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April 25, 2012

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

Re: Case 12-E-0786, Petition of Multiple Intervenors Regarding Application for and Use of Fund for the Benefit of New York Electric Consumers Established in FERC Case IN12-7

Dear Secretary Brilling:

On April 10, 2012, Multiple Intervenors (MI), an "unincorporated association of over 55 large industrial, commercial and institutional energy consumers," petitioned the Public Service Commission (PSC) to take certain actions regarding a $78 million fund for the benefit New York consumers created by an Order of the Federal Energy Regulatory Commission (FERC) in FERC Case No. IN12-7-000 on March 9, 2012.[1 2] Public notice of the MI petition and an opportunity for public comment on it has not been issued. Because time is of the essence,[3] and the relief requested in the MI petition would affect AARP[4] members, AARP submits this response to the MI petition, reserving its right to comment in any future public comment process established by the Commission regarding application for and utilization of the $78 million fund.

The $78 million fund represents New York State's portion of $110 million of profits which were disgorged by Constellation Energy Commodities Group (CCG) as part of an overall $245 million settlement of a market manipulation investigation conducted by FERC. The disgorged CCG funds are on deposit in a U.S. Treasury account broadly intended by FERC to be used "for the benefit of electric energy consumers."[5] The funds will be apportioned by a FERC Administrative Law judge based on

[1] FERC Case No. IN12-7-000, *Constellation Energy Commodities Group, Inc., available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12912651

[2] AARP has also intervened as a party in the FERC docket on behalf of our members and other persons over age 50 in all affected states.

[3] A FERC Administrative Law Judge has set April 30, 2012 as the deadline for state agencies to seek a determination of their eligibility to participate in apportionment of the fund, which will then occur in a later phase of the proceeding.

[4] AARP is a not for profit organization whose members include hundreds of thousands of New York residents and electric consumers over 50 years of age.

[5] "[A]ny 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." FERC Case No. IN12-7-000, *Constellation Energy Commodities Group, Inc.*

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applications from eligible agencies of the numerous states which are within the "footprints" of the NYISO, the New England ISO, and the PJM Regional Transmission Organization. Under FERC's order approving the settlement, state agencies eligible to participate in the apportionment the disgorged funds include, without limitation, state utility regulatory commissions such as the New York PSC, state utility consumer advocate offices, and state attorneys general.

MI asks the PSC "to seek expeditious control over the $78 million, representing New York's share of the unjust profits disgorged by CCG pursuant to FERC's Order...." MI Petition at 7. MI asks that the funds be distributed by the PSC "in a manner reflective of the harm caused by CCG's actions," but if determination of relative harm among consumers is not possible, the entire amount should be paid "to all New York electricity consumers based upon energy consumption." MI Petition at 1-2, 9, 10.

MI further threatens that it "would support a request by the Commission for control over 100% of the amount allocated to New York .... [but] 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." MI Petition at 9. MI does not put forward any justification for the limits it seemingly would place on the use of funds for the benefit of non-industrial customers.

In contrast to MI's proposal, in a letter to Governor Cuomo AARP has recommended that New York State seek funds due from the settlement that will directly benefit residential customers in ways that will reduce their future bills and increase consumer representation in regulatory proceedings that affect rates and charges for electric service.[6]

Consistent with FERC's broader vision of potential uses for the fund, AARP proposes that a fair share of New York's $78 million be used to increase funding of electric efficiency measures in New York's weatherization program, to supplement the Home Energy Assistance Program to cover additional aid to prevent shutoff of electric service, and to augment the Energy Efficient Appliance Rebate program. These programs provide immediate benefits to electric energy consumers who are struggling to pay their electric bills and they help New Yorkers to reduce their future electric bills through efficiency measures.

Further, AARP recommends that New York allocate some of the $78 million fund to provide support for residential consumer advocacy in state and federal electric utility proceedings and before the NYISO. In contrast to most other states, New York State has no independent office or organization providing residential consumer advocacy in the lengthy and complex regulatory proceedings at the PSC and FERC that affect prices, terms, and conditions of residential electric service. Such an allocation would provide a voice for New York's residential electric consumers who are harmed by wholesale electricity market malfunctions at the NYISO.[7]

When FERC designated state utility consumer advocate offices and attorneys general as eligible to participate in states' division of the disgorged profits, it clearly anticipated that potential uses "for the benefit of electric energy consumers" is much broader than MI's unnecessarily restrictive proposal to use the New York funds only for rate relief. Parties in the FERC case from the PJM area recently filed their agreement as to numerous agencies eligible to participate in division of the funds, including 13 regulatory

[6] A copy of AARP's letter to Governor Cuomo is attached to this submission.

[7] See Energy Settlement Should Provide Immediate & Long-term Relief to NY Electric Customers, Statement by Joan Parrott-Fonseca, AARP NY State Director, April 16, 2012, *available at* http://www.aarp.org/online-community/people/showProfile.action?UID=598&plckController=PersonaBlog&plckScript=personaScript&plckElementId=personaDest&plckPersonaPage=BlogViewPost&plckPostId=Blog%3a598Post%3acc6c2c6e-0835-419f-b55c-bf00ee757d0b

commissions, 7 state utility consumer advocates, 6 attorneys general, and a Citizens Utility Board.[8] This indicates that MI's proposal for 100% control of the New York fund by the PSC is not only at odds with FERC's intent and expectations but also is contrary to the widespread understanding of agencies in other states that will participate in division of the funds.

MI's petition, insofar as it proposes utilization of the FERC fund solely for refunds based on electricity consumption, has no record basis. The determination by states as to how to use their portions of the FERC settlement fund is fundamentally a legislative or quasi-legislative function, and is not a rate-making function.

Industrial customers may not have been harmed to the extent residential customers were harmed, and thus a distribution of funds based on their usage of electric energy may be unreasonable. While the FERC order is not entirely clear, it appears that a portion of CCG's unjust profits were gained by manipulating NYISO market prices, through uneconomic (low) bids in NYISO markets in order to achieve large payoffs through financial derivatives (contracts for differences) based on the artificially manipulated NYISO prices. Rates for MI members are based on NYISO spot market prices, and so utilities do not incur financial hedging costs for them.

In contrast, residential customers have hedged rates, and so it is possible that hedging costs incurred by utilities on behalf of residential customers were inflated by derivative contract payments that were higher due to CCG's gaming of the NYISO markets. If so, the higher cost of hedging passed through to residential customers may be economic harm of a type that was not passed through to industrial customers.[9] Thus it may not be equitable, just or reasonable for industrial customers to receive refunds, or to allocate the FERC settlement fund based exclusively on energy consumption. It is premature for the Commission to act without further analysis and proceedings to establish a record to decide MI's request for refunds to industrial customers based on their usage.

Accordingly, the Commission should not accept the large industrial customers' proposal for use of all of New York's portion of the FERC funds, and should take into consideration and adopt AARP's proposals for utilization of the funds for the benefit of New York's residential electric consumers.

Thank you for your consideration.

Respectfully submitted,

Sincerely,

Joan Parrott-Fonseca

Joan Parrott-Fonseca
New York State Director, AARP

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[8] Motion for Eligibility Determination and Stipulation of Indicated PJM State Agencies under IN12-7-000, April 20, 2012, *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12956213.

[9] See parties' comments regarding Commission policy to cease utility hedging of energy prices for large commercial and industrial customers in Case 06-M-1017 - *Proceeding on Motion of the Commission As to the Policies, Practices and Procedures For Utility Commodity Supply Service to Residential and Small Commercial and Industrial Customers*, and Case 03-E-0641, *Mandatory Hourly Pricing, Order Denying Petitions for Rehearing and Clarification in Part and Adopting Mandatory Hourly Pricing Requirements* (issued April 24, 2006).

cc: Robert Hallman – Deputy Secretary for Energy and Environment

Thomas Congdon – Assistant Secretary for Energy

Robert Rosenthal – Assistant Counsel