

September 7, 2012

VIA ELECTRONIC FILING

Hon. Jaclyn Brillling
Secretary
State of New York Public
Service Commission
Three Empire State Plaza, 14th Floor
Albany, New York 12223-1350

Re: Case 10-T-0139 – Application of Champlain Hudson Power Express, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation and Maintenance of Two 1,000 MW High Voltage Direct Current Circuits from the Canadian Border to New York City and Bridgeport, Connecticut

Dear Secretary Brillling:

The City of New York hereby submits its *Post-Hearing Reply Brief* in the above-referenced proceeding.

Please contact me with any questions.

Respectfully submitted,

COUCH WHITE, LLP

Jay Goodman

Jay Goodman

JG/dap

Attachment

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**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Application of Champlain Hudson Power Express, Inc.
for a Certificate of Environmental Compatibility and
Public Need Pursuant to Article VII of the PSL for the
Construction, Operation and Maintenance of a High
Voltage Direct Current Circuit from the Canadian
Border to New York City**

Case 10-T-0139

**POST-HEARING REPLY BRIEF
OF THE CITY OF NEW YORK**

September 7, 2012

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TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
 POINT A	
INTRODUCTION AND GENERAL CONSIDERATIONS.....	3
 POINT D	
PROBABLE ENVIRONMENTAL IMPACTS.....	8
1. Entergy’s Claim That The Potential Impacts of Concrete Mats Has Not Been Identified Is Without Merit And Should Be Rejected	8
2. Electromagnetic Fields Are Not Anticipated To Cause Any Significant Impact To Any Aquatic Species, Including Sturgeon	11
 POINT L	
PROPOSED CERTIFICATE CONDITIONS	13
2. Other Conditions - Central Hudson’s Objections To The Proposed Certificate Conditions Are Based On A Misreading Of The Joint Proposal And Should Be Rejected	13
ii. Condition 162	16
CONCLUSION	18

PRELIMINARY STATEMENT

Pursuant to the “Ruling Establishing Schedule and Hearing Procedures,”¹ the City of New York (“City”) hereby submits this Reply Brief. The City received Initial Briefs from the following parties: Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. (collectively, “CHPE”); Department of Public Service Staff (“Staff”); New York State Department of Environmental Conservation (“NYSDEC”); Scenic Hudson, Inc. and Riverkeeper, Inc.; Consolidated Edison Company of New York, Inc. (“Con Edison”); New York Power Authority (“NYPA”); Entergy Nuclear Power Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC (“Entergy”); the Independent Power Producers of New York, Inc. (“IPPNY”); collectively with Entergy, the “Incumbent Generators”); Central Hudson Gas and Electric Corporation (“Central Hudson”); the International Brotherhood of Electrical Workers – Local 97 (“IBEW”).²

In its Initial Brief, the City demonstrated that the evidentiary record in this proceeding provides a rational basis for the New York State Public Service Commission (“Commission”) to make the statutory findings and determinations that are the necessary

¹ Case 10-T-0139, Application of Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City, Ruling Establishing Schedule and Hearing Procedures (issued May 8, 2012).

² References herein to the Initial or Reply Statements or Initial Brief filed by any party will be preceded by the party’s name (*e.g.*, “City Initial Statement at ___,” “City Reply Statement at ___,” and “City Initial Brief at ___”); references herein to the transcript of the evidentiary hearing held on July 18-20, 2012, will be preceded by the notation “Tr.”; and references herein to exhibits admitted into the record at the evidentiary hearing will be preceded by the notation “Ex.” The Incumbent Generators, Central Hudson, and IBEW will be referenced collectively herein as the “JP Opponents”.

predicates to issuing a Certificate of Compatibility and Public Need (“Certificate”) for CHPE to construct, operate, and maintain a high-voltage direct current (“HVDC”) transmission system (“HVDC Transmission System”) and a high-voltage alternating current (“HVAC”) line (the “Astoria-Rainey Cable”).³ In its Initial Brief, the City attempted to anticipate positions likely to be advanced by the JP Opponents, and will attempt to avoid repeating herein arguments raised in its Initial Brief. Rather, this Reply Brief generally responds only to selected arguments by other parties that were not anticipated in the City’s Initial Brief.⁴ Importantly, the failure to respond to a certain position or argument should not be interpreted as agreement or acquiescence therewith. To the contrary, the City stands by all of the positions advanced in its Initial Brief and Initial Statement, and urges that they be adopted.

The City hereby responds to the following arguments raised by the JP Opponents in this proceeding:

1. Entergy’s argument that the evidentiary record in this proceeding “is inadequate as to the potential impacts” of the Facility on shortnose and Atlantic sturgeon; and

³ The HVDC Transmission system would extend from the Canadian border to a converter station located in the Astoria neighborhood of the borough of Queens in New York City. The Astoria-Rainey Cable would extend from the Astoria Substation owned by NYPA to the nearby Rainey Substation owned by Con Edison. The HVDC Transmission System, the converter station, and the Astoria-Rainey Cable and appurtenant facilities are referenced collectively herein as the “Facility.” (*See generally* Case 10-T-0139, *supra*, Joint Proposal [filed February 24, 2012]). As used herein, the term “Joint Proposal” includes all exhibits, appendices and other supporting materials filed by CHPE on February 24, 2012, as well as stipulations modifying the Joint Proposal that were filed after the execution of that agreement.

⁴ This Reply Brief is organized according to a consensus Table of Contents that Staff filed with the presiding Administrative Law Judges, which organization also was adopted for the City’s Initial Brief in this proceeding.

2. Central Hudson's arguments that the proposed Certificate Conditions may be inadequate to protect existing infrastructure or the proprietary interests of owners and operators of co-located infrastructure ("CI").⁵

POINT A

INTRODUCTION AND GENERAL CONSIDERATIONS

In its Initial Brief, the City addressed arguments advanced by the Incumbent Generators in their Initial Briefs regarding: (i) the basis of the need for the Facility, (ii) whether the Facility is economic and can be developed on a merchant basis, and (iii) whether the Facility would serve the public interest, convenience and necessity. In its Initial Brief, the City demonstrated that these arguments by the Incumbent Generators were not persuasive or supported by the weight of the evidentiary record in this proceeding. The Incumbent Generators' positions on these issues also were refuted in the Initial Briefs filed by Staff, CHPE, and NYSDEC.

For example, the Incumbent Generators dispute the basis of the need for the Facility. They claim that the most recent Reliability Needs Assessment ("RNA") conducted by the New York Independent System Operator, Inc. ("NYISO") determined that there is no imminent need for new supply to address resource adequacy.⁶ The Incumbent Generators also disagree that the Facility is necessary to further important public policy goals, and assert that the Facility would harm competition.⁷

⁵ See generally Central Hudson Initial Brief.

⁶ See, e.g., Entergy Initial Brief at 16-17; IPPNY Initial Brief at 13-15.

⁷ Entergy Initial Brief at 14-16, 19-20; IPPNY Initial Brief at 9-10, 16-18.

As the City explained in its Initial Brief, the Commission repeatedly has held that a “need” for purposes of issuing a Certificate under Article VII of the Public Service Law may be “determined by examining numerous factors, including system reliability benefits, economic benefits for customers and the State, and the achievement of public policy goals.”⁸ The Commission’s examination of whether or not a need exists is not limited to the NYISO’s RNA, and whether a resource deficiency has been identified.⁹ The City explained that the Facility is “needed” to further common City and State policies intended to reduce greenhouse gas emissions, reduce the emissions of pollutants known to harm public health (*e.g.*, nitrogen oxides and sulfur oxides), and increase the availability and penetration of renewable energy.¹⁰

Aside from noting that the NYISO’s most recent final RNA did not identify a resource deficiency, the Incumbent Generators’ arguments against the “need” for the Facility are premised on their assumption and speculation that CHPE intends to obtain some form of subsidy.¹¹ The Incumbent Generators claim that the actual cost of the Facility will exceed by a substantial amount the estimated cost of approximately \$2.2 billion that CHPE repeatedly has affirmed. Accordingly, they claim that the Facility is not economic and cannot be developed on

⁸ City Initial Brief at 4-9 (citing Case 08-T-0034, Application of Hudson Transmission Partners, LLC for a Certificate of Environmental Compatibility and Public Need for a 345 kV Submarine/Underground Electric Transmission Link Between Manhattan and New Jersey, Order Granting Certificate of Environmental Compatibility and Public Need [issued September 15, 2010] at 42 [hereinafter, “HTP Order”]).

⁹ *Id.* See also HTP Order at 2; Case 08-T-1245, Bayonne Energy Center, LLC, Order Adopting the Terms of a Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need, with Conditions, and Clean Water Act § 401 Water Quality Certifications (issued November 12, 2009) at 13 (hereinafter, “Bayonne Order”).

¹⁰ City Initial Brief at 9-13. See also Staff Initial Brief at 8-9; CHPE Initial Brief at 7-9.

¹¹ Entergy Initial Brief at 14-15; IPPNY Initial Brief at 5-6.

a merchant basis without the benefit of cost-of-service rates or an out-of-market contract with a shipper or governmental or regulated entity.¹²

These arguments, however, ignore CHPE's repeated efforts to assure the Commission and the other parties that it will develop the Facility on a merchant basis only. CHPE has determined that it can develop the Facility as set forth in the Joint Proposal, including the \$2.2 billion cost estimate, and repeatedly has assured the Signatory Parties, other interveners, and the public that the HVDC Transmission System and use of the Astoria-Rainey Cable by shippers that also use the HVDC Transmission System (*i.e.*, the "Merchant Facilities") will be constructed, financed and operated on a merchant basis without recourse to cost-based rates. Moreover, CHPE executed a stipulation with Con Edison and Staff in which it pledged unequivocally to develop the Merchant Facilities on a merchant basis.¹³ In fact, the Certificate immediately would be deemed invalid if CHPE seeks cost-based support for the Merchant Facilities.

IPPNY contends that the Facility may be subsidized indirectly through its shippers.¹⁴ The City, however, considers the likelihood of an indirect contractual subsidy to be remote. Any such above-market payments ultimately would have to be reflected in a contract with a New York State authority or regulated entity. It is highly doubtful that either customers of such an authority or the Commission would approve such a subsidy-laden contract.

CHPE – and not customers – would bear all financial risk associated with development of the Merchant Facilities. With respect to CHPE's reservation of a right to seek

¹² IPPNY Initial Brief at 20-26; Entergy Initial Brief at 18.

¹³ *See generally* Ex. 150 (hereinafter, the "Merchant Facility Stipulation"). *See also* City Initial Brief at 32-35.

¹⁴ IPPNY Initial Brief at 50.

cost recovery for use of the Astoria-Rainey Cable by shippers not also using the HVDC Transmission System, the proposed Certificate Conditions would predicate the Commission's determination that the Facility would serve the public convenience and necessity on CHPE's estimate that the Astoria-Rainey Cable will cost approximately \$200 million. Pursuant to proposed Condition 15(c), CHPE would have to file with the Secretary to the Commission a Request for Reconsideration of the determination of public need, convenience and necessity made with respect to the Facility if the actual cost of the Astoria-Rainey Cable exceeds the estimated cost by 10 percent or more.¹⁵

Given that CHPE likely will not be able to control use of this HVAC cable, the Signatory Parties concluded that allowing CHPE to retain the option of alternative financing mechanisms would not be unreasonable, and would not undermine the overriding concern that the Facility should be developed on a merchant basis. Thus, notwithstanding the Incumbent Generators' speculation regarding the potential cost of the Facility, CHPE would be liable for the vast majority of costs and risks associated with the Facility. The City submits that CHPE's limited ability to petition to recover a small portion of the total Facility cost is outweighed by the numerous benefits that operation of the Facility is anticipated to yield.

Finally, the Incumbent Generators disagree that the Facility would serve the public interest, convenience, and necessity. To this end, they dispute the amount of energy price and production cost savings that may be realized from Facility operation, and contend that the employment, environmental, reliability, and economic benefits anticipated to arise from Facility operation are speculative and/or overstated.¹⁶

¹⁵ Ex. 127, ¶ 15(c).

¹⁶ Entergy Initial Brief at 48-56; IPPNY Initial Brief at 30-54.

In contrast, the City noted that the Facility would serve the public interest, convenience and necessity by: (a) increasing the amount and diversity of energy available in New York City; (b) increasing the amount of renewable energy available in New York City; (c) yielding substantial wholesale price reductions that should benefit retail electric customers; (d) displacing electricity generated by the combustion of fossil fuels, thereby yielding material reductions in the emissions of greenhouse gases and chemicals that are harmful to public health;¹⁷ and (e) advancing important City and State energy policy initiatives.¹⁸ Operation of the Facility also would yield reliability benefits that the Commission has recognized may support its decision to certificate proposed transmission lines under Public Service Law Article VII.¹⁹ The City explained that the analytical framework applied by IPPNY witness Mark Younger to his examination of the Facility is inappropriate for the evaluation of a proposed merchant project such as the Facility.²⁰

Finally, customers would realize these benefits while CHPE would bear the vast majority of any financial risks associated with the Facility. As noted earlier, CHPE has agreed to numerous provisions and conditions that require it to develop the Facility on a merchant basis as

¹⁷ The emissions reductions that Facility operation is anticipated to yield are not speculative given that CHPE may not commence construction unless and until it can demonstrate a binding commitment from at least one entity that will take and pay for no less than 750 MW of firm transmission service for a period of at least 25 years. (Merchant Facility Stipulation at 2; Ex. 127, ¶ 15[b]). Energy shipped via the Facility “is anticipated to be predominantly from hydroelectric and wind generation from Quebec, Canada” and, therefore, would be associated with reduced emissions as compared to the generation facilities that Facility operation likely would displace. (CHPE Initial Statement at 2-3. *See also* Joint Proposal ¶ 125.)

¹⁸ City Initial Brief at 27.

¹⁹ *Id.* at 13-14, 31-32. *See also* HTP Order at 43-44; Bayonne Order at 13.

²⁰ City Initial Brief at 29.

set forth in the Joint Proposal. The City continues to believe that the provisions of the Joint Proposal provide an adequate record for the Commission to conclude that the Facility will serve the public interest, convenience, and necessity.

POINT D

PROBABLE ENVIRONMENTAL IMPACTS

1. Entergy’s Claim That The Potential Impacts of Concrete Mats Has Not Been Identified Is Without Merit And Should Be Rejected

Entergy argues that CHPE has not developed fully the “nature of the environmental impact” of the Facility and, therefore, that the Commission cannot determine whether the Facility represents the minimum adverse environmental impact, as required by Section 126.1(c) of the Public Service Law.²¹ Specifically, Entergy claims that the record is inadequate with respect to potential impacts on shortnose sturgeon and Atlantic sturgeon arising from: (a) potential habitat displacement caused by the installation of concrete mats where the HVDC Transmission System will lay on the bed of the Hudson River in certain discrete locations; and (b) exposure to electromagnetic fields (“EMFs”) generated by the HVDC Transmission System.²²

CHPE plans to lay concrete mats or other protective systems on top of the HVDC Transmission System for protection in the limited locations where the cable will not be buried underneath the riverbed. Entergy claims that CHPE has not quantified the potential extent to which construction and installation of the concrete mats may degrade or destroy sturgeon habitat, including the benthic environment on which they rely. Entergy further complains that the

²¹ Entergy Initial Brief at 36.

²² *Id.* at 32. Both species of sturgeon are listed as endangered under the federal Endangered Species Act and its New York State analog.

assessment of potential environmental impacts included in the evidentiary record focuses on installation of the concrete mats, and not on potential chronic effects arising from their persistence on the riverbed.²³

The data gaps noted by Entergy are overstated and distorted. Entergy latches on to a statement from CHPE’s Environmental Impact Assessment (“EIA”) that the concrete mats “will alter local hydraulic conditions such that some sediment deposition or scouring may occur around the irregularity the bottom formed by the mats.”²⁴ Conveniently, Entergy omits the remainder of the EIA paragraph that it cites:

The mats will alter local hydraulic conditions such that some sediment deposition or scouring may occur around the irregularity the bottom formed by the mats. However, the overall change in bottom topography will be insignificant because the mats will extend only a short height above the bottom and functional benthic habitat *will* develop. The volume of the cable is extremely small relative to the sediment layer and bottom hydrography of the water bodies involved, and the effect of the cable on bathymetry will be insignificant relative to natural levels of fluctuation due to currents, storms, navigational traffic, and other pre-existing factors.²⁵

The EIA further concludes that: “After the cable is energized, the benthic community is expected to be similar to that from adjacent benthic area.”²⁶ That is, the benthic zone is anticipated to redevelop on or around the concrete mats, and installation of the cable will impact only a small section of the riverbed. The potential impact on sturgeon habitat therefore is anticipated to be insignificant.

²³ *Id.* at 33-34.

²⁴ Entergy Initial Brief, p. 35, n. 96 (citing Ex. 121, p. 168).

²⁵ Ex. 121, p. 168 (emphasis added). The “benthic” zone is the ecological region at the riverbed or lakebed, and “bathymetry” describes the contours of a riverbed or lakebed.

²⁶ *Id.*, p. 206.

The expectation that “functional benthic habitat” will develop in the area of construction is significant, and undermines Entergy’s assertion that placement of the concrete mats will cause loss of benthic habitat. Moreover, the fact that NYSDEC – the State’s administrative body charged with protecting and preserving the State’s natural environment – entered the Joint Proposal and submitted pleadings asserting that the “installation of the underwater cables is not expected to have any significant impacts on shortnose and Atlantic sturgeon” should be accorded substantial weight.²⁷

Entergy argues further that the evidentiary record is deficient because it purportedly focuses only on potential impacts arising from Facility construction, and not on potential impacts arising from presence of concrete mats on the riverbed.²⁸ This argument ignores the EIA’s conclusion, described above, that the benthic zone is anticipated to regenerate post-construction. Entergy’s argument also exaggerates the area of riverbed (*i.e.*, benthic zone) that may be disturbed by Facility construction, which would be relatively small in comparison to the width of the Hudson River.

Contrary to Entergy’s claims, therefore, the potential impacts on sturgeon arising from Facility construction and operation have been identified, evaluated, and remediated. The Joint Proposal imposes multiple obligations on CHPE that are designed to mitigate such potential impacts to the greatest extent practicable. Entergy’s claims, therefore, should be dismissed.

²⁷ See, e.g., NYSDEC Initial Brief at 10. The route proposed for the HVDC Transmission System was scrutinized by Staff and NYSDEC to avoid sensitive habitat and spawning grounds, and requires that CHPE be restricted by construction windows designed to avoid potential impacts on aquatic species.

²⁸ Entergy Initial Brief at 33-34.

2. Electromagnetic Fields Are Not Anticipated To Cause Any Significant Impact To Any Aquatic Species, Including Sturgeon

Entergy claims that the evidentiary record is inadequate with respect to the potential impact on sturgeon of EMFs induced by the HVDC Transmission System.²⁹ Specifically, Entergy argues that the EIA does not address adequately the potential impact of EMFs on sturgeon orientation and migration.³⁰

Contrary to Entergy's claim, the evidentiary record does reflect such consideration and analysis. The "zone of influence" in which EMFs may be detectable above background levels is anticipated to be focused directly above the Facility centerline, and magnetic field levels will weaken quickly with distance from the centerline.³¹ This "zone of influence" would be relatively small in comparison to the width of the Hudson River. The EMFs would be strongest only within a small portion of the "zone of influence," and burial of the cable as proposed would yield "the least change in the background geomagnetic field."³² Mobile aquatic species such as sturgeon should be able to avoid the Facility construction area, and "[s]turgeon ... are expected to distribute themselves throughout the Hudson Estuary as they did prior to cable installation and have only incidental contact with the zone of influence of the cables."³³

²⁹ *Id.* at 39-40.

³⁰ *Id.* at 41-44.

³¹ Ex. 121, pp. 203-04.

³² Ex. 92, p. 8.

³³ Ex. 121, p. 206.

The analyses underlying the EIA considered the impact of EMFs on the migration, spawning, feeding, and development of aquatic species. In all instances, the EIA concluded that EMFs would have no significant impact.³⁴

The available information on the effects of ... changes in the magnetic field on aquatic life shows that potential impacts to fish species, if any, are expected to be insignificant for individual organisms and for various biological functions including migration, spawning, feeding and life stage development. The technical literature is not specific to species in the Hudson, but it does cover a range of related organisms. Both species-specific studies as well as reviews of literature reveal only insignificant impacts from the operation of submarine electric cables. Given this lack of evidence of impacts, the low level of induced changes by the proposed cables and the small spatial extent of these changes, the HVDC Transmission System is anticipated to have an insignificant impact on any fish species present during its operation.³⁵

As an extra measure of caution, CHPE also would be obligated to conduct a study of sturgeon movement patterns before and after the HVDC Transmission System is energized.³⁶

Entergy's attempt to exploit purported data gaps in the evidentiary record is not persuasive. Entergy fails to identify any record evidence demonstrating that sturgeon – or any other aquatic species – are likely to suffer significant, chronic and/or irreparable harm from construction or operation of the Facility, including from EMFs localized to the immediate vicinity of the HVDC cable. To the contrary, the evidentiary record supports a different conclusion. Accordingly, the Commission should reject Entergy's claim that the potential impact of EMFs on sturgeon has not been identified or considered adequately.

³⁴ *Id.*, pp. 203-07.

³⁵ *Id.*, p. 207.

³⁶ Ex. 127, ¶ 163, Att. 4.

POINT L

PROPOSED CERTIFICATE CONDITIONS

2. Other Conditions - Central Hudson's Objections To The Proposed Certificate Conditions Are Based On A Misreading Of The Joint Proposal And Should Be Rejected

A majority of Central Hudson's Initial Brief complains that the language of the Joint Proposal and/or proposed Certificate Conditions needs to be clarified or strengthened. For the reasons described below, the City urges the Commission to reject Central Hudson's interpretation of the Joint Proposal and proposed Certificate Conditions.

i. Central Hudson Misinterpreted the CI Conditions

Central Hudson opposes proposed Conditions 27-29 regarding co-located infrastructure.³⁷ The utility claims that they are "unreasonable" because they: (a) could be interpreted as qualifying or limiting CHPE's responsibility for damages associated with construction or operation of the Facility; and (b) do not reflect CHPE's "repeated representations" that it will bear all risks of the Facility.³⁸ Central Hudson argues that CHPE consistently has failed to provide details regarding the construction and location of its Facility, and contends that the CI Conditions limit the potential reimbursement that CI owners may receive from CHPE as compensation for costs arising from Facility construction or operation.³⁹ It also argues that the CI Conditions somehow would deny it due process because it could not pursue legal remedies in a court of law.⁴⁰

³⁷ Central Hudson Initial Brief at 15.

³⁸ *Id.* at 15-16.

³⁹ *Id.* at 17-18.

⁴⁰ *Id.* at 18-19.

The City generally anticipated these arguments in its Initial Brief. The City noted that the details sought by Central Hudson would be developed as CHPE prepares relevant EM&CP segments for Commission review and approval.⁴¹ Based on the Joint Proposal, CI owners such as Central Hudson, and the City, will have ample opportunity prior to the submission of relevant EM&CP segments to discuss with CHPE how the Facility should be installed over or near co-located infrastructure. The City has previously noted that Central Hudson had not explained how the cumulative procedures afforded by the CI Conditions and EM&CP Guidelines would be inadequate to address its concerns,⁴² and no such explanation was provided in Central Hudson's Initial Brief.

Central Hudson also argues that Condition 29(b) unreasonably would limit CHPE's exposure to \$5,000 for reimbursements to owners and operators of Co-located Infrastructure.⁴³ This claim apparently is based on a misreading of Condition 29.

Condition 29(a) enumerates the costs for which CHPE shall be obligated to reimburse CI owners. Condition 29(b) limits this obligation to \$5,000 for study reviews or design proposals as described in Condition 29(a)(3). Condition 29(c) establishes the process by which CI owners would notify CHPE of reimbursable costs that will be incurred, and also establishes a time frame within which CHPE must pay CI owners. Condition 29(c) would require CI Owners to provide CHPE with a good faith estimate of anticipated reimbursable costs

⁴¹ City Initial Brief at 45.

⁴² *Id.* at 46.

⁴³ Central Hudson Initial Brief at 17-18.

before they are incurred, and CHPE must pay up to 125% of such costs within 30 days.⁴⁴ It is not unreasonable or burdensome for CHPE to be provided such notification.

Central Hudson's argument apparently is based on a misunderstanding that Condition 29(b) generally limits to \$5,000 CHPE's exposure for reimbursable costs. As described above, the \$5,000 limitation applies only to certain costs described in Condition 29(a)(3). The CI Conditions do not establish a hard limit on the amount of incremental costs that may be incurred for repair or maintenance of CI, as Central Hudson claims.⁴⁵ To the contrary, the CI conditions clearly state that CHPE will be obligated to reimburse reasonable costs that CI owners incur as a result of Facility construction or operation.

Finally, the City notes again that Con Edison, NYPA, and Vermont Electric Power Company, Inc. ("VELCO") own significant and extensive infrastructure that will be co-located with, and potentially affected by, construction and operation of the Facility. None of those entities share the concerns raised by Central Hudson. In fact, VELCO advocated persuasively against Central Hudson's claims in its Reply Statement.⁴⁶ For instance, VELCO stated that it "is concerned that if Central Hudson's interpretation of CHPE's obligations were to be accepted, either directly or indirectly, by the Commission ... the obligations of CHPE with regard to Co-located Infrastructure would be diluted to the detriment" of CI owners.⁴⁷ Central

⁴⁴ Condition 29(c) also establishes a process for CI owners to seek reimbursement for costs that exceed 125% of the good faith estimate.

⁴⁵ Central Hudson Initial Brief at 17-18. *See also* Ex. 127, ¶¶ 29(a)-(c).

⁴⁶ VELCO Reply Statement at 1-2.

⁴⁷ *Id.*

Hudson apparently stands alone among utilities in its strained interpretation of the CI Conditions, which should be rejected.

ii. Condition 162

Proposed Condition 162 details the information that CHPE must include in the EM&CP for the protection of Co-located Infrastructure. Central Hudson “is concerned” that this Condition “might later be interpreted to authorize impacts to Central Hudson’s pre-existing infrastructure.”⁴⁸ According to Central Hudson, Condition 162(e)(iii) may allow CHPE to impede Central Hudson’s access to its infrastructure, and Condition 162(f) may allow CHPE to interfere with the operation, maintenance or repair of Central Hudson’s pre-existing facilities.⁴⁹ Central Hudson also claims that, although Condition 162(g) requires CHPE to provide a “full description of all measures that will be employed by Certificate Holders to protect all CI that may be affected by the construction, operation, or maintenance of the Facility...”, it does not provide for compensation if such activities damage Central Hudson infrastructure.⁵⁰

Central Hudson’s assertion that the Certificate Conditions, or any other element of the Joint Proposal, somehow would allow CHPE to interfere with Central Hudson’s right or ability to serve its electric and gas customers cannot withstand scrutiny. It is inconceivable that the Commission would allow any Certificate Holder to interfere with the normal operation of an investor-owned utility. If, arguendo, CHPE did attempt to impede Central Hudson’s access to its infrastructure or otherwise obstruct the utility’s ability to deliver safe and reliable service, the Commission undoubtedly would act swiftly and decisively on behalf of Central Hudson.

⁴⁸ Central Hudson Initial Brief at 19.

⁴⁹ *Id.* at 19-20.

⁵⁰ *Id.* at 20 (citing Ex. 127, ¶ 162[g]).

Central Hudson's concern that Condition 162 does not provide for reimbursement of damaged CI also is misplaced. For the reasons set forth above, such reimbursement is allowed by the CI Conditions.⁵¹

⁵¹ Central Hudson also claims in its Initial Brief that: (a) the Joint Proposal does not obligate CHPE to bear all risks of the Facility, because the Conditions purportedly would not require CHPE to reimburse Central Hudson for all incremental costs incurred as a result of the construction or operation of the Facility; and (b) certain provisions of the Joint Proposal should be re-written to address utility concerns arising from its strained interpretation of the documents. (Central Hudson Initial Brief at 20-24, 26-30.) The CI Conditions are clear, however, that CHPE will reimburse CI owners for reasonable costs incurred from construction or operation of the Facility, and Central Hudson's speculation to the contrary is not persuasive.

CONCLUSION

For all the reasons set forth herein and in the City's Initial and Reply Statements in Support and Initial Brief, the Commission should reject the positions advocated by the JP Opponents and issue a Certificate for the Facility subject to the terms and conditions of the Joint Proposal.

Dated: September 7, 2012
Albany, New York

Respectfully submitted,

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