texas Am. Bank/Galleria N.A., 958 F.2d 80, 82-84 (5th Cir. 1992) (applicant did not become a party until the court permitted intervention, and could not be served or respond to a motion for summary judgment until it was a party). Therefore, now that the Court has granted the State's Motion to Intervene and to Join Claim, the State should formally file its complaint against Constellation. Constellation may respond to the complaint in whatever manner it sees fit in accordance with the ordinary rules of procedure.[20]

IV. Conclusion

For the foregoing reasons, Constellation's Motion to Dismiss or, in the Alternative, to Stay is DENIED. The State's Motion to Intervene and to Join Claim is GRANTED.

IT IS SO ORDERED.

William E. Smith
United States District Judge
Date: 12/10/07

[20] Although the Court leaves to Constellation's discretion the manner in which it will proceed against the complaint once filed by the State, the Court is disinclined, based on its analysis and rulings here, to grant any motion to dismiss based on a theory that the State lacks standing to pursue its claims derived from the Settlement Agreement.