

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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

Case 10-T-0139

**BRIEF IN RESPONSE TO NOTICE REGARDING ENTERGY PETITION FOR
REHEARING SUBMITTED BY ENTERGY NUCLEAR POWER MARKETING, LLC
AND ENTERGY NUCLEAR FITZPATRICK, LLC**

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Albany, New York

PRELIMINARY STATEMENT

Entergy Nuclear Power Marketing, LLC and Entergy Nuclear FitzPatrick, LLC (collectively referred to as “Entergy”) respectfully submit the following brief in response to the “Notice Regarding Entergy Petition for Rehearing” (“Notice”) entered in this N.Y. Public Service Law (“PSL”) Article VII proceeding on May 23, 2013 by New York Public Service Commission (“Commission”) Acting Secretary Jeffrey C. Cohen.¹ As demonstrated below, the Acting Secretary should credit the additional day provided by Section 3.5(f) of the Commission’s Rules of Practice and deem Entergy’s Petition for Rehearing (“Petition”) of the Commission’s “Order Granting a Certificate of Environmental Compatibility and Public Need” in this proceeding as timely filed on May 21, 2013.² Alternatively, the Acting Secretary should find that the delayed filing described in the Notice occurred due to an unanticipated server delay that caused no prejudice to any party, and that the circumstances surrounding Entergy’s timely service of the Petition and attempt to file it on May 20 establish a reasonable inability to file the Petition on May 20 and/or demonstrate good cause why the Acting Secretary should exercise his discretion and accept the Petition for filing on May 21.

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 for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City, “Notice Regarding Entergy Petition for Rehearing” (issued May 23, 2013).

² Id., “Order Granting a Certificate of Environmental Compatibility and Public Need” (issued April 18, 2013).

STATEMENT OF FACTS

On April 18, 2013, the Commission issued the “Order Granting a Certificate of Environmental Compatibility and Public Need” to Champlain Hudson Power Express, Inc. and CHPE Properties, Inc.³ Shortly thereafter, the Department of Public Service (“DPS”) Document Matter and Management System (“DMMS”) furnished electronic notification of the April 18 Order to the Active Parties (and the public). The Commission’s electronic issuance of the April 18 Order commenced running the limitations period for seeking rehearing established in Section 22 of the PSL and Section 3.7(a) of the Commission’s Rules of Practice.

Over the following weeks, Entergy studied the April 18 Order in depth, consulted the voluminous record on which it is based, and drafted the Petition. At 3:08 p.m. on May 20, 2013, Entergy (as required by the Commission’s Rules of Practice) transmitted the Petition to the Commission Acting Secretary electronically via e-mail at “secretary@dps.ny.gov.”⁴ Entergy appropriately copied all of the Active Parties in this proceeding on its May 20 transmittal e-mail to the Acting Secretary, as it has done with each of its prior filings in this case.⁵

Additionally, Entergy’s counsel had “registered” the outbound May 20 e-mail transmitting Entergy’s Petition to the Acting Secretary and Active Parties using the “RPost” commercial vendor service.⁶ The RPost service creates a permanent record of the time when an outbound e-mail message is transmitted from the user’s servers, and of the time when the “registered” message is delivered to the recipients’ servers.⁷ In some cases, RPost can also

³ Id. (hereinafter, the “April 18 Order”)

⁴ See Affirmation of William A. Hurst, dated May 29, 2013 (“Hurst “Affirmation”), Exhibit “A.”

⁵ Id.

⁶ Id., ¶ 6.

⁷ See generally Affidavit of Alex Khan, sworn to May 29, 2013 (“Khan Affidavit”).

generate a record of when the recipient actually opened the “registered” e-mail message.⁸ Entergy’s counsel utilized the RPost service in this instance as an added precaution to ensure a more formal record of the May 20 transmission, having once before experienced an error in transmission in this proceeding.⁹

Following service of the Petition, Entergy’s counsel immediately received an automated message from RPost stating, inter alia, “Acknowledgment: Your message has been sent.”¹⁰ The 3:09 p.m. acknowledgement message showed the full list of addressees on the 3:08 p.m. outbound e-mail message, and contained no delayed delivery or other warning.¹¹ Entergy’s counsel then conferred with an in-house IT assistant regarding the 3:09 p.m. acknowledgment notice.¹² Based on the appearance of the outbound May 20 e-mail in counsel’s “sent” items folder, and the RPost acknowledgment notice, and in the absence of any indication to the contrary, Entergy’s counsel believed (as confirmed by his conversation with an IT specialist) that he had successfully transmitted the outbound 3:08 p.m. e-mail, and Entergy’s Petition, to the Acting Secretary and Active Parties on May 20, 2013.¹³

The next day, May 21, 2013, Entergy received a notification from the RPost service stating that the service had not delivered the May 20 transmittal e-mail to the Acting Secretary and Active Parties.¹⁴ The May 21 notice from the RPost service attributed the failure of delivery to the number of addressees on the outbound May 20 transmittal message.¹⁵ At that time,

⁸ Id.

⁹ Hurst Affirmation, ¶ 6. See also Case 10-T-0139, supra, “Ruling on Motion to Strike Briefs on Exception” (issued January 20, 2013).

¹⁰ Hurst Affirmation, Exhibit “B.”

¹¹ Id.

¹² Id., ¶ 9 and Exhibit “C”; See generally Affidavit of Christopher Hodge (“Hodge Affidavit”), sworn to May 29, 2013.

¹³ Hurst Affirmation, ¶ 10.

¹⁴ Id., Exhibit “D.”

¹⁵ Id.

Entergy's counsel was unaware of this apparent limitation on the RPost service.¹⁶ Entergy has since learned that RPost held the outbound May 20 transmittal e-mail based on the number of addressees to ensure that it did not qualify as impermissible "spam," then released the original message for delivery during the afternoon of May 21.¹⁷ Entergy's counsel had no contemporaneous notice of any of these actions by RPost.¹⁸

Entergy re-transmitted the Petition to the Acting Secretary and the Active Parties at approximately 12:21 p.m. on May 21, in part using the RPost service, and received an acknowledgment of receipt by RPost at 12:25 p.m.¹⁹ Additionally, Entergy transmitted the Petition a third time on May 21 at approximately 12:59 p.m., but without using the RPost service at all.²⁰ The Acting Secretary accepted filed Entergy's Petition for filing at 12:59 p.m. on May 21, 2013, and uploaded the Petition to DMMS at approximately 1:10 p.m. on that date.²¹

¹⁶ Id., ¶¶ 12-13.

¹⁷ See Khan Affidavit, ¶ 3.

¹⁸ Id., ¶ 12.

¹⁹ Hurst Affirmation, Exhibits "E" – "G." In the 12:21 p.m. cover e-mail sent on May 21, Entergy's counsel noted that he was serving the Active Parties in two separate but contemporaneous e-mails, in an attempt to avoid the apparent limitation in RPost on the number of addressees for any given e-mail transmittal. The second, forwarded version of the 12:21 p.m. e-mail was not registered.

²⁰ Hurst Affirmation, ¶ 18 and Exhibits "H" – "I."

²¹ Id. Exhibit "J."

DISCUSSION

I. ENERGY TIMELY SERVED AND FILED THE PETITION FOR REHEARING ON MAY 21, 2013.

As established below, Entergy served the Petition on May 20 and May 21, 2013, and filed the Petition no later than May 21. Taking into account the extra day that Rule 3.5(f) of the Commission's Rules of Practice adds to the 30-day period for seeking rehearing under Rule 3.7(a), which did not expire until May 20, Entergy timely served and filed the Petition on May 21. Specifically, the initial 30-day period provided by Rule 3.7(a) expired on Monday, May 20, 2013. With the day added to the applicable period by Rule 3.5(f), the deadline moved to Tuesday, May 21, 2013.

A. Entergy Timely Served the Petition on May 20, 2013.

The Commission's Rules of Practice make clear that "[E]lectronic service is complete on sending."²² As demonstrated in the accompanying Hurst Affirmation, Entergy transmitted the Petition to the Secretary and the Active Parties via e-mail at 3:08 p.m. on May 20, 2013 (then again via e-mail twice more on May 21). Immediately following the 3:08 p.m. e-mail transmission, Entergy's counsel reviewed the transmittal e-mail in his "sent" items folder, and received a notification from the RPost service confirming, "Your message has been sent."²³ Accordingly, pursuant to §§ 3.2(b)(3) and 3.5(e)(3) of the Commission's Rules of Practice, Entergy effectuated proper service of the Petition by "sending" it to the Active Parties via e-mail on May 20, 2013.²⁴

²² 16 N.Y.C.R.R. §§ 3.2(b)(3), 3.5(e)(3).

²³ Hurst Affirmation, Exhibits "A" and "B." At that time, Entergy's counsel had no indication that the RPost service would delay the actual delivery of the message.

²⁴ Khan Affidavit, ¶ 2.

B. Entergy Timely Filed the Petition for Rehearing on May 21, 2013.

The Active Parties, including Entergy, received electronic notice of the April 18 Order via the DMMS on April 18, 2013. The April 18 DMMS notice triggered Rule 3.7(a) of the Commission's Rules of Practice, which states:

Any person interested in an order of the Commission may request rehearing within 30 days of service of the order. The petition for rehearing shall, pursuant to section 3.5 of this Part, be filed with the Secretary and at the same time be served on each party to the proceeding.²⁵

The 30th calendar day after entry of the April 18 Order, May 18, 2013, fell on a Saturday. Therefore, the 30-day period contained in Rule 3.7(a) did not expire until Monday, May 20, 2013 – the same date that Entergy first served and attempted to file the Petition.²⁶

Although Entergy attempted to file the Petition within 30 calendar days of the April 18 Order, 16 N.Y.C.R.R. § 3.5(f) states, in pertinent part: “When a reply must be submitted or other action taken within a specified number of days from the service of a document, that time shall be extended by five days if service was by mail and by **one day if service was made electronically** or by overnight delivery.”²⁷ Rule 3.7(a), which governs the time for filing petitions for rehearing, expressly incorporates Rule 3.5 by reference.²⁸ As applied to the April 18 Order, the above rules compel finding that “service was made electronically” within the meaning of Rule 3.5(f), *i.e.* service was made via the DMMS on April 18. Under Rule 3.5(f), the filing of the Petition qualifies as an “action” that must be “taken within a specified number of days from the service of” the April 18 Order, *i.e.*, within “30 days of service of the order” under Rule 3.7(a).²⁹

²⁵ 16 N.Y.C.R.R. § 3.7(a)

²⁶ Hurst Affirmation, Exhibit “A.” See also N.Y. General Construction Law § 25-a.

²⁷ 16 N.Y.C.R.R. § 3.5(f) (emphasis supplied).

²⁸ 16 N.Y.C.R.R. § 3.7(a). See also 16 N.Y.C.R.R. § 3.6(d)(1) (“Parties wishing to respond to motions shall do within eight days after service **unless a different time period is permitted by section 3.5(f) of this Part** or is otherwise established by the presiding officer or the Secretary.”) (Emphasis supplied).

²⁹ 16 N.Y.C.R.R. §§ 3.5(a), 3.7(a).

Thus, one day must be added to the 30-day period. In this instance, because the original filing date was May 20, Rule 3.5(f) advances that date to May 21.

The above establishes that the Acting Secretary should apply Rule 3.5(f) here and find that the rule granted Entergy (or, for that matter, any other party) one additional day for filing the Petition, beyond the 30-day period expressly set forth in Rule 3.7(a). Taking into account the intervening weekend, which extended the initial 30-day period until May 20, the authorized 31-day period for filing the Petition thus did not expire until 4:30 p.m. on May 21, 2013. Consequently, when the Acting Secretary received the Petition for filing at 12:59 p.m. on May 21, the filing remained timely under the Commission's Rules of Practice.

II. ALTERNATIVELY, ENTERGY HAS ESTABLISHED A REASONABLE INABILITY TO FILE THE PETITION ON MAY 20 AND/OR GOOD CAUSE TO ACCEPT ENTERGY'S PETITION FOR FILING ON MAY 21.

As the Acting Secretary is aware, Entergy experienced an unanticipated server delay after transmitting its brief on exceptions to the Recommended Decision ("RD") in this proceeding on January 17, 2013, which caused Entergy's brief on exceptions to be filed at approximately 4:06 p.m. on that date – six minutes beyond the deadline established in the Acting Secretary's "Notice for Filing Exceptions."³⁰ Separately, the New York State Business Council had filed its brief on exceptions to the RD at 4:17 p.m. on that date. On January 18, 2013, Applicants moved to strike both Entergy's and the Business Council's briefs on exceptions.³¹

In considering Applicants' motion to strike, the Acting Secretary observed that "determinations on motions to strike are case-specific, depending upon the facts and

³⁰ See generally Case 10-T-0139, *supra*, "Ruling on Motion to Strike Briefs on Exception" (issued January 30, 2013) ("January 30 Order").

³¹ Case 10-T-0139, *supra*, "Motion of Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. to Strike Briefs on Exceptions Filed Out of Time" (filed January 18, 2013).

circumstances of the particular proceeding.”³² After noting that procedures in administrative proceedings “may be more informal” than in judicial proceedings, the Acting Secretary held, “Actual prejudice or unfairness to parties is the paramount concern, and no substantial unfairness or prejudice occurred here.”³³ Finding no actual prejudice or unfairness resulting from the short delay in filing, the Acting Secretary denied Applicants’ motion to strike Entergy’s brief on exceptions.³⁴

The Business Council did not oppose Applicants’ motion to strike, or otherwise explain its apparent delay in filing. Nonetheless, the Acting Secretary gave weight to his finding that Applicants had retrieved the Business Council’s brief from the DMMS on January 18, 2013 (one day after expiration of the January 17 deadline).³⁵ The Acting Secretary further observed that “[g]ranteeing Applicants’ motion to strike would preclude consideration of the Business Council’s brief on the merits.”³⁶ Exercising the discretion granted by PSL § 22 and 16 N.Y.C.R.R. § 3.3(a)(1), the Acting Secretary held that “any minimal prejudice suffered by Applicants or any other party can be remedied by extending the schedule for filing [opposing briefs], providing an additional day to respond to the Business Council’s brief on exceptions.”³⁷ With that accommodation in place, the Acting Secretary also denied Applicants’ unopposed motion to strike the Business Council’s brief on exceptions.³⁸

The error in transmission of Entergy’s Petition occurred for reasons that differ from those that caused the delayed transmission of Entergy’s’ brief on exceptions, but the same rationale

³² Id., p. 2.

³³ Id.

³⁴ January 30 Order, pp. 2-3.

³⁵ Id., 3. Here, Certificate Holders’ counsel received a copy of the Petition no later than the afternoon of May 21. (Khan Affidavit, ¶ 13 and Exhibit “A”)

³⁶ January 30 Order, p. 3.

³⁷ Id.

³⁸ Id.

that led the Acting Secretary to deny Applicants' motion to strike Entergy's brief on exceptions applies here. In fact, Entergy's counsel "registered" the outbound May 20 e-mail transmitting Entergy's Petition using the RPost service as an added precaution in an attempt to avoid repeating the problems that occurred with the January 17 filing.³⁹ Unbeknownst to Entergy's counsel, however, the RPost service delayed transmission of the May 20 e-mail because it was addressed to more than 100 recipients.⁴⁰ In any event, Entergy's counsel re-served and successfully filed the Petition by no later than 12:59 p.m. on May 21, 2013.⁴¹ Indeed, by the close of business on that date, the Acting Secretary and Active Parties should have received three different e-mail transmittals containing Entergy's Petition, two of which were sent on May 21 in an attempt to mitigate the slight prejudice, if any, which might arise from the delayed transmission of the May 20 e-mail. RPost delivered the third, the May 20 transmittal e-mail, late in the afternoon of May 21.⁴²

The Acting Secretary should apply the same rationale that informed his exercise of discretion in the January 30 Ruling and find that the circumstances surrounding Entergy's May 20 and May 21 e-mail transmissions establish a reasonable inability to file the Petition on May 20 and/or demonstrate good cause to justify the Acting Secretary's receipt of the Petition for filing. As to any potential prejudice, the Acting Secretary has already tolled the applicable time for responding to Entergy's Petition pending resolution of this issue; therefore, no party is prejudiced by a shortened response time. As occurred with respect to the Business Council's untimely brief on exceptions, moreover, the Acting Secretary has the discretion to re-set the

³⁹ Hurst Affirmation, ¶ 6.

⁴⁰ Hurst Affirmation, Exhibit "D."

⁴¹ Notice, p. 1.

⁴² Khan Affidavit, ¶¶ 15-16.

response dates to ensure that the Certificate Holders (or any other party) have a fair and adequate period within which to prepare and submit a response to the Petition.

Excusing Entergy's filing on May 21 poses no discernible prejudice to the Certificate Holders, or any Active Party. For example, the April 18 Order remains in full force and effect. Subject to Ordering Clause "4" of the April 18 Order, which required Certificate Holders to either petition for rehearing or file a letter accepting the conditions contained therein within 30 days of its entry, the April 18 Order became "effective upon issuance, which occurs when it is posted on the Commission's website."⁴³ The Certificate Holders complied with Ordering Clause "4" of the April 18 Order by submitting correspondence to the Acting Secretary on April 23, 2013 indicating their assent to the conditions contained in the April 18 Order. In short, the resolution of the instant filing issue in Entergy's favor by extending the filing deadline by one day would have no effect on the Certificate Holder's substantive rights under the April 18 Order.

Because the April 18 Order has not and will not be stayed, even if the Acting Secretary excuses the late filing and accepts Entergy's Petition, the Certificate Holders are in exactly the same position now vis-à-vis their Article VII Certificate as they would have been had Entergy successfully transmitted the Petition for filing on May 20, rather than on May 21. While the late filing is certainly regrettable, and steps are being undertaken to remedy the cause, the fact remains that neither the Certificate Holders, nor any party, is prejudiced by a one-day extension of the filing deadline, should the Acting Secretary be inclined to grant it in his discretion.

Next, the circumstances described above establish that Entergy gained no advantage from the delay in filing. Entergy served and attempted to file the Petition at 3:08 p.m. on May 20, and merely re-served the original document (twice) on May 21. In other words, Entergy did not (and

⁴³ 16 N.Y.C.R.R. § 3.2(a)(2). See also 16 N.Y.C.R.R. § 3.7(d).

could not) take advantage of the extra time to draft the Petition. Instead, Entergy served its papers well in advance of the applicable deadline using the same method of service it has always used in this proceeding, enhanced by the RPost service, and without any notice or expectation that delivery might be delayed. To the contrary, at the time of service, Entergy reasonably expected, including based on the RPost acknowledgment message, that electronic service and filing would occur virtually simultaneously, as it had with respect to substantially all of Entergy's prior filings in this case.

Finally, strict enforcement of the 30-day deadline “would preclude consideration of [Entergy's Petition] on the merits.”⁴⁴ Entergy has been a party to this proceeding in some capacity since September of 2010.⁴⁵ Entergy participated in the post-Joint Proposal briefing phase, cross-examined witnesses at the evidentiary hearing, timely filed initial and reply post-hearing briefs, and prepared and timely served its brief on exceptions and, most recently, drafted and filed the Petition. In short, because the Certificate Holders will suffer no actual prejudice, refusing to accept Entergy's Petition for filing would accomplish nothing other than to prejudice Entergy unfairly. Under these circumstances, the Acting Secretary has, and should exercise, discretion to accept Entergy's Petition for filing for good cause shown. That is the only outcome here that will promote “the fair, orderly, and efficient conduct of the case.”⁴⁶

⁴⁴ January 30 Order, p. 3.

⁴⁵ Entergy Nuclear Power Marketing, LLC intervened in this proceeding on September 10, 2010. Entergy Nuclear FitzPatrick, LLC intervened on March 16, 2012.

⁴⁶ See 16 N.Y.C.R.R. § 3.3(a)(1).

CONCLUSION

For all of the foregoing reasons, Entergy respectfully requests that the Acting Secretary deem Entergy's Petition as timely filed, pursuant to Rule 3.5(f), or, alternatively, find that the circumstances described above (and in the accompanying Affirmation of William A. Hurst and Affidavits of Mr. Christopher Hodge and Mr. Alex Khan) demonstrate a reasonable inability to file the Petition in a timely fashion and/or good cause to justify acceptance of the filing on May 21.

Dated: May 29, 2013
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Respectfully submitted,

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