STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE
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October 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 Answer of the New York Public Service Commission in the above-entitled proceeding.

Should you have any questions, please contact me at (518) 474-1585.

Very truly yours,

Alan T. Michaels
Assistant Counsel

Attachment

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

ANSWER OF THE
NEW YORK PUBLIC SERVICE COMMISSION

INTRODUCTION

The New York Public Service Commission ("NYPSC") submits this Answer to three comments in opposition to NYPSC's proposal for allocation of funds in the matter captioned above. NYPSC makes this Answer in accordance with Rule 213 of the Federal Energy Regulatory Commission's ("FERC" or the "Commission") Rules of Practice and Procedure, and the *Order Permitting Reply Comments* of Deputy Chief Administrative Law Judge Bobbie J. McCartney issued September 28, 2012 in this proceeding.

BACKGROUND

On March 9, 2012, the Commission approved the Stipulation and Consent Agreement reached between FERC Enforcement Staff and Constellation Energy Commodities Group, Inc. ("Constellation" or "CCG") to resolve an investigation of potential violations of the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2, and of the Commission's regulation prohibiting the submission of inaccurate information, 18 C.F.R. § 35.41(b).[1] Within the Stipulation and Consent Agreement, Constellation agreed to disgorge unjust profits of $110 million including interest, which would be divided among the three Independent System Operator ("ISO") markets affected by Constellation's actions.[2] The Commission explained that the distribution between the affected ISOs

> "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 [day ahead] schedules ***flowing between ISOs and virtual transactions within NYISO*** that were part of what staff determined to be CCG's manipulative scheme."[3]

By using this methodology, FERC allocated $20 million to ISO-NE and $6 million to PJM for the transactions flowing between ISOs and virtual transactions, noted above. FERC apportioned $78 million to the New York ISO ("NYISO").

Deputy Chief Administrative Law Judge McCartney directed parties to file Motions for Determination of Eligibility to participate in requests for apportionment of the funds.[4] On June 7, 2012, NYPSC was named as one of the three appropriate state agencies, along with the New York Office of Attorney General and the New York Department of

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1 *See*, Constellation Energy Commodities Group, Inc., 138 FERC ¶61,168 (March 9, 2012), attached Stipulation and Consent Agreement (March 8, 2012) at ¶ 1 [hereinafter the "Order"].

2 Order at 5, ¶22.

3 *Id.*, emphasis added.

4 *See*, *Order Confirming Rulings from Prehearing Conference*, Constellation Energy Commodities Group, Inc., IN12-7-000 (April 2, 2012).

State, with authority to propose an allocation plan of the NYISO funds.[5]

On September 10, 2012, the NYPSC filed its Motion to Approve Allocation of Constellation Funds and detailed its proposal for the disbursement of the NYISO Constellation monies. On the same day, the New York Office of Attorney General and the New York Department of State, Utility Intervention Unit both filed separate comments in support of the allocation proposal. The proposal contained three parts: (a) a refund to customers totaling $48 million; (b) funding for consumer advocacy in the wholesale electric markets in the NYISO totaling $10 million;, and, (c) funding of the promotion of advanced technologies to optimize NYISO transmission system performance totaling $20 million.[6]

Three comments were submitted in response to NYPSC's allocation proposal. First, Identified Neighboring States[7] submitted the *Joint Objection to Allocation Proposal of New York Public Service Commission*. Second, New Jersey Board of Public Utilities ("NJBPU")

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5 See, *Order Granting Unopposed Motions for Determination of Eligibility*, Constellation Energy Commodities Group, Inc., IN12-7-000 (June 7, 2012).

6 New York Power Authority ("NYPA"), a state-owned utility that would participate in the distribution of the $48 million refund to customers, also filed comments on September 25, 2012 supporting the NYPSC allocation proposal.

7 The Identified Neighboring States are comprised of a subset of the Neighboring States entities that purchase NYPA hydropower, and do not include the public power "bargaining agents" for Pennsylvania or Massachusetts. The objectors include: the City of Cleveland, Ohio, Division of Cleveland Public Power; Pascoag Utility District; Attorney General of the State of Rhode Island and Rhode Island Division of Public Utilities and Carriers; Connecticut Municipal Electric Energy Cooperative; Public Power Association of New Jersey; and the Vermont Department of Public Service. *See*, Joint Objection of Identified Neighboring States to Allocation Proposal of New York Public Service Commission, IN12-7-000, Constellation Energy Commodities Group, Inc. (Sept. 24, 2012) (hereinafter "Identified Neighboring States").

filed comments in opposition to NYPSC's proposal. Third, AARP filed comments. Each set of comments holds different arguments and shall be reviewed individually.

DISCUSSION

I. Identified Neighboring States

The Identified Neighboring States lay a claim to the funds allocated to the NYISO due to their purchase of low-cost hydropower which involved the export of electricity from the NYISO system. These purchases were already taken into consideration when FERC devised its distribution of the Constellation Funds to the three affected ISOs in paragraph 22 of the Order. Despite this allocation from FERC for any harm received by cross-ISO trading, the NYPSC held discussions, accepted comments from all of the Neighboring States, and took into consideration all requests for the funding.

Throughout this proceeding, all of the Neighboring States argued that they should be treated equally to in-state customers. As a result, and in response to this argument, the NYPSC's allocation proposal treats all of the Neighboring States as any other New York customer. The proposal provides to each of the Identified Neighboring States a load-based equitable share of the $48 million refund to customers.

However, the Identified Neighboring States oppose the allocation plan. They apparently are not satisfied with an allocation plan that in fact provides them "treatment comparable to other similarly affected NYPA customers residing within New York State," as Deputy Chief Judge McCartney prescribed,[8] but instead want a refund that exceeds the load-share based refunds that are proposed for other in-state customers. Specifically, the Identified Neighboring States intone that the funding allocated for the consumer advocate and the promotion of advanced technologies will only benefit in-state customers. Based on this argument, the Identified Neighboring States want a refund to out-of-NYISO customers based on the full $78 million allocated to the NYISO market. The Identified Neighboring States fail to recognize the full benefits of the NYPSC proposal for all consumers, including those in the Identified Neighboring States, from the proposed support for a consumer advocate and for advanced technologies.

The Identified Neighboring States point to the ratemaking principles of the Natural Gas Act and the Federal Power Act to bolster their claim that an additional refund to them is appropriate based on excessive rates and charges. However, this is an enforcement proceeding, and the funds to be distributed here are not associated with ratemaking. Rather, the funds result from the disgorgement of proceeds as part of the resolution of that enforcement case. It is recognized that "FERC enjoys a great deal of flexibility in the remedy phase of an enforcement proceeding. Indeed, as we have often noted, FERC's discretion is 'at [its] zenith

[8] *See, Order Denying Opposed Motions for Eligibility Determination and Directing Eligible Parties to File Joint Stipulations*, Constellation Energy Commodities Group, Inc., IN12-7-000 (June 11, 2012) at ¶57.

when the action assailed relates primarily … to the fashioning of … remedies and sanctions.'"[9]

If the Commission wanted all three ISOs to utilize the disgorged funds as refunds to customers, it would have specified the remedy in its Order. Instead, FERC relies upon the "appropriate state agency" to determine how to best use the disgorged funds for the benefit of the consumer. NYPSC prepared a three-pronged plan to satisfy the needs of the NYISO market.

A. Consumer Advocacy Funding

As detailed in the allocation proposal, the second element of the proposal establishes long term funding to support comprehensive end-user advocacy at the NYISO and at FERC. Heightening the capabilities and strengthening the voice of the consumer at the NYISO should help in the development of new procedures or rules to identify and prevent market manipulations detrimental to consumers. The consumer advocate is designed to represent all end users, and in particular small business and residential customers, including out-of-state entities that receive NYISO exports such as the Identified Neighboring States, just like any in-State consumer. The Identified Neighboring States do not point to anything to suggest that the

[9] *Laclede Gas Co. v. FERC*, 997 F.2e 936, 944 (D.C. Cir. 1993), *citing, Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967); *see also, Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1549 (D.C. Cir. 1985); *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984).

advocacy supported by the NYPSC proposal is adverse to their consumers' interests.

The advocate's presence is expected to lead to additional representation and participation for all end users of the NYISO market. By seeking to receive a portion of the NYISO allocation, the Identified Neighboring States have most assuredly conceded that they participate in the NYISO market, and like other participants, were therefore harmed by Constellation's market manipulation scheme. If the Identified Neighboring States can be harmed within the NYISO market, they are not too remote to benefit from a well-funded end-user advocate in that market.

Further support for the value of an end-user advocate can be found in Your Honor's recent order approving allocation of 20 percent of the PJM portion of the fund to "a new non-profit entity that would enable sustained and meaningful representation [at PJM meetings] to retail electric customers throughout the PJM region."[10] The New Jersey Board of Public Utilities, which, like the Public Power Association of New Jersey (one of the Identified Neighboring States) is within the PJM region, stated in its September 28, 2012 letter to Your Honor that it supported the request for funding of end-use advocacy.

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[10] *Order Confirming Rulings From the October 4, 2012 Oral Argument*, Constellation Energy Commodities Group, Inc., IN12-7-000 (issued October 10, 2012), pars. 14-18.

B. Program Funding to Promote Advanced Technologies to Optimize Transmission System Performance

The third element of the NYPSC allocation proposal is funding to advance cutting-edge technologies that would increase bulk transmission system reliability and efficiency. As stated in the allocation proposal, congestion of the NYISO bulk power transmission grid at times causes consumers to experience higher electric costs. The intent of this funding is to overcome barriers which currently slow the development and deployment of new technologies. $20 million will provide sufficient funding to conduct research and development, and to implement technologies designed to reduce congestion and improve reliability for the benefit of consumers.

The Identified Neighboring States argue that these technologies would only benefit in-state customers. However, transmission system improvements affect all customers receiving power from the market, and may even alter the prices paid for electricity. A more reliable transmission system would optimize electricity flows, which is expected to reduce the cost for all customers. Notably, the Identified Neighboring States have failed to explain how they would not derive benefits from NYISO transmission system improvements.

Moreover, any technology proven through this funding to be beneficial may be introduced in other markets. Again, the purpose of the program is to reduce the entry costs for research and deployment. Once those costs are removed, the technology has been tested and demonstrated to provide a benefit. Outside markets may then implement the tested technologies without paying for the introductory expenses. This provides benefits for all consumers, including consumers served by the Identified Neighboring States.

Once again, Your Honor's October 12, 2012 order is instructive. The order approved the proposal of the Pennsylvania entities to use their allocation for a variety of activities including establishment of a phone line for the reporting of electricity market violations, a statewide educational campaign addressing customers' rights and protections, and several energy efficiency initiatives.[11] If anything, improvements in the bulk energy transmission system, as proposed by the NYPSC, have a closer nexus to energy prices that these other important activities.

C. Proposals for the ISO-NE and PJM Markets

State agencies within the footprint of ISO-NE and PJM offered allocation proposals for their own markets, and members of the Identified Neighboring States participated in their respective home-market proposals. However, neither the ISO-NE nor the PJM allocation proposal recognizes or compensates any electricity purchases from out-of-ISO footprint customers. If NYPSC were to pattern its allocation plan after those designed by New York's neighbors in PJM and ISO-NE, then the NYISO allocation plan would not have provided any refund to the Identified Neighboring States.

[11] *Id.* at pars. 22-32.

D. FERC's Allocation Intent

Since the Identified Neighboring States suggest that NYPSC's proposal for allocation is neither fair nor equitable, the Commission's intent in the allocation of funds in this proceeding should be reviewed. Although NYPSC maintains that its allocation proposal is the most proper, fair, just, and effective way to utilize the Constellation funds for the benefit of all customers of the NYISO market, Paragraph 22 of the Order demonstrates that NYPSC's proposal is overly generous to the Identified Neighboring States.

Paragraph 22 demonstrates that the Commission took into consideration all cross-ISO transactions when FERC allocated funds amongst the three ISO markets. To take the cross-ISO and virtual transactions into account, FERC must have enhanced the amount of funds provided to the ISO-NE and PJM markets for the impact realized in those markets from actions outside their footprints. Having already recognized cross-ISO and virtual trading in FERC's distribution of the funds between the ISO markets, any claim made in a second ISO market is redundant. Within Paragraph 22 of the Order, the Commission simplified this proceeding and prevented cross-ISO claims. The Commission satisfied all outside-ISO footprint claims within its distribution between ISOs, and any additional claims could be considered double-dipping. However, despite the Commission's Order, it was the intent of NYPSC to involve all participants of the NYISO market in this proceeding and treat them fairly and benefit all consumers.

II. NJBPU

NJBPU requests a lump sum payment in lieu of rebates directly to customers. However, such treatment would be different from all others involved in this allocation proposal, and would not be fair to those customers within New Jersey that are contemplated in NYPSC's allocation proposal. The Identified Neighboring States, including NJBPU, wanted to be treated fairly as compared to other in-state customers, and the allocation proposal meets this standard.

III. AARP

AARP's comments did not oppose the allocation plan. Rather, AARP provided alternative recommendations for use of the funds, and criticized the implementation of the consumer advocate.

First, AARP suggests that the money allocated to a customer refund would have a greater impact on the market if it were used collectively. AARP suggests using the money for low-income energy assistance and energy efficiency assistance. Though these programs have merit, NYPSC determined that its three-pronged plan best uses the funds to provide customers with an immediate return in the form of a refund, to boost consumer advocacy, and to increase efficiency of the transmission system. Consumer advocacy and system efficiency have been recognized as two priorities for Chairman Wellinghoff, and NYPSC's proposal aligns with these policy goals.[12]

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[12] *See, e.g.*, New York Independent System Operator, Inc., *Connection A Newsletter for Market Participants*, "NYISO Symposium Brings Energy Leaders Together,"

Second, it should be noted that AARP does not object to the funding of a consumer advocate, but recommends alternative implementation of the program. Specifically, AARP suggests that the design is too complex, and that the advocate should be more independent.

The funding may at first appear intricate, but in reality the steps are relatively simple and provide additional assurance that the money is spent wisely. The funding, if approved, will be given to the New York State Energy Research and Development Authority ("NYSERDA"). Either NYSERDA will act as trustee, or another entity will be named. The New York Department of State's Utility Intervention Unit will then hire and work with an entity to staff the consumer advocacy project. To strengthen this framework, the Department of Public Service ("DPS") would have authority to review the UIU's consumer advocacy budget.

The purpose of the system is to provide oversight so the funding is used as effectively as possible. This proposal maintains the independence of the advocate from the NYISO; having a funding source outside the NYISO prevents any conflict between advocate and market operator. NYPSC's plan, as presented, balances oversight with independence.

(Second Quarter, 2009) available at http://www.nyiso.com/public/webdocs/documents/newsletters/connection/nyiso_connection_2Q09_06302009.pdf [accessed October 2, 2012]; *see also*, Craig Cano, *States Get RTO Funding, so Why Not Consumer Advocates, Ask Wellinghoff, NASUCA*, Inside FERC, Oct. 4, 2010.

CONCLUSION

The NYPSC allocation proposal is designed to utilize the Constellation funds in the interest of NYISO electric consumers. It provides additional participation and advocacy on behalf of end-use consumers at the NYISO and at FERC. The funding will also stimulate new technologies designed to benefit transmission efficiency. The remainder will provide a direct and immediate return to customers. The allocation plan treated all NYISO market participants equally. Based on the foregoing, NYPSC requests that Your Honor approves its allocation plan.

Respectfully submitted,

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of the State of New York
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(518) 474-1585

Dated: October 15, 2012
Albany, New York

CERTIFICATE OF SERVICE

I, Alan T. Michaels, do hereby certify that I will serve on October 15, 2012, the foregoing Answer of the New York Public Service Commission upon each of the parties of record indicated on the official service list compiled by the Secretary in this proceeding.

Dated: October 15, 2012
Albany, New York

Alan T. Michaels