

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE
THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

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May 15, 2012

SENT VIA ELECTRONIC FILING
Hon. Bobbie J. McCartney
Deputy Chief Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 11F-21
Washington, D.C. 20426

Re: Docket No. IN12-7-000
Constellation Energy Commodities Group, Inc.

Dear Deputy Chief Judge McCartney:

Attached please find the Joint Response in Opposition of the New York Public Service Commission, the New York Office of Attorney General, and the New York Department of State's Utility Intervention Unit in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 474-1585.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Alan T. Michaels', is written over a horizontal line.

Alan T. Michaels
Assistant Counsel

Attachment

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Constellation Energy Commodities) Docket No. IN12-7-000
Group, Inc.)

**JOINT RESPONSE IN OPPOSITION FROM
THE NEW YORK PUBLIC SERVICE COMMISSION,
THE NEW YORK OFFICE OF ATTORNEY GENERAL, and
THE NEW YORK DEPARTMENT OF STATE, UTILITY INTERVENTION UNIT**

The New York Public Service Commission ("NYPSC"), the New York Office of Attorney General ("NYAG"), and the New York Department of State ("NYDOS") (collectively, the "New York Respondents") submit this Joint Response in Opposition to several parties' Motions for Determination of Eligibility to participate in the allocation and distribution of the fund created as a result of Constellation Energy Commodities Group, Inc. ("Constellation") disgorgement of unjust profits ("the Fund") in the above-captioned proceeding. The New York Respondents are the appropriate state agencies eligible to propose apportionment of Fund monies earmarked for electric energy consumers within New York, the sole state within the electric service territory administered by the New York Independent System Operator ("NYISO"). No other party claiming to be eligible to request apportionment of Fund monies allocated to New York electric energy consumers meets the criteria

established by the Federal Energy Regulatory Commission ("FERC" or the "Commission").¹ The New York Respondents oppose all other motions seeking authorization to request monies allocated to New York electric energy consumers. In particular, the New York Respondents oppose the motions of: Allegheny Electric Cooperative, Inc. ("AEC"); the City of Cleveland, Ohio, Division of Cleveland Public Power ("Cleveland"); Connecticut Municipal Electric Energy Cooperative ("CEEC"); Innovative Energy Systems, LLC ("IES"); Long Island Power Authority ("LIPA"); Massachusetts Municipal Wholesale Electric Company ("MMWEC"); New Jersey Board of Public Utilities ("NJBP"); New York Association of Public Power ("NYAPP"); Public Power Association of New Jersey ("PPANJ"); the Joint Motion of the Rhode Island Division of Public Utilities ("RIDPU"), Attorney General of the State of Rhode Island ("RIAG"), and Pascoag Utility District ("Pascoag"); and Vermont Department of Public Service ("VDPS") (collectively, the "Movants").

For the reasons stated below, all of the Movants' Motions for Determination of Eligibility to participate in the distribution of the NYISO's portion of the Fund should be denied, and the Joint Motion for Eligibility of the NYDPS, NYAG, and NYDOS should be granted.

¹ To the extent a party is staking a claim to money from the Fund in its Motion, the New York Respondents respectfully suggest that such a claim is premature and not a purpose of these Motions.

INTRODUCTION

On March 29, 2012, Deputy Chief Administrative Law Judge Bobbie J. McCartney presided over a pre-hearing conference in this matter. Judge McCartney set procedural rules and a schedule for the proceeding, requesting that each party asserting its eligibility to propose apportionment of the Fund file a Motion for Determination of Eligibility.² In addition to the New York Respondents, numerous other parties filed for eligibility to request apportionment of the Fund monies allocated to New York electric energy consumers. This Response addresses all such applications for determination of eligibility.

BACKGROUND

On March 8, 2012, FERC entered into a stipulation and order ("Settlement Order") with the Constellation Energy Commodities Group, Inc. ("Constellation") to settle claims that Constellation illegally profited from certain electric market manipulations affecting the territories of three regional electric transmission and wholesale power market management organizations (ISO New England, Inc. ["ISO-NE"], PJM

² Constellation Energy Commodities Group, Inc., FERC Docket No. IN12-7-000, Order Confirming Rulings from Prehearing Conference (issued April 2, 2012) (hereinafter, the "Prehearing Order").

Interconnection L.L.C. ["PJM"], and the NYISO).³ This settlement created the Fund for the benefit of electric energy consumers in various states, with \$78 million allocated to New York electric energy consumers. FERC provided guidance for determination of which entities are eligible to propose a disbursement of the monies in the Fund. The Commission ordered that "any requests for apportionment of the monies in the Fund by the affected states within the NYISO, ISO-NE and PJM may only be made by the appropriate state agency or agencies of those respective states, including, for example, state public service commissions, state attorneys general, or state consumer advocates, for the benefit of electric energy consumers."⁴ Therefore, only an "appropriate state agency" may be eligible for apportionment of the funds in the state or states served by each ISO.

FERC provided additional guidance when it described how it divided the Fund among the states served by the three affected ISOs.⁵ The Settlement Order states that the distribution of Funds was based on FERC Staff's "assessment of relative harm

³ See, Constellation Energy Commodities Group, Inc., 138 F.E.R.C. ¶61,168 (Mar. 9, 2012) Order Approving Stipulation and Consent Agreement at ¶22; attached Stipulation and Consent Agreement (Mar. 8, 2012) at 8-9, ¶37.c (the "Settlement Order").

⁴ See, Settlement Order at 8-9, ¶37.c.

⁵ FERC divided the fund "among the affected states in the ISOs" as follows: ISO-NE \$20 million, PJM \$6 million, and the NYISO \$78 million. See, Settlement Order at ¶22.

imposed on each organized market as a result of CCG's trading."⁶ The Commission further explained that the distribution of the Fund among the affected states "was based on the megawatts associated with DA schedules flowing between the ISOs and virtual transactions within NYISO that were part of what [S]taff determined to be CCG's manipulative scheme."⁷ Therefore, Paragraph 22 of the Settlement Order explains that the Commission already took into consideration electric energy trading across ISO boundaries, and factored this into its distribution of the Fund among the affected states. Thus FERC's allocation to home ISOs makes cross-ISO claims unnecessary; for this reason claims across ISO boundaries are superfluous and should not be considered.

DISCUSSION

The Settlement Order established that FERC would consider requests for distribution of the Fund by the affected states provided the requestor(s) meet(s) certain criteria. First, the Settlement Order provides that only the "appropriate state agencies" of each affected state are eligible to make a request for apportionment of the monies in the Fund.⁸ Second, FERC made

⁶ Settlement Order at ¶22.

⁷ *Id.*

⁸ *Id.*, attached Stipulation and Consent Agreement at p.8-9, ¶37(c).

it clear that it already considered claims of harm from inter-ISO electric energy trading when it assigned disgorged profits to the states served by each ISO.⁹

I. The Movants are not "appropriate state agencies" within the meaning of the Constellation Settlement.

The Settlement Order states that

any requests for apportionment of the monies in the Fund by the affected states within the NYISO, ISO-NE and PJM may only be made by the appropriate state agency or agencies of those respective states, including, for example, state public service commissions, state attorneys general, or state consumer advocates, for the benefit of electric energy consumers.¹⁰

None of the parties whose motions the New York Respondents oppose meet this criterion.

A. LIPA is Not an Appropriate State Agency.

LIPA was created in 1986 to replace the Long Island Lighting Company ("LILCO"), an investor owned utility, with a "publicly owned power authority." At the time, the State legislature was concerned about LILCO's increasing electricity rates stemming from the construction of the Shoreham Nuclear Power plant.¹¹ As a result, the state legislature created LIPA

⁹ See, *Id.* at ¶22.

¹⁰ Settlement Order, attached Stipulation and Consent Agreement at 8-9, ¶37.c, emphasis added.

¹¹ See, New York Public Authorities Law, art 5, §1020-a.

to provide electric service in the counties of Suffolk and Nassau and a portion of Queens, which had constituted LILCO's franchise area.¹² LIPA was designed to assume the business affairs of a troubled electric utility company and is therefore not a state agency within FERC's definition.

Because it is authorized to operate in only three of New York's 62 counties, LIPA does not possess statewide obligation or jurisdiction. LIPA therefore does not have either an interest in serving all New York electric energy consumers nor the necessary authority to disburse the Fund for the benefit of all New York electric energy consumers.¹³ Since LIPA has limited interest and jurisdiction, even if it were a state agency it would not be appropriate to assign LIPA authority to apportion the Fund for the benefit of all the New York electric energy consumers. LIPA's claim of eligibility should be denied.

B. AEC, Cleveland, CEEC, IES, MMWEC, NYAPP, PPA NJ, and Pascoag Are Not State Agencies.

None of the above-named entities are state agencies.¹⁴ Indeed, two do not claim to be state agencies. The others allege state agency status through the work they performed.

¹² *Id.*

¹³ *See*, New York Public Authorities Law, art 5, §1020-b[17].

¹⁴ Although none of the Movants addressed within this Response meet the criteria in this matter to be considered an "appropriate state agency" within the New York ISO, the New York Respondents will accept all comments

1. IES and NYAPP do not claim to be an appropriate state agency.

Two of the Movants, IES and NYAPP, do not claim to be a state agency. IES, a private corporation, owns facilities in New York that are base load generators.¹⁵ Within its Motion, IES states that the prehearing conference led IES to believe that the Motion for Eligibility Determination "might ultimately involve issues and decisions well beyond the determination of the agency(ies) that would serve as allocators(s) of the Funds."¹⁶ IES continued explaining that it incurred harm, but did not ask to be considered as an appropriate state agency.

NYAPP is an "unincorporated association of nine municipal electric utilities and four rural electric cooperatives."¹⁷ NYAPP claims that as "community-owned electric utilities" it should be entitled to participate in the allocation and distribution of the Fund. However, NYAPP does not claim to be an appropriate state agency, and it would not meet the criteria for such status. Moreover, it would be inconsistent with the Settlement Order to approve the disbursement of the Fund

regarding the allocation of the Fund for the benefit of electric energy consumers.

¹⁵ Supplement to IES Motion for Leave to Intervene, Constellation Energy Commodities Group, Inc., IN12-7-000 at 7, ¶7(a).

¹⁶ *Id.* at 6, ¶6.

¹⁷ Statement of Eligibility of NYAPP, Constellation Energy Commodities Group, Inc., IN12-7-000 at 1.

pursuant to the direction of an entity serving such a small portion of total New York electric energy consumers.

2. AEC, CEEC, Cleveland, MMWEC, Pascoag, and PPANJ are not state agencies despite work performed.

AEC, CEEC, Cleveland, MMWEC, Pascoag, and PPANJ claim state agency status by virtue of the work they perform as a purchaser of electric power on behalf of a state. None, however, are actually "state agencies." CEEC, for instance, describes itself as a "publicly owned wholesale electric power joint action agency."¹⁸ Similarly, Cleveland, by its own terms, is a "municipal utility" that bargains for wholesale electric power;¹⁹ PPANJ is a self-described "Bargaining Agent" that purchases wholesale power from the New York Power Authority;²⁰ AES is the bargaining agent for the Commonwealth of Pennsylvania for the purchase of hydropower from the New York Power Authority;²¹ Pascoag "administers the contracts between the State of Rhode Island and NYPA;"²² and MMWEC states that its "member municipal

¹⁸ Motion of the CEEC for Determination of Eligibility to Participate, Constellation Energy Commodities Group, Inc., IN12-7-000 at 2 (emphasis added).

¹⁹ Motion for Eligibility Determination by Cleveland, Constellation Energy Commodities Group, Inc., IN12-7-000 at 4.

²⁰ Motion of the PPANJ as Bargaining Agent for the State of New Jersey for a Determination of Eligibility, Constellation Energy Commodities Group, Inc., IN12-7-000 at 1.

²¹ Motion of AES for a Determination of Eligibility, Constellation Energy Commodities Group, Inc., IN12-7-000 at 1.

²² Joint Motion with Rhode Island Division of Public Utilities and Carriers, the Attorney General of the State of Rhode Island and Pascoag Utility District for Determination of Eligibility to Participate in Distribution

utilities purchased power and transmission service in . . . the New York ISO markets."²³ Although each of these entities may have been assigned the responsibility to act on behalf of a state for the purpose of purchasing electric power, that assignment does not make them a state agency. At best, they are merely an "agent" of a "state agency."

FERC was specific in its choice that only appropriate state agencies may request apportionment of the Fund. Municipal purchasing agents for Massachusetts, Ohio, Connecticut, New Jersey, Rhode Island, or even a small part of New York, do not have the responsibility, the interest or the authority to ensure that all New York electric energy consumers benefit from the Funds. If non-state agencies are designated to apportion New York electric energy consumers' share of the Fund, FERC's interest in ensuring that New York's share of the Fund is used for the benefit of all New York electric energy consumers would fail.

Some Movants point to legislation to assist in their claim for "appropriate state agency" status. Though a state legislature may have created an entity and granted it some authority, that authority does not change the entity into a

of Funds Allocated to Customers in the New York ISO, Constellation Energy Commodities Group, Inc., IN12-7-000 at 2.

²³ Motion for Determination of eligibility of MMWEC, Constellation Energy Commodities Group, Inc., IN12-7-000 at 1.

state agency. For example, MMWEC, a nonprofit corporation, may be given authority to act on the state's behalf, but it is still a private corporation. CEEC remains a cooperative; AEC remains an incorporated business entity; Pascoag is a utility district; NYAPP is an "unincorporated association;" and Cleveland is a municipality. None are state agencies able to carry out FERC's New York-wide mandate.

For these reasons, the Motions for Eligibility of AES, CEEC, Cleveland, MMWEC, PPA NJ, and Pascoag should be denied.

C. Other than the New York Respondents, none of the Movants are "appropriate".

Of the Movants specifically addressed in this response, only RIAG, RIPUC, VTDPs, and NJBPU are state agencies. They are not, however, "appropriate" state agencies that should be given authority to apportion New York electric energy consumers' share of the Fund. First, the jurisdictional interests of each of these state agencies are outside New York. While they may have some authority to take action to benefit customers in their own states, they have no authority to apportion funds for the benefit of New York electric energy consumers. Moreover, they have no obligation or interest in benefiting electric energy consumers in states other than their own. Finally, their obligations to their own states' electric customers might create

a conflict of interest even if one or more attempted to benefit New York electric energy consumers.

D. The New York Respondents Are the Only "Appropriate" New York State Agencies.

In contrast to the out-of-state agencies, the New York Respondents have the duty, the interest, and the authority to advocate for the interests of all New York electric energy consumers. As explained in the New York Respondents Joint Motion, the NYPSC has broad authority over the entire area the NYISO serves, the NYAG is the chief legal officer of New York with authority within the entire NYISO service area, and the NYDOS is the designated Consumer Advocate for New York, recognized by the NYISO. Acting jointly, NYPSC, NYAG, and NYDOS are the appropriate state agencies to receive eligibility status for New York electric energy consumers. RIAG, RIPUC, VTDPS, and NJBPU are not, and their motions for eligibility should be denied.

II. Power Purchases by Movants Outside New York Should Not be a Basis for Further Relief.

The New York Respondents do not dispute that NYPA customers outside New York were affected by Constellations' unjust profiteering. However, Paragraph 22 of the Settlement Order clearly demonstrates that FERC has already considered each

state's claims by identifying and apportioning the harm in each ISO market to which these entities belong.

The Settlement Order specifically states that the distribution of Funds assigned to the states served by each ISO was based on FERC Staff's "assessment of the relative harm imposed on each organized market as a result of CCG's trading."²⁴ The Commission further explained that the distribution of the Fund between the ISOs "was based on the megawatts associated with DA schedules flowing between the ISOs and virtual transactions within NYISO that were part of what [FERC] staff determined to be CCG's manipulative scheme."²⁵ The specified apportionments FERC has already made to each ISO territory included the relative harm to each state within that ISO. FERC's division of the Fund between the ISO territories makes any claims from outside ISO boundaries superfluous and inappropriate since each state's "harm" has already been considered and apportioned to the Fund share allocated to their home ISO's service territory. For these reasons, all Motions for Eligibility from parties located outside New York should be denied.

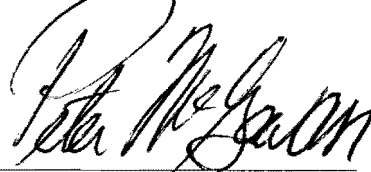
²⁴ Settlement Order at 5, ¶22.

²⁵ *Id.*

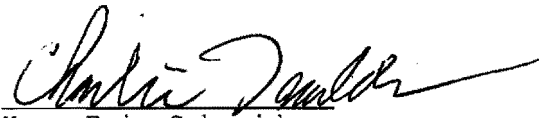
CONCLUSION

Based on the foregoing, NYPSC, NYAG, and NYDOS are the only appropriate state agencies eligible to propose apportionment of the monies in the Fund for the benefit of New York electric energy consumers. The other Movants are either not appropriate state agencies, have claims that FERC has already taken into account, or both. Therefore, the New York Respondents' eligibility status should be granted, and all other Motions for Eligibility to participate in apportionment of the Fund share FERC allocated to New York electric energy consumers should be denied.

Respectfully submitted,



Peter McGowan
General Counsel
Public Service Commission
of the State of New York
3 Empire State Plaza
Albany, NY 12223-1305
(518) 474-1585



Hon. Eric Schneiderman
Attorney General for the
State of New York

By: Charlie Donaldson
Assistant Attorney General
120 Broadway
New York, NY 10271-0332
(212) 416-8334



Susan Watson
General Counsel
New York State Department of
State

Intervenor Attorney
One Commerce Plaza
99 Washington Avenue
Albany, NY 12231
(518) 474-5016

Dated: May 15, 2012
Albany, New York

CERTIFICATE OF SERVICE

I, Alan T. Michaels, do hereby certify that I will serve on May 15, 2012, the foregoing Joint Response in Opposition of the New York Public Service Commission, the New York Attorney General, and the New York Department of State upon each of the parties of record indicated on the official service list compiled by the Secretary in this proceeding.

Dated: May 15, 2012
Albany, New York


Alan T. Michaels