

138 FERC ¶ 61,168  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

Constellation Energy Commodities  
Group, Inc.

Docket No. IN12-7-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued March 9, 2012)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and Constellation Energy Commodities Group (CCG). This order is in the public interest because it resolves the investigation into whether CCG violated the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2, and the Commission's regulation prohibiting the submission of inaccurate information, 18 C.F.R. § 35.41(b). CCG has agreed to pay a civil penalty of \$135,000,000 and to disgorge unjust profits of \$110,000,000, including interest. In addition, CCG has instituted and will continue to institute additional compliance measures such as: (1) regular monitoring of profit and loss concentrations in virtual transactions and physical schedules of electric energy; and (2) reviewing and documenting the purpose of virtual transactions. CCG is required to monitor and preserve for no less than five years trader communications, including but not limited to Instant Messages (IMs), emails, and telephone calls. CCG must also submit compliance monitoring reports.

**Background**

2. In January 2008, Enforcement opened a preliminary, non-public investigation pursuant to Part 1b of the Commission's regulations of CCG's physical power trading in and around the New York Independent System Operator's (NYISO) control area after receiving two anonymous hotline calls related to that trading. After commencing that investigation, Enforcement observed through its own surveillance activities that CCG was engaging in virtual trading in the NYISO that was unprofitable. In addition, on February 19, 2009, the NYISO Department of Market Monitoring and Performance (MMP) informed Enforcement that it had decided to apply mitigation measures against CCG related to its virtual bidding behavior in the NYISO, because its virtual load trading

in NYISO Zone A had contributed to an unwarranted divergence of locational based marginal prices between the day-ahead (DA) and real-time (RT) markets. Based on Enforcement's surveillance observations and the NYISO's information, Enforcement opened another preliminary, non-public investigation pursuant to Part 1b to determine whether, in violation of 18 C.F.R. § 1c.2, CCG employed a scheme of trading in the NYISO virtual market to move DA prices in a direction that would benefit its financial contract for differences (CFD) positions. Enforcement thereafter conducted the two investigations jointly.

3. In its investigation, Enforcement examined certain of CCG's: virtual trading in the NYISO and ISO-New England (ISO-NE); physical DA scheduling between the NYISO and ISO-NE, PJM Interconnection (PJM) and Ontario Independent Electric System Operator (IESO); and CFD positions in the NYISO and ISO-NE. Enforcement examined certain data related to CCG's East Power Trading Group from January 1, 2007 through February 28, 2009 and, as a result, focused its investigation on trading activity by certain members of the East Power Trading Group over a sixteen month period from September 2007 through December 2008 (the Months of Interest). The members of the East Power Trading Group whose activity was investigated were Joseph Kirkpatrick, Michael Pavo, and Jason Hughes (Kirkpatrick, Pavo and Hughes together the East Traders). Kirkpatrick was the supervisor of Pavo and Hughes. In addition, Enforcement investigated the activity of Maxim Duckworth, CCG's Managing Director of Portfolio Management and Trading, and Kirkpatrick's direct supervisor and Pavo and Hughes' indirect supervisor.

4. During the Months of Interest, CCG participated in energy trading in markets including the NYISO, ISO-NE and PJM. In the Months of Interest, the East Power Trading Group participated in the virtual markets in the NYISO and PJM and in the scheduling of DA physical power between the NYISO and ISO-NE, PJM and IESO, as detailed in the Agreement.

5. CCG's East Power Trading Group also held CFDs during the Months of Interest, including: swaps that priced off the average DA prices in the NYISO and ISO-NE; swaps that priced off the RT price in PJM; financial transmission rights (FTRs) in ISO-NE and PJM; and transmission congestion contracts (TCCs) in the NYISO. The swap positions investigated by Enforcement settled off the monthly average of the DA price of the Zone/region for which the swap was held. As further described in the Agreement, Enforcement found the size of the swap positions to be substantial. The FTR/TCC positions similarly settled off the DA price for the ISO Zone/region in which they were held. The CFDs investigated by Enforcement in the NYISO predominantly settled off the monthly average DA price in Zones A and G and the CFDs investigated by Enforcement in ISO-NE predominantly settled off the monthly average DA price at Mass Hub.

6. For the period of September 2007 through December 2008, the swap positions entering a month ranged in size from approximately 395 MW/h to approximately 12,274 MW/h in NYISO Zone A, from approximately 125 MW/h to approximately 3,682 MW/h in NYISO Zone G, and from 88 MW/h to 3,350 MW/h in ISO-NE Mass Hub. Over that same time frame, the TCC positions ranged in size from 25 MW/h to 936 MW/h in Zone A and 450 MW/h to 931 MW/h in Zone G.

7. As detailed in the Agreement, Enforcement found a repetitive pattern to the virtual and DA physical trading during the Months of Interest. While the practice varied somewhat from month-to-month and zone-to-zone, the trading behavior can be summarized as follows: (i) when the net CFD position which settled off the average DA price of a region was short, the CCG traders at issue entered virtual supply in the Zone/region on which the CFD settled and/or scheduled the import of DA power into the region on which the CFD settled; and (ii) when the net CFD position which settled off the average DA price of a Zone/region was long, the CCG traders at issue entered virtual load in the Zone/region on which the CFD settled and/or scheduled an export of DA power from the region on which the CFD settled to a neighboring ISO.

8. During the Months of Interest the virtual and physical transactions scheduled by the East Traders were routinely unprofitable.

9. CCG's compliance training materials recognized that behavior which was uneconomic on a stand alone basis in order to benefit positions in other markets should not be engaged in by its traders and that the Commission would likely consider this market manipulation.

10. When the NYISO investigated CCG's virtual trading activity in its markets for purposes of examining unwarranted divergence, CCG stated in its communications with the NYISO, that its decisions to participate in the NYISO virtual market were based on market fundamentals and omitted the fact that the virtual trading was directly related to its CFDs.

## **Investigation**

### **A. Commission Anti-Manipulation Rule**

11. Enforcement concluded that from September 2007 through December 2008, CCG violated the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2, which prohibits any entity from: (1) 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 Commission-filed tariff, Commission 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; (2) with the requisite scienter; and (3) in connection with a transaction subject to the jurisdiction of the Commission.

12. Enforcement determined that during the Months of Interest, CCG violated the Anti-Manipulation Rule 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 to the benefit of certain significant CFD positions held by CCG.
13. Enforcement also determined that as part of this scheme, CCG combined the use of virtual transactions with DA physical schedules to impact DA prices in NYISO and ISO-NE to benefit the CFD positions that priced off a component of those impacted DA prices.
14. Enforcement determined that CCG's virtual transactions and DA physical schedules were often large in volume and were scheduled with regularity and persistency. By way of example, Enforcement found that in on-peak Zone A during the Months of Interest the East Traders' virtual trading represented between approximately 24 and 79 percent of all virtual activity in the Zone when the East Traders placed a trade. Enforcement also concluded that in approximately half of the on-peak Zone A months, the East Traders bid virtually in 100 percent of available hours and only three times did their activity drop below 60 percent of available hours. In half of the on-peak Zone A activity identified in the Months of Interest, Enforcement found that virtual trading comprised between 30 and 40 percent of the Zone's actual physical load when the East Traders placed a trade. During this same time frame, the East Traders flowed DA on-peak physical power between the NYISO and PJM in 100 percent of the hours in two of the four months identified by staff and their flows represented over 50 percent of the limit of the intertie when it flowed. The East Traders' DA, on-peak physical flows between the NYISO and Ontario ranged in frequency from approximately 20 to 80 percent in the four months identified and averaged between approximately 20 to 80 percent of the available capacity of the intertie when they flowed.
15. Enforcement also found that CCG impacted the DA price in the various markets in which they engaged in this trading behavior to the benefit of their CFD positions.
16. Based on these findings, Enforcement determined 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 markets for the benefit of its CFD positions during the Months of Interest; and (3) CCG's manipulative scheme was in connection with transactions subject to the jurisdiction of the Commission all in violation of 18 C.F.R. § 1c.2.
17. Enforcement determined 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.

**B. Commission Accurate Information Provision**

18. Enforcement concluded that CCG violated 18 C.F.R. § 35.41(b), which requires sellers, such as CCG, to “provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with . . . Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.”

19. Enforcement determined that Section 35.41(b) of the Commission’s regulations applies to CCG because it is a power marketer that is authorized by the Commission to sell – and it does sell – energy, capacity and certain ancillary services at market-based rates in the NYISO, ISO-NE and PJM.

20. Enforcement determined that CCG violated 18 C.F.R. § 35.41(b) by providing inaccurate and misleading information to the NYISO. Specifically, Enforcement determined that CCG denied that its virtual transactions were related to its CFD positions and instead told the NYISO that the transactions were independent of the CFD positions and were entered into based on market fundamentals.

**Stipulation and Consent Agreement**

21. Enforcement and CCG have resolved Enforcement’s investigation by means of the attached Agreement. CCG neither admits nor denies that the trading behaviors examined by Enforcement violated the Commission’s rules, regulations, or policies. Also, upon the Effective Date of the Agreement, as that term is defined in the Agreement, the investigation of CCG and of Kirkpatrick, Pavo, Hughes, and Duckworth will terminate.

22. The Agreement requires CCG to pay a \$135,000,000 civil penalty to the United States Treasury within ten business days of the Effective Date of the Agreement. CCG will pay disgorgement and interest of \$110,000,000, such amount representing unjust profits. The disgorgement shall be paid as follows: (i) \$6,000,000 to be divided equally among and paid directly to the NYISO, ISO-NE, PJM, the Midwest ISO, Southwest Power Pool, and the California ISO for use in the enhancement of their surveillance capabilities; and (ii) to a fund set up for the benefit of electric energy consumers in the affected states and from which state agencies in those affected states may make requests for apportionment by a Commission Administrative Law Judge. That fund will be divided among the affected states in the ISOs as follows: NYISO (\$78,000,000); ISO-NE (\$20,000,000); and PJM (\$6,000,000). 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.

23. Since the onset of Enforcement's investigation, CCG instituted additional procedures to monitor the profit and loss concentrations in virtual transactions and DA physical schedules of electric energy and to document the purpose of virtual transactions.

24. The Agreement requires CCG and any successor company to retain communications by its traders, including, but not limited to, IMs, emails and telephone calls, for a period of no less than five years and to regularly monitor those communications for irregularities or illegalities.

25. The Agreement requires CCG and any successor company to submit semi-annual compliance monitoring reports to Enforcement staff for two years following the Effective Date of the Agreement, with the option of a third year of compliance monitoring reports at Enforcement's discretion. Each compliance report shall describe any new and existing compliance program measures, including training, and alert Enforcement staff to any violations that may occur.

26. Under the Agreement, Pavo, Hughes, and Duckworth will not hold a position which involves physical and financial energy trading at CCG or a successor company in the future. CCG has also agreed that Kirkpatrick will not hold any such position at CCG or a successor company in the future.

### **Determination of the Appropriate Civil Penalty**

27. Pursuant to section 316A(b) of the FPA, the Commission may assess a civil penalty up to \$1,000,000 for each day that the violation continues.<sup>1</sup> In determining the appropriate remedy, Enforcement considered the factors described in section 316A(b) of the FPA and in the Revised Policy Statement on Penalty Guidelines.<sup>2</sup> Specifically, Enforcement considered that: CCG's conduct was serious and was committed willfully and intentionally; CCG's conduct was committed through the participation or oversight of CCG's Managing Director of Portfolio Management and Trading and therefore involved upper management; the conduct involved more than 100,000 MWh of electricity and continued for more than 250 days; CCG's compliance program was not effective at the time; and CCG's actions caused harm and impacted the DA price in the Commission's jurisdictional markets.

28. We conclude that the penalties, disgorgement, the enhanced compliance measures, and the compliance monitoring reports set forth in the Agreement are a fair and equitable

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<sup>1</sup> 16 U.S.C. § 825o-1(b) (2006).

<sup>2</sup> *Enforcement of Statutes, Orders, Rules and Regulations*, 132 FERC ¶ 61,216 (2010).

resolution of this matter and are in the public interest, as they reflect the nature and seriousness of CCG's conduct.<sup>3</sup>

The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>3</sup> The civil penalty falls within a range consistent with the Penalty Guidelines. Application of the Penalty Guidelines in this case furthers the goal of “add[ing] greater fairness, consistency, and transparency to our enforcement program.” *Id.* at P 2. We have considered the factors set forth in the Revised Policy Statement on Penalty Guidelines and have concluded that the penalty in this case is appropriate.





(RT) markets. Based on Enforcement's surveillance observations and the NYISO's information, Enforcement opened a preliminary, non-public investigation pursuant to Part 1b of the Commission's regulations to determine whether, in violation of 18 C.F.R. § 1c.2, CCG employed a scheme of trading in the NYISO virtual market to move DA prices in a direction that would benefit its contract for differences (CFD) positions. Due to similarities in the geographical regions and trading behavior at issue, Enforcement jointly conducted the two investigations. The Enforcement examination, as described in greater detail in Sections I and II herein, constitutes the Investigation.

4. In its Investigation, Enforcement examined certain of CCG's: virtual trading in the NYISO and ISO-New England (ISO-NE); physical DA scheduling between the NYISO and ISO-NE, PJM Interconnection (PJM) and Ontario Independent Electric System Operator (IESO); and CFD positions in the NYISO and ISO-NE. Enforcement examined certain data, submitted pursuant to 18 C.F.R. § 1b.9, related to the East Power Trading Group from January 1, 2007 through February 28, 2009 and, as a result, focused its Investigation on trading activity by certain members of the East Power Trading Group over a sixteen month period from September 2007 through December 2008 (the Months of Interest). Enforcement initially considered data related to virtual trading and DA physical schedules by certain members of the East Power Trading Group in the Midwest Independent System Operator (MISO) from January 1, 2007 through December 31, 2008, but did not discover conduct in MISO that warranted further investigation.

5. During the Months of Interest, CCG participated in speculative energy trading in markets including the NYISO, ISO-NE and PJM. In the Months of Interest, CCG's East Power Trading Group participated in the virtual markets in the NYISO and PJM and in the scheduling of DA physical power between the NYISO and ISO-NE, PJM and IESO.

6. In the Months of Interest, CCG's East Power Trading Group also held CFDs, including: swaps that priced off the average DA prices in the NYISO and ISO-NE; swaps that priced off the RT price in PJM; financial transmission rights (FTRs) in ISO-NE and PJM; and transmission congestion contracts (TCCs) in the NYISO.

7. The CFDs investigated by Enforcement were held either in the books of Joseph Kirkpatrick, Managing Director of East Power Trading, or, when Kirkpatrick was stopped-out of his books on at least two occasions, Maxim Duckworth, whose title was Managing Director of Portfolio Management and Trading for all but two of the Months of Interest and of which East Power Trading was a part, placed and held those CFD positions in his book. While the CFDs were in Duckworth's book on these occasions, the virtual and DA physical schedules remained in Kirkpatrick's books.

8. The virtual transactions and DA physical schedules investigated by Enforcement were placed or ordered to be placed predominantly by Michael Pavo, Vice President in East Power Trading, and Jason Hughes, Associate in East Power Trading. Kirkpatrick was Pavo and Hughes' direct supervisor (Kirkpatrick, Pavo and Hughes, collectively, the

East Traders). Duckworth was Kirkpatrick's direct supervisor and the indirect supervisor to Pavo and Hughes.

9. The swap positions held in Kirkpatrick's or Duckworth's books and investigated by Enforcement settled off the monthly average of the DA price of the Zone/region for which the swap was held. The FTR/TCC positions similarly settled off the DA price for the ISO Zone/region in which they were held. The CFDs investigated by Enforcement in the NYISO predominantly settled off the monthly average DA price in Zones A and G and the CFDs investigated by Enforcement in ISO-NE predominantly settled off the monthly average DA price at Mass Hub.

10. For example, for the period of September 2007 through December 2008, the swap positions entering a month ranged in size from approximately 395 MW/h to approximately 12,274 MW/h in NYISO Zone A, from approximately 125 MW/h to approximately 3,682 MW/h in NYISO Zone G, and from 88 MW/h to 3,350 MW/h in ISO-NE Mass Hub. Over that same time frame, the TCC positions held by or for the benefit of Mr. Kirkpatrick's books ranged in size from 25 MW/h to 936 MW/h in Zone A and 450 MW/h to 931 MW/h in Zone G.

11. Enforcement found a repetitive pattern to the virtual and DA physical trading scheduled by the East Traders during the Months of Interest. While the practice varied somewhat from month-to-month and zone-to-zone, the trading behavior can be summarized as follows: (i) when the net CFD position which settled off the average DA price of a region was short, the East Traders entered virtual supply in the Zone/region on which the CFD settled and/or scheduled the import of DA power into the region on which the CFD settled; and (ii) when the net CFD position which settled off the average DA price of a Zone/region was long, East Traders entered virtual load in the Zone/region on which the CFD settled and/or scheduled an export of DA power from the region on which the CFD settled to a neighboring ISO.

12. Thus, for example, when there was an on-peak or off-peak net long CFD position in NYISO Zone A during the Months of Interest, the East Traders generally bid virtual load in Zone A and/or Zone B. In addition, the East Traders also scheduled DA exports of physical power from the NYISO to IESO or from NYISO to PJM. Conversely, when there was an on-peak or off-peak net short CFD position in NYISO Zone A, the East Traders generally offered virtual supply in Zone A. In addition, the East Traders also scheduled DA imports of physical power into New York from IESO and/or into NYISO from PJM.

13. During most of the Months of Interest in which Kirkpatrick held CFD positions in Zone A, he also held a spread between Zone G in the NYISO and ISO-NE. For example, when Kirkpatrick was net long Zone G swaps (and often net short ISO-NE swaps), the East Traders generally bid virtual load in Zones G or H or scheduled DA physical flows from the NYISO to ISO-NE. In some months the East Traders combined these strategies,

for example, by bidding virtual load in Zones G or H at the same time or by combining virtual load bids in Zones G or H with physical flows from the NYISO to ISO-NE.

14. During the Months of Interest the virtual and physical transactions scheduled by the East Traders were routinely unprofitable.

15. CCG's compliance training materials recognized that behavior which was uneconomic on a stand alone basis in order to benefit positions in other markets should not be engaged in by its traders and that the Commission would likely consider this market manipulation.

16. When the NYISO investigated CCG's virtual trading activity in its markets for purposes of examining unwarranted divergence, the NYISO's MMP conducted a conference call with and received written correspondence from CCG. In its communications with the NYISO, CCG stated that its decisions to participate in the NYISO virtual market were based on market fundamentals and omitted the fact that the virtual trading was directly related to its CFDs. Participants on behalf of CCG in the conference call between CCG and the NYISO's MMP included Pavo and Hughes.

### **III. Violations**

#### **A. Enforcement Determined that CCG Engaged in Market Manipulation**

17. Enforcement determined that, during the Months of Interest, CCG violated the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2. Specifically, Enforcement determined that CCG entered into virtual and DA physical schedules with the intent of impacting DA prices in the NYISO and ISO-NE to the benefit of the CFD positions held in Kirkpatrick's or Duckworth's books. The Commission's Anti-Manipulation Rule prohibits any entity from: (1) 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 Commission-filed tariff, Commission 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; (2) with the requisite *scienter*; (3) in connection with a transaction subject to the jurisdiction of the Commission.

18. Enforcement determined that the size of the swap positions held in Kirkpatrick's or Duckworth's books was significant.

19. Enforcement found that Kirkpatrick, Duckworth, Pavo and Hughes each did not concern himself with the profitability of the virtual trades or the DA physical schedules.

20. Enforcement determined that CCG's virtual and DA physical schedules were entered into without regard to their economics or market fundamentals and were instead

entered into solely with the intent to impact DA price in the NYISO and ISO-NE to the benefit of the CFD positions.

21. Specifically, Enforcement determined that during the Months of Interest, when the net CFD position which settled off the monthly average DA price in a region was short, the CFD (and thus CCG) would benefit from a decrease in DA price in that region. Enforcement concluded that the East Traders usually entered virtual supply in and/or imported into the region on which the CFDs were priced. Enforcement found that the price impact of the East Traders' virtual and/or physical behavior was to decrease the DA price in that region, to the benefit of the CFD position.

22. Further, Enforcement determined that during the Months of Interest, when the net CFD position which settled off the monthly average DA price in a region was long, the CFD (and thus CCG) would benefit from an increase in DA price in that region. Enforcement concluded that the East Traders usually entered virtual load in and/or exported out of the region on which the CFDs were priced. Enforcement found that the price impact of the East Traders' virtual and/or physical behavior was to increase the DA price in that region, to the benefit of the CFD position.

23. Enforcement observed evidence of this pattern in the virtual trading and scheduling of DA physical power engaged in by CCG, which demonstrated that the virtual and physical trading behavior supported the CFDs in the Months of Interest. For example, in January 2008 Zone A on-peak, Duckworth's books held a net long CFD position of approximately 7,114 MW/h on average. Beginning in early January 2008, Kirkpatrick's CFDs had been transferred to Duckworth's books when Kirkpatrick was stopped out. Also, at this time, the East Traders bid and cleared approximately 500-800 MW/h of virtual load bids. In addition, the East Traders exported more than 1000 MW/h of day-ahead physical power from the NYISO to Ontario for six on-peak days. Moreover, CCG cleared approximately 400-500 MW/h in virtual load bids for four on-peak days in Zone B. On the other hand, in February Zone A on-peak, the net CFD position became short approximately 2600 MW/h on average and the East Traders cleared an average of approximately 589 MW/h of virtual supply offers. In addition, the East Traders scheduled imports of approximately 397 MW/h on average of DA physical power from IESO to the NYISO for most of the month. For six out of the nineteen on-peak days, those imports were up to 1000 MW/h.

24. Enforcement determined that the NYISO virtual transactions and DA physical trades scheduled by the East Traders for the benefit of Kirkpatrick were often large in volume and were scheduled with regularity and persistency. By way of example, Enforcement found that in on-peak Zone A during the Months of Interest the East Traders' virtual trading represented between approximately 24 and 79 percent of all virtual activity in the Zone when the East Traders placed a trade. Enforcement also concluded that in approximately half of the on-peak Zone A months, the East Traders bid virtually in 100 percent of available hours and only three times did their activity drop

below 60 percent of available hours. In half of the on-peak Zone A activity identified in the Months of Interest, Enforcement found that virtual trading comprised between 30 and 40 percent of the Zone's actual physical load when the East Traders placed a trade. During this same time frame, the East Traders flowed DA on-peak physical power between the NYISO and PJM in 100 percent of the hours in two of the four months identified by staff and their flows represented over 50 percent of the limit of the intertie when it flowed. The East Traders' DA, on-peak physical flows between the NYISO and Ontario ranged in frequency from approximately 20 to 80 percent in the four months identified and averaged between approximately 20 to 80 percent of the available capacity of the intertie when they flowed.

25. During the Months of Interest, Enforcement determined that the East Traders also combined the use of virtuals with scheduling DA physical trading. For example, while the virtuals in Zone A on-peak were being bid 100 percent of the time in January 2008, at a total that represented approximately 27 percent of the Zone's actual load and approximately 48 percent of all virtuals in the Zone, the East Traders were also flowing DA power from the NYISO to Ontario at an amount that approached 80 percent of the available capacity for the intertie when the East Traders flowed for about 30 percent of the hours. And again, for example, in on-peak February 2008, while the East Traders' virtual trading was close to 100 percent of all of the virtuals in Zone H, they also participated in 100 percent of the hours available for flowing power between the NYISO and ISO-NE at an average level that was over 80 percent of the intertie limit when it flowed.

26. Enforcement determined that the DA price was the ultimate arbiter of profitability of the CFD positions held by Kirkpatrick and/or Duckworth, as each of these CFD positions priced off a component of the DA price. In addition, as the volume of the virtual and physical trading engaged in by CCG was so large and so persistently repetitive -- despite the fact that the trades were unprofitable -- Enforcement concluded that CCG intended to impact the DA price in the Zones/regions in which the trading was engaged. Enforcement also determined that through their actions CCG affirmatively impacted the DA price in the various markets in which they engaged in this activity to the benefit of their CFD positions.

27. Enforcement alleged that Kirkpatrick intended to and did manipulate the DA markets in the NYISO and ISO-NE from September 2007 through at least September 2008. Kirkpatrick left the physical employ of CCG in October 2008 although he still remained in a consulting arrangement until late February 2009. Enforcement alleged that Kirkpatrick knew that: (i) physical transactions impact DA price and that he intended to impact price with physical transactions scheduled for his benefit; (ii) virtual transactions impact DA price and that he intended to impact price with virtual transactions scheduled for his benefit; and (iii) the virtual and physical transactions together impact DA price

and that he intended to impact DA price with physical and virtual transactions scheduled for his benefit.

28. Enforcement alleged that Pavo and Hughes intended to and did engage in a scheme to manipulate the DA markets in the NYISO and ISO-NE during the Months of Interest. Enforcement alleged that evidence adduced during the investigation demonstrated that Pavo and Hughes each understood that the DA physical schedules and virtual transactions impacted DA price and that each intended to impact DA price through the placement of those schedules.

29. Enforcement alleged that Duckworth actively participated in the trading scheme to manipulate DA prices in the NYISO and ISO-NE during the Months of Interest. Enforcement alleged that Duckworth took proactive steps to ensure that the East Traders could and would continue to trade virtually and physically to improve the value of Kirkpatrick's CFD positions.

30. Based on these findings, Enforcement determined that CCG intended to and did manipulate the NYISO and ISO-NE DA markets for the benefit of its CFDs during the Months of Interest. Enforcement also determined that Duckworth was a member of upper management and thus CCG's upper management understood the relationship between the virtual and DA physical strategy and the CFDs. Enforcement also determined that information concerning the manner in which the East Traders were trading was available to Duckworth and other CCG senior managers through CCG's electronic database. However, Enforcement determined that no one in upper management, including Duckworth, reviewed these virtual trades and DA physical schedules. In addition, Enforcement determined that while CCG's Risk Management Group was concerned about the size of Kirkpatrick's positions and brought those concerns to the level of upper management, the concerns were not addressed.

31. Enforcement determined that this manipulation of the physical and virtual markets and the respective DA prices resulted in 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.

32. Enforcement determined that these actions were 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 in the Months of Interest in violation of 18 C.F.R. § 1c.2.

#### **B. Enforcement Determined that CCG Violated Accuracy Provisions**

33. Enforcement determined that CCG violated the accuracy requirements of Commission regulations, 18 C.F.R. § 35.41(b). Section 35.41(b) of the Commission's regulations applies to CCG because it is a power marketer that is authorized by the

Commission to sell -- and it does sell -- energy, capacity and certain ancillary services at market-based rates in the NYISO, ISO-NE and PJM. This section requires CCG to “provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with...Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.”

34. Enforcement determined that CCG violated 18 C.F.R. § 35.41(b) by affirmatively providing misleading information to the NYISO. Specifically, Enforcement determined that CCG denied that its virtual transactions were related to its CFDs and instead told the NYISO MMP that the transactions were independent of the CFD positions and were entered into based on market fundamentals.

35. Enforcement further determined that CCG’s failure to provide accurate information to the NYISO MMP provided additional evidence to Enforcement of CCG’s scheme to manipulate the virtual and physical markets to impact DA price.

#### **IV. Remedies and Sanctions**

36. For purposes of settling any and all civil and administrative disputes arising out of, related to, or connected with Enforcement’s Investigation, CCG agrees with the facts as stipulated in Section II of this Agreement but neither admits nor denies the violations described in Section III of this Agreement. CCG agrees to take the following actions:

##### **A. Disgorgement**

37. CCG shall disgorge unjust profits and interest of \$110,000,000 within ten business days after the direction set forth in subpart (g) below. The entirety of the \$110,000,000, which is not a civil penalty, shall be distributed as follows:

- a. a total of \$6,000,000 will 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, in consultation with the Commission’s Director of the Office of Enforcement;
- b. the remaining funds will be deposited, as follows, 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) (the Fund);
- c. 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;

- d. these requests will be filed with and decided by a Commission Administrative Law Judge (ALJ);
- e. the apportionment process will be determined by the ALJ;
- f. neither CCG nor any of its successors or affiliates, or their agents officers, directors or current or former employees, or related entities shall have any role, including, but not limited to the role of intervenor or amicus, in the ALJ's apportionment of the funds or any proceedings concerning the requests made for apportionment of the monies in the Fund;
- g. CCG will deposit the monies for the Fund into a United States Treasury account, as directed by the Commission's Director of the Office of Enforcement, and CCG will provide the monies specified above in subparagraph (a) to the ISOs and RTOs pursuant to the direction of the Commission's Director of the Office of Enforcement; and
- h. the final disposition of the Fund, including the amount of each allocation and identity, to the extent known, of the recipient(s) shall be made public by the ALJ.

## **B. Civil Penalty**

38. CCG shall pay a civil penalty of \$135,000,000 to the United States Treasury, by wire transfer, within ten business days after the Effective Date of this Agreement, as defined below.

## **C. Compliance**

39. Since the onset of Enforcement's investigation, CCG has taken steps to implement enhancements to its compliance program. Specifically, CCG instituted a new policy and process to monitor profit and loss concentrations in virtual transactions and physical schedules of electric energy and to review and document the purpose of virtual transactions. This monitoring had not been done previously. The monitoring is to be performed in a manner such that improper trading may be readily identified by CCG should it occur in the future.



40. In addition to the enhancements already in effect at CCG as described above, CCG agrees that CCG, and any successor companies, develop and enforce policies which require that communications by its traders, including but not limited to instant messaging (IMs), email, and phone calls, will be retained by CCG for a period of no less than five years. In addition, CCG agrees that CCG, and any successor companies, set up a system whereby such communications will be regularly monitored by its compliance group for potential irregularities or illegalities. CCG agrees that these policies will be made fully effective within 90 days after the Effective Date of this Agreement.

41. CCG shall adopt or maintain compliance measures and procedures related to its trading of jurisdictional products, including virtual transactions, scheduling of physical power, TCCs and FTRs. These measures shall include improved training for its traders, supervisors, and managers regarding the Commission's regulations prohibiting manipulation of jurisdictional energy markets and the Commission's regulations governing energy trading, including the adherence to the tariffs in the organized markets in which CCG participates and providing accurate information to the Commission, RTOs and ISOs. CCG shall make semi-annual compliance monitoring reports to Enforcement for two years following the Effective Date of this Agreement. The first semi-annual compliance monitoring report shall be submitted no later than ten days after the end of the second calendar quarter after the quarter in which the Effective Date of this Agreement falls. The period covered by the report shall consist of the six months ending one calendar month prior to the date of such report. The second semi-annual compliance monitoring report shall be submitted six months thereafter for the six month period succeeding the prior reporting period. The third and fourth semi-annual compliance monitoring reports shall follow the same schedules.

42. Each compliance monitoring report shall: (1) advise Enforcement whether violations of Commission regulations have occurred during the applicable period; (2) provide a detailed update of all compliance measures and procedures instituted, and compliance training administered, by CCG in the applicable period, including a description of the compliance measures and procedures instituted, the compliance training provided to all relevant personnel concerning the Commission's energy trading, accuracy and anti-manipulation regulations, and a statement of the personnel or other evidence demonstrating that the personnel have received such training and when the training took place; and (3) include an affidavit executed by an officer of CCG that the compliance monitoring reports are true and accurate. Upon request by Enforcement, CCG shall provide to Enforcement documentation to support its reports. After the receipt of the fourth semi-annual report, Enforcement may, at its sole discretion, require CCG to submit semi-annual reports for one additional year.

43. Moreover, CCG represents that by the Effective Date of this Agreement, its current employees, Duckworth, Pavo and Hughes, shall be removed from any position at CCG where any of these individuals engage in or perform any duties related to managing, directing, or engaging in wholesale physical and financial energy trading (a CCG Trading Position). CCG similarly agrees that Duckworth, Pavo and Hughes will not hold any CCG Trading Position as long as each is within the employ of CCG or any successor or affiliate. Kirkpatrick is not currently employed by CCG, and will not hold any CCG Trading Position in the future.

## **V. Terms**

44. The Effective Date of this Agreement shall be the later of the date on which: (a) the Commission issues an order approving this Agreement without material modification; or (b) the merger pursuant to the Agreement and Plan of Merger among Constellation Energy Group, Inc., Exelon Corporation, and Bolt Acquisition Corporation, dated April 28, 2011, is consummated. When effective, this Agreement shall resolve the matters specifically addressed herein as to CCG and any affiliated entity, and their agents, officers, directors and employees, both past and present, and any successor in interest to CCG.

45. Upon the Effective Date of this Agreement, the Commission shall release CCG and any successor or affiliate, Kirkpatrick, Pavo, Hughes, and Duckworth and forever bar the Commission from holding CCG and any successor or affiliate, and their respective agents, officers, directors and employees, both past and present, liable for any and all administrative or civil claims, known or unknown, arising out of, related to, or connected with the Investigation as defined in this Agreement. Moreover, upon the Effective Date of this Agreement, the Investigation of CCG, Kirkpatrick, Pavo, Hughes, and Duckworth shall terminate.

46. CCG's failure to: (a) make a timely civil penalty payment; (b) make a timely disgorgement payment as set forth in paragraph 37 above; (c) comply with the compliance requirements specified herein; or (d) comply with any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the Federal Power Act, 16 U.S.C. § 792, *et seq.*, and may subject CCG and any successor companies to additional action under the enforcement and penalty provisions of the Federal Power Act.

47. If CCG fails to make the civil penalty and disgorgement payments described above at the times agreed by the parties, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a(a)(2)(iii)(A) (2011) from the date the payments are due, in addition to any other enforcement action and penalty that the Commission may take or impose.

48. This Agreement binds CCG and its agents, successors, and assigns. The Agreement does not create any additional or independent obligations on CCG, or any affiliated entity, its agents, officers, directors, or employees, other than the obligations identified in this Agreement.

49. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer, or promise of any kind by any member, employee, officer, director, agent, or representative of Enforcement or CCG has been made to induce the signatories or any other party to enter into the Agreement.

50. Unless the Commission issues an order approving this Agreement in its entirety and without material modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor CCG shall be bound by any provision or term of this Agreement, unless otherwise agreed to in writing by Enforcement and CCG.

51. In connection with the payment of the civil penalty provided for herein, CCG agrees that the Commission's order approving this Agreement without material modification shall be a final and unappealable order assessing a civil penalty under § 316A(b) of the Federal Power Act, 16 U.S.C. § 825o-1(b). CCG waives findings of fact and conclusions of law, rehearing of any Commission order approving this Agreement without material modification, and judicial review by any court of any Commission order approving this Agreement without material modification.


52. This Agreement may be modified only if in writing and signed by CCG and Enforcement. No waiver of any provision of this Agreement or departure from any term of this Agreement shall be effective unless in writing and signed by CCG and Enforcement. No modification will be effective unless any approval of the Commission that may be required with respect to such modification has been received.

53. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity, and accepts this Agreement on the entity's behalf.

54. The undersigned representative of CCG affirms that he or she has read this Agreement, that all of the matters set forth in this Agreement are true and correct to the best of his or her knowledge, information, and belief, that he or she understands that this Agreement is entered into by Enforcement in express reliance on those representations, and that he or she has had the opportunity to consult with counsel.

55. This Agreement may be signed in counterparts.

Agreed to and Accepted:

  
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Norman Bay  
Director, Office of Enforcement  
Federal Energy Regulatory Commission

Date: 3.8.12

  
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CCG  
By: Charles A. Berardesco  
Its: Corporate Secretary

Date: 3-8-12