

April 10, 2012

VIA ELECTRIC FILING

Hon. Jaclyn A. Brillling
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

Re: Case 12-E-____ – Petition of Multiple Intervenors Seeking \$78 Million in Customer Refunds Stemming From the Civil Penalty Imposed On Constellation Energy Commodities Group

Dear Secretary Brillling:

Enclosed for filing is a petition by Multiple Intervenors, an unincorporated association of over 55 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State. The petition addresses the treatment of \$78 million in unjust profits and interest disgorged by Constellation Energy Commodities Group.

Respectfully submitted,

COUCH WHITE, LLP

Michael B. Mager

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MBM/cgw
Enclosures

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**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Petition of Multiple Intervenors Seeking \$78 Million in
Customer Refunds Stemming From the Civil Penalty Imposed
On Constellation Energy Commodities Group**

Case 12-E-_____

PETITION

PRELIMINARY STATEMENT

Multiple Intervenors, an unincorporated association of over 55 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, hereby submits this Petition to the New York State Public Service Commission (“Commission”) seeking: (a) a commitment by the Commission to seek expeditiously apportionment of \$78 million out of the \$110 million of unjust profits and interest disgorged by Constellation Energy Commodities Group, Inc. (“CCG”) pursuant to the Order Approving Stipulation and Consent Agreement (“Order”) issued by the Federal Energy Regulatory Commission (“FERC”) on March 9, 2012 in FERC Docket No. IN12-7-000, which approved a Stipulation and Consent Agreement (“Stipulation”) executed therein by FERC’s Office of Enforcement (“Enforcement”) and CCG on March 8, 2012; (b) if such apportionment is granted, issuance of an order directing that the aforementioned \$78 million, which was paid into a fund “for the benefit of electric energy consumers,” be refunded expeditiously to New York electricity consumers in a manner reflective of the harm caused by CCG’s actions that are the subject of the Order and the Stipulation; and (c) if, arguendo, it is not possible to implement the requested refund in a manner reflective of the harm caused by CCG’s actions, the \$78 million

alternatively should be refunded to all New York electricity consumers on the basis of energy consumption.

BACKGROUND

A. The Investigation by Enforcement

In January 2008, Enforcement instituted a preliminary, non-public investigation of CCG's physical power trading in and around the New York Independent System Operator, Inc. ("NYISO") control area based on two anonymous hotline telephone calls relating to that trading activity.¹ During that investigation, Enforcement observed that CCG was engaging in virtual trading in the NYISO's energy markets that consistently was unprofitable.² On February 19, 2009, the NYISO Department of Market Monitoring and Performance informed Enforcement that it would apply mitigation measures to CCG because its virtual load trading had contributed to an unwarranted divergence of location-based marginal prices between day-ahead ("DA") and real-time ("RT") energy markets.³ In response thereto and based on its own observations, Enforcement instituted another preliminary, non-public investigation to determine if CCG's pattern of virtual trading in the NYISO's energy markets was intended to move DA prices in a direction that would benefit its contract for differences ("CFD") financial positions.⁴ Enforcement's two investigations into CCG thereafter were conducted jointly.⁵

As part of Enforcement's investigation, it examined CCG's transactions in the NYSIO, ISO-New England ("ISO-NE"), PJM Interconnection ("PJM") and Ontario Independent

¹ FERC Docket No. IN12-7-000, Constellation Energy Commodities Group, Inc., Order at P. 2.

² Id.

³ Id.

⁴ Id.

⁵ Id.

Electric System Operator markets.⁶ Enforcement focused specifically on the trading activities of CCG's East Power Trading Group from January 1, 2007 through February 28, 2009, with the 16-month period of September 2007 through December 2008 forming the "Months of Interest."⁷

As a result of its investigation, Enforcement determined that CCG violated FERC's Anti-Manipulation Rule⁸ by entering into virtual transactions and DA physical schedules without regard for their profitability, but with the intent of impacting DA prices in the NYISO and ISO-NE energy markets in a manner that would benefit certain CFD positions that it held.⁹ Additionally, Enforcement determined that as part of this scheme, CCG combined the use of virtual transactions with DA physical schedules to impact DA prices in the NYISO and ISO-NE energy markets to benefit the CFD positions that priced off a component of those impacted DA prices.¹⁰

CCG's virtual transactions and DA physical transactions often were large in volume and scheduled with regularity and persistency. Based on its findings, Enforcement concluded that: "(1) CCG's virtual and physical trading activities during the Months of Interest constituted a fraudulent device, scheme or artifice and that CCG engaged in a course of business that operated as a fraud upon the NYISO and ISO-NE markets; (2) CCG intended to manipulate the NYISO and ISO-NE DA energy markets for the benefit of its CFD positions during the

⁶ Id. at P. 3.

⁷ Id.

⁸ 18 C.F.R. § 1c.2 (2012). The Anti-Manipulation Rule prohibits any entity from (i) using a fraudulent device, scheme, or artifice, or making a material misrepresentation or a material omission as to which there is a duty to speak under a FERC-filed tariff, FERC order, rule or regulation, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity, (ii) with the requisite scienter, and (iii) in connection with a transaction subject to FERC's jurisdiction.

⁹ Order at P. 12, 13.

¹⁰ Id. at P. 14.

Months of Interest; and (3) CCG's manipulative scheme was in connection with transactions subject to the jurisdiction of [FERC] in violation of [the Anti-Manipulation Rule]."¹¹

Enforcement also concluded that "this manipulation of the physical and virtual markets and the respective DA prices resulted in widespread economic losses to market participants who bought and sold energy in the DA markets of ISO-NE and the NYISO. In addition, this manipulation distorted price discovery for all market participants, which contributes not only to trading decisions, but to a variety of industry-wide determinations."¹²

Lastly, Enforcement concluded that CCG, in addition to engaging in market manipulation, also violated 18 C.F.R. § 35.41(b),¹³ which prohibits the submission of inaccurate information with respect to electricity trading activities.¹⁴ Specifically, Enforcement determined that "CCG denied [to the NYISO] that its virtual transactions were independent of the CFD positions and were entered into based on market fundamentals."¹⁵

Upon the conclusion of Enforcement's investigation, FERC issued a "Staff Notice of Alleged Violations" on January 30, 2012, which notified the public of CCG's alleged market violations during the Months of Interest that were the subject of the investigation. Approximately one month later, on March 9, 2012, FERC issued the Order, which approved the Stipulation that had been executed by Enforcement and CCG one day earlier, on March 8, 2012.

¹¹ Id. at P. 16.

¹² Id. at P. 17.

¹³ 18 C.F.R. §35.41(b) requires that sellers of energy, capacity and/or ancillary services at market-based rates "provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with ... [FERC]-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences."

¹⁴ Order at P. 18.

¹⁵ Id. at P. 20.

B. The Stipulation and the Order

In the Stipulation, Enforcement and CCG stipulated and agreed to a number of facts, including many relating to Enforcement’s investigation of CCG’s trading activities.¹⁶ The Stipulation recounts that Enforcement determined that CCG violated: (a) FERC’s Anti-Manipulation Rule; and (b) the accuracy provisions of FERC’s regulations.¹⁷ The Stipulation provides explicitly that CCG “agrees with the facts as stipulated ... but neither admits nor denies the violations described” therein.¹⁸

As part of the Stipulation, CCG agreed to “disgorge unjust profits and interest of \$110 million.”¹⁹ Said disgorgement is to be distributed as follows: (a) \$6 million is to be “distributed directly to and equally among the NYISO, ISO-NE, PJM, Midwest-ISO, Southwest Power Pool and the California ISO for the purposes of purchasing computer hardware and/or software that improves their respective surveillance and analytic capabilities”; and (b) the remaining funds – totaling \$104 million – are to be deposited into a fund “for the benefit of electric energy consumers in the affected states within the NYISO (\$78,000,000), ISO-NE (\$20,000,000) and PJM (\$6,000,000).”²⁰ CCG further agreed to “pay a civil penalty of \$135,000,000 to the United States Treasury.”²¹

With respect to the \$104 million in disgorged unjust profits and interest set aside “for the benefit of electric energy consumers,” the Stipulation provides, in pertinent part, that “any requests for apportionment of the monies in the Fund by the affected states within the

¹⁶ Stipulation at P. 2-16.

¹⁷ Id. at P. 17-35.

¹⁸ Id. at P. 36.

¹⁹ Id. at P. 37.

²⁰ Id.

²¹ Id. at P. 38.

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.”²² Thus, the Commission is authorized to request control of the \$78 million allocated to New York for subsequent allocation to electric energy consumers within the State.

On March 9, 2012, FERC issued the Order approving the Stipulation executed on March 8, 2012. Initially, the Order summarizes Enforcement’s investigation into CCG’s trading activities, including Enforcement’s determinations that CCG violated: (a) FERC’s Anti-Manipulation Rule; and (b) the accuracy provisions of FERC’s regulations.²³ The Order then summarizes the material elements of the Stipulation.²⁴

With respect to New York’s \$78 million share of the \$110 million disgorged by CCG, FERC directed that the money is to be used “for the benefit of electric energy consumers.”²⁵ FERC also noted that the distribution of the disgorged amount between the NYISO, ISO-NE and PJM was based on the relative harm imposed by CCG’s activities:

This distribution is based on the results of staff’s investigation and its assessment of the relative harm imposed on each organized market as a result of CCG’s trading. Specifically, the allocation was based on the megawatts associated with DA schedules flowing between the ISOs and virtual transactions within NYISO that were part of what staff determined to be CCG’s manipulative scheme.²⁶

Finally, in approving the Stipulation, FERC concluded that the \$110 million disgorgement and the \$135 million civil penalty, as well as other aspects of the Stipulation, constituted “a fair and

²² Id. at P. 37.

²³ Order at P. 2-20.

²⁴ Id. at P. 21-26.

²⁵ Id. at P. 22.

²⁶ Id.

equitable resolution of this matter and are in the public interest, as they reflect the nature and seriousness of CCG's conduct."²⁷

ARGUMENT

THE REQUESTED RELIEF SHOULD BE GRANTED

By this Petition, Multiple Intervenors seeks: (a) a commitment by the Commission to seek expeditiously control over the \$78 million, representing New York's share of the unjust profits and interest disgorged by CCG pursuant to FERC's Order; (b) if such control is granted, issuance of an order directing that said \$78 million, which was paid into a fund "for the benefit of electric energy consumers," be refunded expeditiously to New York electricity consumers in a manner reflective of the harm caused by CCG's actions; and (c) if, arguendo, it is not possible to implement the requested refund in a manner reflective of the harm caused by CCG's actions, the \$78 million alternatively should be refunded to all New York electricity consumers on the basis of energy consumption. For the reasons set forth herein, the requested relief should be granted.

CCG's actions, detailed at length in the Order and the Stipulation, harmed New York energy consumers. For this reason, and others, FERC approved the Stipulation between Enforcement and CCG pursuant to which CCG agreed to, inter alia, disgorge \$110 million in unjust profits and interest, of which \$78 million was allocated to New York. That money should be refunded to the consumers harmed by CCG's actions in an equitable and expeditious manner.

Initially, there should be no dispute that the \$78 million should be used for the benefit of electric energy consumers. Indeed, the Stipulation provides explicitly that the vast

²⁷ Id. at P. 28 (footnote omitted).

majority of CCG's disgorgement, including the entire \$78 million, is to be deposited "into a fund for the benefit of electric energy consumers."²⁸

The best way to use the \$78 million to benefit electric energy consumers is to return it, in the form of a refund, to electric energy consumers. Such approach reflects – and, to some extent would offset – the financial harm caused by CCG's actions. Indeed, in the Order, FERC noted that the specific allocation of the amounts disgorged for the benefit of electric energy consumers in the regions where the NYISO, ISO-NE and PJM operate is based on the relative harm caused by CCG's trading activities.²⁹

In overseeing a refund of the \$78 million, the Commission should: (a) limit such refund to electric energy consumers, as stipulated to by Enforcement and CCG and approved by FERC; (b) coordinate with the NYISO in terms of the best way to implement the refund; and (c) to the extent possible, distribute the refund among electric energy consumers in a manner reflective of the harm caused by CCG's actions. With respect to the latter request, upon information and belief not all electric energy consumers in New York were harmed equally. For instance, it appears that the bulk of CCG's trades found by Enforcement to have violated FERC's Anti-Manipulation Rule occurred in a limited subset of NYISO Load Zones.³⁰ Such trades undoubtedly affected energy prices, and uplift, in those zones. Accordingly, to the extent discernible, the Commission should seek to direct all or most of the \$78 million to those electric energy consumers impacted most directly by CCG's actions.

If, arguendo, it is not possible to implement the requested refund in a manner reflective of the harm caused by CCG's actions, the \$78 million alternatively should be refunded

²⁸ Stipulation at P. 37.

²⁹ Order at P. 22.

³⁰ See, e.g., Stipulation at P. 9-13.

to all New York electricity consumers on the basis of energy consumption. At a minimum, implementing the refund based on energy consumption is reflective of the type of harm caused by CCG's actions (i.e., impacts to energy market prices).

Additionally, the customer refund sought herein should be implemented expeditiously. The Months in Interest scrutinized by Enforcement, which formed the basis for the Stipulation, encompassed the 16-month period from September 2007 through December 2008.³¹ Thus, consumers were harmed by CCG's actions roughly 3-5 years ago. Under such circumstances, it makes sense to implement the refund expeditiously. Moreover, the sooner the refund is implemented, the greater the likelihood that the disgorgement will be returned to the consumers that actually were harmed – a probability likely to diminish over the passage of time.

Multiple Intervenors believes that among New York State agencies, the Commission is uniquely qualified and best situated to work with the NYISO to ensure that the \$78 million of CCG's disgorgement allocated New York is refunded to electric energy consumers in an equitable and expeditious manner. Accordingly, so long as the Commission agrees that said disgorgement should be refunded to consumers, Multiple Intervenors would support a request by the Commission for control over 100% of the amount allocated to New York. Significantly, however, Multiple Intervenors would oppose any effort by the Commission to use said amount for any purpose other than the direct compensation of electric energy consumers that were harmed by CCG's actions.

³¹ See Order at P. 4.

CONCLUSION

For the reasons set forth herein, Multiple Intervenors respectfully requests that the Commission: (a) commit to seek expeditiously control over the \$78 million fund created by the Order, which represents New York's share of the unjust profits and interest disgorged by CCG; (b) if such control is granted, issue an order directing that said \$78 million, which was paid into a fund "for the benefit of electric energy consumers," be refunded expeditiously to New York electricity consumers in a manner reflective of the harm caused by CCG's actions; and (c) if, arguendo, it is not possible to implement the requested refund in a manner reflective of the harm caused by CCG's actions, the \$78 million alternatively should be refunded to all New York electricity consumers based upon energy consumption.

Dated: April 10, 2012
Albany, New York

Respectfully submitted,

Michael B. Mager

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NEW YORK STATE PUBLIC SERVICE COMMISSION
PARTY STATUS REQUEST FORM

If you wish to become a party, fill out this "Party Status Request Form" OR use the Department's web interface. A separate request for Party status will be required for each proceeding. Only one form per party is necessary. Additional representatives of a party can be added informally, via an e-mail to the ALJ or Secretary, or by use of the "Party Representatives Form" if desired. To remove or substitute representatives on the Party List, the "Party Representatives Form" is required.

Case No.:	<u>12-E-</u>
Case Title (short reference):	<u>Petition of Multiple Intervenors</u>
Date of Request:	<u>April 10, 2012</u>

Name of Party (This MUST be filled in. If you are an individual representing yourself, please so indicate):	<u>Multiple Intervenors</u>
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Your Name:	<u>Michael B. Mager, Esq.</u>
Title:	<u>Partner</u>
Firm/Company/Organization, if applicable:	<u>Couch White, LLP</u>
Mailing Address:	<u>540 Broadway</u> <u>P.O. Box 22222</u> <u>Albany, New York 12201-2222</u>
Telephone Number:	<u>(518) 320-3409</u>
E-mail Address:	<u>mmager@couchwhite.com</u>

Please state here the nature of the party's interest in the case, including, if applicable, how the party's participation might contribute to the development of a complete record or is otherwise fair and in the public interest:

Multiple Intervenors is an unincorporated association of over 55 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State. As large electricity consumers, Multiple Intervenors members were impacted by the activities of Constellation Energy Commodities Group, as detailed in Multiple Intervenors' petition. Additionally, Multiple Intervenors members will be impacted by the allocation and disbursement of the \$78 million set aside for the benefit of New York electric energy consumers, as described in the petition. Multiple Intervenors' participation in a proceeding instituted to address its petition would be in the public interest because the record will reflect the positions of many of the State's largest electricity consumers and employers.

ELECTRONIC SERVICE OF DOCUMENTS ISSUED BY PARTIES UPON EACH OTHER:

We will presume that, by providing your e-mail address, you are consenting to electronic service of documents upon you by other parties, and you agree that you will electronically serve all other parties except those who have not consented to electronic service, whom you must serve by mail or hand delivery.

Check the ***box*** below if the party does not have the ability to send and receive e-mail:

I do not have the ability to send and receive e-mail. Therefore I do not consent to receive electronic service and I do not agree to serve other parties by e-mail. Instead, I request that documents be served upon me by mail or hand delivery.

Note: Whether or not you have an e-mail address, if you require use of a different means of service of some or all documents between parties, then you may, pursuant to 16 NYCRR §3.5(e)(2), 1) apply to the Secretary or presiding officer and make a showing of good cause why you should be allowed to use a different means of serving or receiving service of documents, or 2) agree with other parties on a different means of service and file such agreement with the Secretary or presiding officer with a signed copy of this form.

ELECTRONIC SERVICE OF DOCUMENTS ISSUED BY THE COMMISSION:

If you consent to receive Commission-issued orders electronically, you will receive all Commission-issued documents electronically. If you do not consent to receive Commission-issued orders electronically, you will receive all Commission-issued documents by mail.

Check the ***boxes*** below if the party consents to have the Commission serve orders that affect such party upon the party by electronic means only, pursuant to 16 NYCRR §3.2(b)(1).

I am authorized by the party to grant consent to receive electronic-only service of Commission-issued orders, AND

I, on behalf of myself or the party I represent, knowingly waive the right specified in Public Service Law §23(1) to be served personally or by mail with orders that affect me or the party I represent and consent to receive service of Commission-issued orders by electronic means only, such consent to remain in effect until revoked.

Note: Any party specifying terms of its consent to receive service by electronic means of Commission-issued orders other than that the consent would remain in effect until revoked, shall state such terms with respect to e.g. duration, persons consenting or types of documents, in writing to the Secretary or presiding officer *with a copy of this form*.

SUBMISSION OF THIS FORM:

If you have consented to electronic service of documents among the parties and of orders issued by the Commission, please e-mail this form to Secretary@dps.state.ny.us AND serve it upon all parties (including any presiding ALJ) on the Parties List for this case, if such a Parties List is posted.

If you:

- (a) do not have the ability to send and receive e-mail or for some other reason will request permission from the Secretary or presiding officer to serve and be served by other parties by means other than electronic service OR
- (b) do not consent to electronic service of Commission-issued orders, including orders that may affect you, as indicated above,

sign below and mail a hard copy of this form to the Secretary, NYS Public Service Commission, Three Empire State Plaza, Albany, NY 12223-1350. ALSO, you must mail or e-mail or deliver copies to all parties (including any presiding ALJ) on the Parties List for this case, if such a Parties List is posted.

Signature: _____	Date: <u>4/10/2012</u>
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Your request to be a party is subject to the right of other parties to object and subject to the final determination of the Administrative Law Judge, if one is assigned, or to the Secretary if no Administrative Law Judge is assigned to this case.