

**BEFORE THE
PUBLIC SERVICE COMMISSION
STATE OF NEW YORK**

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 Public Service Law for the Construction,)
Operation and Maintenance of a High-)
Voltage Direct Current Circuit from the)
Canadian Border to New York City.)

Case No. 10-T-0139

**REPLY POST HEARING BRIEF OF
CHAMPLAIN HUDSON POWER EXPRESS, INC. AND CHPE PROPERTIES, INC.**

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APPLICANTS' REPLY POST HEARING BRIEF

Applicants submit this Reply Post Hearing Brief pursuant to the Ruling Establishing Schedule and Hearing Procedures issued by Your Honors in this proceeding on May 8, 2012.¹

A. INTRODUCTION AND GENERAL CONSIDERATIONS

The only parties submitting Initial Briefs opposing approval of the JP and certification of the Facility were IPPNY, Entergy (collectively with IPPNY, the “Incumbent Generators”), Central Hudson, and IBEW. None of these parties deny that the Facility will produce substantial Energy Price Savings and Production Cost Savings benefits for consumers, and only Entergy questions the air emissions benefits of the Facility on grounds that are wholly without merit.² Instead, these parties all contend that the Facility should be rejected notwithstanding these clear benefits.

¹ Capitalized terms and abbreviations used but not defined in this Reply Brief shall have the same meaning as provided in Applicants’ Initial Brief in this proceeding.

² Entergy’s objections to these air emissions benefits is addressed in Section J.4 of this Reply Brief.

The Incumbent Generators' opposition to the Facility is based on two pillars. The first pillar is their claim that uneconomic entry poses a clear and present danger to New York's competitive markets that can only be addressed by the Commission in this Article VII siting proceeding. The second pillar is their claim that the Facility is "grossly" uneconomic and so should not be certified in order to prevent uneconomic entry. If either of these pillars falls, so too does their claim that the Facility should be denied a Certificate in order to protect New York's competitive wholesale power markets. Applicants have demonstrated, and will demonstrate again in this Reply Brief, that neither of these pillars is sound and that they both consist instead of nothing more than mis-statements, contradictions and allegations not supported by any evidence in the record in this proceeding.

Applicants have added a new section immediately before the Conclusion of this Reply Brief for the purpose of addressing the contentions advanced by Central Hudson that Applicants could not fit into the approved outline for briefs in this proceeding.³ Other issues raised by Central Hudson and all issues addressed by IBEW are addressed where those issues arise in the outline approved by Your Honors.

B. BASIS OF THE NEED

1. Public Policy

The most important public policy issue in this proceeding is the Incumbent Generators' flawed claim that uneconomic entry poses a threat to competition in New York's wholesale power markets that can best be addressed by the Commission in this Article VII siting proceeding. Because the Incumbent Generators have addressed this issue in Section B.5 of their Initial Briefs dealing with the impacts of the Facility on competition, Applicants will present

³ This has also resulted in changing the designation of the Conclusion from "O" to "P".

their response to this contention in Section B.5 of this Reply Brief as well. The claims of the Incumbent Generators and IBEW that the Facility should be rejected because it has no “on ramps” to accept electricity from generating facilities in western and/or upstate New York are addressed in Section G of this Reply Brief dealing with the conformance of the Facility with New York’s long-range plans for expanding the New York State Transmission System. The remaining public policy claims raised by the Incumbent Generators are without merit for the reasons noted below.

IPPNY advances two completely contradictory policy claims on page 11 of its Initial Brief, suggesting first that the Facility would “reduce the revenues upstate generators could and should receive for selling their power” and immediately thereafter claiming that the Facility will “forc[e] consumers in [upstate] areas . . . to bear higher electric rates.”⁴ At least one of these claims must be patently false. In fact, neither of these contradictory claims is true.

Ms Frayer’s testimony makes clear that the Facility will result in only modest reductions in electricity prices in upstate New York.⁵ IPPNY’s suggestion that the Facility will somehow limit markets available to upstate generators is also contradicted by its statement in another portion of its Initial Brief that the Facility provides a direct connection between Quebec and New York City and therefore cannot possibly interfere in any way with the ability of upstate generators to serve downstate markets using the existing transmission system, and there is no evidence in the record to support this claim.

IPPNY’s contradictory claim that the Facility will increase prices in upstate New York must also be rejected. As Ms Frayer and Dr. Paynter both explained, it would be uneconomic for HQ to sell the substantial additional output of the new hydroelectric generating facilities now

⁴ IPPNY IB at 11.

⁵ TR at 271 lines 1 to 7 (Frayer Direct Figure 4).

coming on line in Quebec across Quebec’s already constrained existing interties with New York State.⁶ Thus, contrary to IPPNY’s claim, Dr. Paynter never predicted that HQ would sell these additional power supplies into New York State. Instead, as IPPNY correctly notes in its Initial Brief, all that Dr. Paynter ever said on this issue was to predict that if HQ were to make such sales, prices in upstate New York would be reduced: “Were HQ to simply sell this additional energy at the border, this could cause a substantial reduction in the market price at the border.”⁷ Thus, as Mr. Jessome noted in his testimony, the most likely result if the Facility was not allowed to go forward would be that HQ would develop the transmission facilities needed to supply this new low-cost hydroelectric power to other markets outside of New York.⁸

2. Reliability Needs

The Incumbent Generators raise only one issue not fully addressed in Applicants Initial Brief – Entergy’s claim that “NYISO already has a fully developed process to address any reliability needs that may arise on the New York transmission system through its RNA process” and, as a result, there is no “need” for any new merchant facilities to address the installed capacity needs that Ms Frayer demonstrated were likely to arise in New York by 2021 at the latest.⁹ Entergy’s claim that NYISO’s RNA process eliminates the “need” for new merchant providers of installed capacity must be rejected as wholly inconsistent with the Commission’s reliance on competition and market mechanisms, rather than on cost-based ratemaking, to meet New York’s wholesale electric power needs.¹⁰

⁶ TR at 334 line 10 to 335 line 4 (Frayer Rebuttal); TR at 181 line 18 to 183 line 5 (Paynter Rebuttal).

⁷ IPPNY IB at 11, citing TR at 175 lines 2 to 7 (emphasis supplied). Entergy’s mis-statements regarding Dr. Paynter’s testimony on this issue are exposed in Section J of this Reply Brief.

⁸ TR at 68 lines 12 to 19 (Jessome Direct).

⁹ See TR at 318 line 16 to 320 line 6 (Frayer Rebuttal) and Section B.2 of Applicants IB.

¹⁰ See, e.g., TR at 194 line 20 to 195 line 3 (Paynter Rebuttal)(“[T]he entry of merchant projects in advance of a

3. Fuel Diversity Benefits

Entergy alone contests the obvious fuel diversity benefits to New York City of the 1,000 MW of low-cost hydroelectric power to be delivered by the Facility. In addressing this issue, Entergy completely contradicts its own earlier claims that the Commission should regard Applicants and HQ together as the co-developers of the Facility,¹¹ and in this section contends that the fuel diversity benefits of the Facility are “speculative” because Applicants “have no supplier contracts to ensure the delivery of hydroelectric power or other energy to New York City.”¹² What Entergy ignores in advancing this claim is that: (1) the Facility will interconnect with the Quebec Control Area; (2) over 98 percent of the electricity now produced in the Quebec Control Area comes from hydroelectric resources;¹³ and (3) at the present time, over 1500 MW of additional hydroelectric resources are currently under development in the Quebec Control Area and are expected to come “on line” between 2015 and 2020.¹⁴ In light of these facts, as well as the strong interest in the Facility expressed by HQ in its comments in response to Governor Cuomo’s Energy Highway Task Force Request for Information,¹⁵ the Commission can be fully assured that the Facility will in fact deliver hydroelectric power to New York City.

Entergy also claims that hydroelectric power from Canada should not be seen as a benefit to consumers in New York City because it does not meet the strict definition of a “renewable resource” eligible for special payments under the Commission’s Renewable Portfolio Standard. This fallacious claim was properly labeled a “green herring” by DPS Staff in its Reply Statement

‘reliability need’ is not only consistent with, but is in fact an integral part of the NYISO’s market-based planning process.”).

¹¹ Entergy IB at 10-11.

¹² Entergy IB at 17

¹³ Hearing Exhibit 197 at 1.

¹⁴ Hearing Exhibit 197 at 1.

¹⁵ See Hearing Exhibit 197 generally.

in Support of the JP.¹⁶ As DPS Staff correctly pointed out, the Facility is not seeking RPS benefits, and the hydroelectric power delivered by the Facility will provide substantial economic and air emissions benefits regardless of the label assigned to it by Entergy. One of these clear benefits is that this power does not come from natural gas, which is the primary source of supply for the vast majority of generation in New York City today. Thus, Entergy's claims fall far short of demonstrating that the Facility will fail to enhance fuel diversity in New York City.¹⁷

4. Blackstart

Entergy is also the only party contending that the Facility would not provide Blackstart benefits to load serving entities in New York City. Entergy's claim in this regard is simply that the proposed certificate conditions do not "require" Applicants to provide Blackstart service and, consequently, the Commission has no assurance that the Facility will actually provide such services. Entergy's suggestion that the Commission should require a merchant service provider to supply any generation-related service is inconsistent with the Commission's policy of relying on competition and market mechanisms, rather than command and control regulation, to control wholesale markets for generation services. Indeed, any such requirement could cause serious damage to other suppliers of Blackstart service in New York City if it forced Applicants to make uneconomic investments to meet that service obligation. Thus, the provisions of the JP requiring Applicants to work with NYISO to perform a study of the facilities required to provide

¹⁶ Staff Initial Reply Statement at 17 (March 30, 2012).

¹⁷ In footnote 44 on page 18 of its Initial Brief, Entergy makes reference to a documentary film that makes certain allegations concerning the development of large-scale hydroelectric power in Canada. The Commission must reject this reference to extra-record materials as inconsistent with the requirements of SAPA § 306(3) that the Commission's decision in this adjudicatory proceeding must be based on evidence in the record. This is particularly true in light of the detailed description of the steps HQ has taken to ensure that all host communities, including Aboriginal communities, are involved in the development of its hydroelectric projects as set out in HQ's letter to the Commission dated June 20, 2012 and posted in DMM as Document No. 558 in this proceeding.

In the unlikely event that the Commission were to consider this highly unreliable extra-record evidence, then it should also consider the information concerning HQ's hydroelectric facilities available at: www.hydroforthefuture.com/home.

Blackstart service, but leaving the decision on whether Applicants should provide such service to be determined by market forces, are plainly appropriate and in the public interest.

5. Impact on Competition

a. The Incumbent Generators' Mis-statements Concerning Uneconomic Entry

The first pillar of the Incumbent Generators' opposition to the Facility is their policy claim that uneconomic entry poses a clear and present danger to competition that the Commission should address on a case-by-case basis in individual siting proceedings. In support of this contention, IPPNY and Entergy both cite to the same excerpt from Paragraph 103 ("Paragraph 103") of FERC's March 7, 2008 order in Docket No. EL07-39-000 (the March 7, 2008 FERC Order"), where FERC recognized the threat to competition posed by uneconomic new entry.

When the March 7, 2008 FERC Order is read in its entirety, however, the Incumbent Generators' mis-statements are revealed. In Paragraph 103 of that order, FERC did not stop after it identified uneconomic entry as a threat to the ability of competitive wholesale power markets to produce just and reasonable rates, as the Incumbent Generators truncated excerpt suggests. Instead, FERC went on in Paragraph 103 to also rule that its mandate under the Federal Power Act provided it with both the authority and the obligation to take action to address that threat. Here is the full text of Paragraph 103, with the portions omitted by the Incumbent Generators shown in italics:

103. Markets require appropriate price signals to alert investors when increased entry is needed. By allowing net buyers to artificially depress prices, these necessary price signals may never be seen. While a strategy of investing in uneconomic entry and offering it into the capacity market at a lower or zero price may seem to be good for consumers in the short run, it can inhibit new entry, and thereby raise price and harm reliability, in the long-run."

*Under the [Federal Power Act], the Commission must ensure that rates are just and reasonable. The courts have long held that establishing just and reasonable rates involves a balancing of consumer and investor interests.*¹⁸

Two paragraphs later in that order, FERC exercised this authority by directing NYISO to adopt tariff measures to protect New York's markets from competitive injury from uneconomic entry. In this passage, FERC's clear directive to NYISO to adopt rules providing effective mitigation of the adverse impacts of uneconomic entry is italicized for emphasis:

105. Furthermore, as described above, properly constructed capacity markets can also encourage reliable and efficient levels of investment only if market participants can expect prices that provide a reasonable opportunity to recover the costs of needed investment. *In order to prevent uneconomic entry by net buyers and the adverse effects that can follow from such entry, net buyer mitigation is necessary.*¹⁹

Thus, when read in its entirety, the March 7, 2008 FERC Order makes clear that FERC has taken the regulatory actions required to ensure that uneconomic entry will no longer pose a threat to New York's wholesale power markets.

The Incumbent Generators' failure to acknowledge the full impact of FERC's March 7, 2008 Order is particularly difficult to understand in light of: (1) Mr. Younger's sworn affidavit in that very same FERC proceeding candidly acknowledging that the buyer-side mitigation rules proposed by NYISO in that case were "generally sound in principle" and "will provide a reasonable framework over the long run to deter further uneconomic entry;"²⁰ and (2) Mr. Younger's statement in a second sworn affidavit also filed in that case that these new rules will enable NYISO to "meet [FERC's] directive to provide a level of compensation that will attract

¹⁸ *New York Independent System Operator, Inc.*, 122 FERC ¶61,211 at P 103 (2008)(emphasis supplied).

¹⁹ *New York Independent System Operator, Inc.*, 122 FERC ¶61,211 at P 105 (2008)(emphasis supplied).

²⁰ Hearing Exhibit 159 at 4.

and retain needed infrastructure and thus promote long-term reliability while neither over-compensating or under-compensating generators.”²¹

Now that the Incumbent Generators’ mis-statements have been revealed, the Commission must find that the Incumbent Generators are fully protected and fairly compensated by NYISO’s buyer-side mitigation rules – and that those Incumbent Generators are fully aware of that fact.²² Moreover, as Applicants explained in their Initial Brief, any Commission action that would upset the delicate balance between consumer interests and investor interests struck by FERC in approving the current rules protecting Incumbent Generators from uneconomic entry not only would enrich those Incumbent Generators at consumer expense, but also would either be preempted by FERC’s exclusive jurisdiction under the Federal Power Act or lead to the loss of market based rate authority for all suppliers serving New York’s wholesale power markets.²³

b. The Broader Threat To Competitive Markets Arising From The Incumbent Generators Baseless And Anticompetitive Claims In This Proceeding

Far from protecting consumers from a market failure as Mr. Younger suggested, acceptance of the Incumbent Generators’ uneconomic entry claims in this Article VII siting proceeding would in fact harm consumers by creating a new market failure. To the extent that the buyer-side mitigation rules mandated by FERC fully address the issue of uneconomic entry as Mr. Younger has previously testified, the injury to competition that would result from unnecessarily denying Applicants the ability to compete with the Incumbent Generators is clear.

²¹ Hearing Exhibit 160 at 2.

²² Captive utility ratepayers are also fully protected by Certificate Condition 15(b), which prohibits the Applicants from seeking cost-based rates for the HVDC Transmission System or use of the Astoria-Rainey Cable by shippers also using the HVDC Transmission system or from entering into contracts with any regulated utility or any state agency or authority. As Con Edison stipulated in accepting these provisions, its previous concern that the costs of the Facility and related upgrades in Canada may be imposed on its ratepayers “is addressed by the provisions of the changes to proposed Certificate Condition 15 agreed to herein and that this revised Condition will fully protect Con Edison’s customers.” Hearing Exhibit 150 at 11.

²³ Applicants IB at 17-20.

But even if those rules do not fully protect the Incumbent Generators from uneconomic entry, their uneconomic entry claims have no place in this Article VII siting proceeding. The problem with addressing uneconomic entry in the Article VII siting process is that it depends on the willingness of parties such as IPPNY and its members to bring that issue forward. Unfortunately, IPPNY has proven itself to be wholly incapable of policing uneconomic entry by any of its members.²⁴ In such circumstances, acceptance of the Incumbent Generators' claims concerning uneconomic entry in this proceeding will not protect consumers from any threat to competition that such uneconomic entry may pose, but will instead compound any injury to competition resulting from uneconomic entry by permitting IPPNY's members to pursue out of market contracts for their own projects serving New York City and surrounding areas free from competition from the Facility.

²⁴ Applicants have identified no less than ten proceedings before the Commission and the Siting Board between 2003 and the date of this Reply Brief in which IPPNY could have, but did not, require that the project developer demonstrate that its proposed new facility did not constitute uneconomic entry. These proceedings include Case 01-F-1276, where IPPNY intervened in support of the request of TransGas Energy Systems, LLC to construct a new 1,000 MW combined-cycle gas turbine generating facility in New York City, Case 08-T-1245, where IPPNY member Amerada Hess Corporation requested and received permission to construct an HVAC line to deliver 512 MW of electricity from its generating facility in Bayonne, New Jersey, to Con Edison's Gowanus Substation and Cases 10-E-0276 where the Commission granted lightened regulation to that facility; Case 10-E-0197, where the Commission issued a certificate of public convenience and necessity ("CPCN") to IPPNY member NRG Astoria Power LLC for the construction of its proposed 1,040 MW electric generating facility in Astoria, Queens, New York; Case 09-E-0250, where the Commission issued a CPCN to Astoria Generating Company, L.P. ("AGC") for the construction of its 100 MW South Pier Improvement Project; Case 00-F-1552, where the Siting Board granted an Article X certificate for the construction of AGC's proposed 1,816 MW Astoria Repowering Facility at Astoria, Queens, New York; Case 99-F-1164, where IPPNY member GenOn Bowline LLC recently filed to amend its Article X certificate to construct a new 750 MW combined-cycle generating plant in the Town of Haverstraw in Rockland County; and Cases 99-F-1191, 04-E-0058 and 08-E-1111 involving IPPNY members Astoria Energy LLC and Astoria Energy II LLC.

B. COST ISSUES

1. Record Evidence.

As Applicants noted in their Initial Brief, no party submitted testimony challenging Applicants' \$1.99 billion estimated cost of constructing the Facility. IPPNY did not address this issue in its Initial Brief, but Entergy's Initial Brief challenges this estimate on two grounds. First, Entergy complained that Applicants failed to include any cost for the converter station site in Astoria in their cost estimate.²⁵ As Applicants noted in their Initial Brief, however, their \$1.99 billion cost estimate covers only the capital costs of the Facility.²⁶ Applicants plan to lease the converter station site, and these lease expenses will be an operating expense rather than a capital cost.²⁷ Second, Entergy claims that cost overruns are likely to occur as a result of decisions by the Army Corps of Engineers ("ACOE") rejecting certain aspects of the Facility's proposed route.²⁸ As described in Section D.1 of this Reply Brief below, Entergy's claims that the ACOE will require modifications to the proposed route of the Facility are without merit.

2. The Facility Is Economic

The second pillar of the Incumbent Generators' opposition to the Facility is that, in their view, the Facility is "grossly" uneconomic and so must be rejected to prevent the injury to competition that they claim would flow from uneconomic entry. The Incumbent Generators have fallen far short of the showing required to justify such anticompetitive action. The repeated claims that the Facility is "grossly" uneconomic, featured by the Incumbent Generators in their

²⁵ Entergy IB at 21.

²⁶ Applicants' IB at 29.

²⁷ Entergy actually acknowledges this on page 21 of its Initial Brief, where it cites Mr. Jessome's statement that "lease payments would be made".

²⁸ Entergy IB at 22-23.

Initial Briefs, are based on two analyses presented by Mr. Younger. Both of these analyses have been demonstrated by Ms Frayer and Dr. Paynter to be incomplete and incorrect.

In the first of these analyses, Mr. Younger compared his estimate of the prices that the Facility will be able to charge to his estimate of the Facility's annual operating costs.²⁹ Mr. Younger's support for this pricing analysis directly contradicted his own testimony that price analyses are inherently unreliable due to the transitory nature of market conditions and that the only way to avoid this problem is by developing an analysis based on production costs.³⁰ The distorting impact of transitory market conditions on Mr. Younger's pricing analysis is clearly shown by the testimony of Ms Frayer and Dr. Paynter, both of whom demonstrated that the prices used by Mr. Younger in his analysis were artificially depressed due to the impact of the "Great Recession" and consequent reductions in consumer demand for electric power.³¹ As Dr. Paynter explained in his rebuttal testimony:

On the revenue side, Mr. Younger chose to analyze electricity prices in 2010 and 2011, which were severely depressed by short-term market conditions, including the "Great Recession." Prices in other years have been substantially higher, yielding much greater potential revenues. For example, applying the same method to prices in 2007 and 2008 yields \$20.28/MWh on average, roughly double the energy values from 2010-2011.³²

Moreover, as Applicants demonstrated in their Initial Brief, this analysis is also distorted by Mr. Younger's unsupported and unsupportable assumptions concerning HQ's opportunity costs.³³

Mr. Younger's second analysis of the economic viability of the Facility consists of a comparison between his stunted estimate of the Production Cost Savings associated with the

²⁹ TR at 474 line 14 to 475 line 2 (Younger Direct).

³⁰ TR at 518 lines 1 to 7 (Younger Direct).

³¹ TR at 350 line 31 to 352 line 14 (Frayer Rebuttal); TR at 188 line 20 to 189 line 1 (Paynter Rebuttal).

³² TR at 188 line 20 to 189 line 7 (Paynter Rebuttal).

³³ Applicants' IB at 88-90.

Facility and his estimated annual revenue requirements of the Facility determined by multiplying the projected costs of the Facility by the 16% “carrying cost” used in NYISO’s CARIS process to determine whether a proposed transmission upgrade creates sufficient cost savings to permit that project to be developed under cost-based rates. The errors in Mr. Younger’s estimate of the Production Cost Savings associated with the Facility are discussed in Section J.2 of this Reply Brief below. But this analysis also suffers from the more serious defect of answering a question that no one has asked: whether the Facility should be granted cost-based rates under NYISO’s CARIS process. Since Applicants are not seeking cost-based rates for the Facility, there is no need to compare the benefits of the Facility to the costs the Facility will impose on customers through utility rates.

The only witness to perform an actual analysis of the long-run costs of the Facility was Dr. Paynter. As Dr. Paynter made clear in his rebuttal testimony, his analysis is profoundly different from those sponsored by Mr. Younger in that it measures whether the Facility will be economically efficient from a societal perspective:

My analysis addresses the question of whether such investments are economically efficient from a societal perspective, i.e. whether the costs of the combined investments in CHPE and associated hydroelectric resources in Quebec are less than the costs of the likely alternative resources. Mr. Younger's analyses address a different question, namely whether CHPE could obtain financing as a stand-alone merchant project under current market conditions, which have been depressed due to the "Great Recession" and low natural gas prices. Although my analysis treated CHPE as entering service in 2015, this was only for convenience; the actual timing would be determined by the developer and its financial backers, and according to Mr. Jessome's testimony, would not be feasible until 2018 at the earliest.³⁴

³⁴ TR at 170 line 6 to 171 line 1.

Because Dr. Paynter’s analysis demonstrates that the total costs to society of the Facility will range from \$ 0.4 to \$ 2.6 billion less than the total costs to society of constructing and operating a CCGT and of providing the natural gas fuel required to operate that facility, the Facility will in fact be economically efficient from a societal perspective.³⁵ Accordingly, the Commission must reject the Incumbent Generators’ claims that the Facility is so “grossly” uneconomic that it would threaten competition as factually unsound.

Dr. Paynter’s long-run cost analysis also sheds light on another important contradiction in the positions taken by the Incumbent Generators in this and other proceedings. At the same time that the Incumbent Generators are claiming in this proceeding that the Facility is uneconomic because there will be no need for additional generating capacity to serve New York City prior to 2028, many of IPPNY’s members are moving forward with their new generating projects, which they contend are needed to serve New York City and surrounding areas.³⁶ Because Dr. Paynter has shown that the costs of the Facility are less than the cost of these rival projects, and because these rival projects are now being developed by IPPNY’s members on a merchant basis without any subsidy, it is clear that the Facility can also be developed successfully on a merchant basis without the need for any subsidy. And, to state the same point in another way, it is completely inappropriate and disingenuous for IPPNY to contend that the Commission should deprive the Facility of the opportunity to compete on a level playing field with the less economic gas-fired generating facilities that its members are developing to serve the same markets that the Facility seeks to serve.

³⁵ TR at 199 lines 15 to 19 (Paynter Rebuttal). As Applicants demonstrated on page 35 of their Initial Brief, this is a conservative estimate that fails to recognize the facts that: (1) TransÉnergie’s OATT specifically prohibits it from passing the \$357 million cost of interconnecting to the Facility through to customers; and (2) the Quebec Energy Board has also limited TransÉnergie to recovering only \$918 million of the \$1.8 billion in interconnection costs for the Romaine Project from shippers.

³⁶ See Applicants’ IB at 15 n.34.

For these reasons, and because of the other defects in Mr. Younger’s analyses detailed in Applicants’ Initial Brief, the Commission must find that the Incumbent Generators have fallen far short of demonstrating that the Facility is in fact uneconomic. In such circumstances, the Commission must leave the issue of the economics of the Facility to be resolved by market forces. This can only occur if the Commission rejects the Incumbent Generators demand that the Commission protect them from -- and thereby deprive consumers of -- the enhanced competition that would stem from a Commission order authorizing construction and operation of the Facility.

3. Contracts and Open Season

IPPNY does not address this issue in its Initial Brief. Contradicting its claim elsewhere in its Initial Brief that Applicants and HQ are joined at the hip and should be regarded as a single entity, Entergy claims that because Applicants’ open season has not yet occurred, Applicants’ claim of dramatic air emissions benefits from the Facility “remain mere speculation.”³⁷ This contention is addressed in Section J.4 of this Reply Brief.

D. PROBABLE ENVIRONMENTAL IMPACTS

1. Underwater Environmental Impacts

a. Cable Burial Depth

- i. The proposed cable route is consistent with previous permits issued by the Army Corps of Engineers (“ACOE”) allowing the burial of structures within the federally-maintained navigation channel.**

Entergy’s Initial Post-Hearing Brief³⁸ grossly mischaracterizes the correspondence between the Applicants and the ACOE and neglects prior ACOE determinations allowing the placement of structures in federally-maintained navigation channels. Entergy incorrectly states

³⁷ Entergy IB at 27.

³⁸ Entergy IB at 28-31.

that the ACOE has already rejected the Applicants' proposal to place approximately nine (9) miles of cable longitudinally within the federally-maintained navigation channel via correspondence dated July 5, 2011. Entergy also alleges that the Applicants have departed from prior ACOE and Public Service Commission ("Commission") precedent by proposing to bury the cables at a shallower depth than three prior projects located in waters of the State.

Contrary to Entergy's assertions, the conditions set forth in individual ACOE permits regarding the longitudinal installation or burial depth of submarine cables within federally maintained navigation channels are established on a case-by-case basis. Thus, while Entergy suggests that the ACOE articulated universal standards in the agency's letter of July 5, 2011 to the Applicants,³⁹ permit conditions are often project specific. In fact, in the recent Bayonne Energy Center proceeding (one the three cases which Entergy puts forth as precedent-setting), the ACOE issued a permit⁴⁰ authorizing Bayonne to install its cables across or along the following federal navigation channels: Kill Van Kull Navigation Channel, Pierhead Navigation Channel, Port Jersey Navigation Channel, Anchorage Navigation Channel, Buttermilk Navigation Channel, Red Hook Navigation Channel, and Gowanus Creek Navigation Channel.⁴¹ In 2011, the ACOE authorized a burial depth for Bayonne of "at least eight (8) feet below the

³⁹ Hearing Exhibit 216, Attachment D (Updated ACOE Application) (stating, in pertinent part, that "[t]he Corps of Engineers does not permit permanent structures within the length of the right of way, including side slopes, of a Federal navigation channel (perpendicular crossings are permitted)" and also stating that burial must be "fifteen (15) feet below the authorized depths when crossing a federally maintained navigation channel.").

⁴⁰ Bayonne Energy Center, LLC ACOE Permit, NAN-2008-01564-M3, July 7, 2011, *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={EADD1AF6-8451-4660-A9D4-5C150BB29BA8}>.

⁴¹ Case 08-T-1245, *Application of Bayonne Energy Center, LLC for a Certificate of Energy Center, LLC for a Certificate of Environmental Compatibility and Public Need for the Construction of the New York State Portion (Kings County) of a 6.6 Mile, 345 kV AC, 3 Phase Circuit Submarine Electric Transmission Facility Pursuant to Article VII of the PSL*, Order Adopting the Terms of Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need, With Conditions, and Clean Water Act § 401 Water Quality Certification (Issued and Effective Nov. 12, 2009), *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={8BF803F7-E587-439E-AB32-83C01BB41401}>.

Federal Navigation Channels' Congressionally authorized depth.”⁴² Accordingly, not only has the ACOE previously authorized longitudinal projects within the navigation channel, the agency has approved depths that are shallower than those which have been proposed by the Applicants. Entergy's argument also ignores the fact that the Applicants are required, pursuant to Revised Certificate Condition 95(a)(i), to bury the cable at a depth of fifteen (15) feet in the federally maintained navigation channel.

Entergy's brief also improperly suggests that the approval of this Facility as proposed in the Joint Proposal for Settlement would be inconsistent with previous Commission decisions regarding burial depths. As Entergy's brief points out, in the Bayonne proceeding, the Commission set the burial depth to be “consistent with the requirements of the Certificate Holder's U.S. Army Corps of Engineers permit.”⁴³ In this proceeding, Revised Certificate Condition 11 requires that, prior to construction, the Applicants must obtain permits pursuant to Section 404 of the Federal Clean Water Act and Section 10 of the Federal Rivers and Harbors Act” from the ACOE. Thus, Entergy's contention is misplaced, because the Applicants must secure approvals and comply with the ACOE's requirements as an express condition of the Certificate.

Entergy's claims in its Initial Post-Hearing Brief also mischaracterize the Applicants' discussions with the ACOE. Contrary to Entergy's assertions, the ACOE has not made a final determination regarding the consistency of the Facility with existing federal regulations. In the

⁴² Bayonne Energy Center, LLC ACOE Permit, NAN-2008-01564-M3 at 1 (July 7, 2011), *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={EADD1AF6-8451-4660-A9D4-5C150BB29BA8}>.

⁴³ Case 08-T-1245, *Application of Bayonne Energy Center, LLC for a Certificate of Energy Center, LLC for a Certificate of Environmental Compatibility and Public Need for the Construction of the New York State Portion (Kings County) of a 6.6 Mile, 345 kV AC, 3 Phase Circuit Submarine Electric Transmission Facility Pursuant to Article VII of the PSL*, Order Adopting the Terms of Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need, With Conditions, and Clean Water Act § 401 Water Quality Certification (Issued and Effective Nov. 12, 2009) at 18.

event that, as Entergy suggests, the ACOE elects to establish deeper burial depths, Entergy clearly states that this would be “less environmentally harmful,”⁴⁴ which further supports the Commission’s determination under PSL §126.1(c) that the facility represents the minimum adverse environmental impact.

The Public Service Law simply requires the Commission to make a determination based on whether “the facility represents the minimum adverse environmental impacts, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations including but not limited to, the effect on agricultural lands, wetlands, parklands and river corridors traversed.” Although the language in Section 126 is fairly broad, it does not, as Entergy seems to suggest, justify the denial of the Certificate based on a pending federal process conducted by a federal agency completely independent and outside of the Article VII process. Accordingly, a Certificate should be granted for the Facility, because it is consistent with PSL §126.

ii. The environmental effects of abandoning the HVDC Transmission line at the end of its useful life will be insignificant.

In its Initial Post-Hearing Brief,⁴⁵ Entergy states in passing that the Applicants have failed to evaluate the “potential environmental impacts” of abandoning the HVDC Transmission line at the end of its useful life. This specific issue was not raised in Entergy’s initial statement in opposition and Entergy fails to provide even one example of a “potential” impact.

The record shows that Entergy’s conclusory argument regarding “potential” impacts is without merit, not only because of the inert, solid-state structure of the direct current cable, but also because, even when operating, the Facility will have insignificant impacts. The cable type

⁴⁴ Entergy IB at 28.

⁴⁵ Entergy IB at 45.

selected, XLPE, is a solid state design with no fluids that could leak over time.⁴⁶ Moreover, once the cables are de-energized, even the minor magnetic fields and heat produced by the cable will no longer be present.

Additionally, it is unclear why Entergy assumes that it is at the Applicants' discretion whether the cables should be removed or remain in place. The Applicants will need to abide by the conditions set by the New York Office of General Services ("NYSOGS") in its Use and Occupation of Lands Underwater Easement.⁴⁷ Should NYSOGS require that the Applicants remove all or portions of the cable, the minimal impacts would be similar to those of a repair operation, where cable sections are cut and lifted out of the water.⁴⁸

The unspecified "potential environmental impacts" referenced in Entergy's brief are clearly illusory given the structure of the cable being used and the fact that the cable will be both buried and de-energized and subject to the authority of NYSOGS. Indeed, the parties offering the ESS report which Entergy relies upon,⁴⁹ Scenic Hudson and Riverkeeper, have each signed on to the Joint Proposal for Settlement. Accordingly, the Applicants have demonstrated that the long term presence of the cable represents a minimum adverse impact consistent with PSL §126.

⁴⁶ Hearing Exhibit 63 at 85 (DPS-1 through DPS-190).

⁴⁷ Public Lands Law §§ 3 and 75; 9 NYCRR Parts 270 and 271.

⁴⁸ Hearing Exhibit 65 at 11 (APA-1 through APA-9).

⁴⁹ Hearing Exhibit 89 at 33, 43, 44, and 47 (Technical Review Report by ESS, submitted by Riverkeeper, Inc. and Scenic Hudson (January 21, 2011)).

b. Impact on Endangered Species

i. The Applicants designed the route in cooperation with the Signatory Parties to avoid protected and potentially important habitats for threatened and endangered species.

Entergy's Initial Post-Hearing Brief⁵⁰ argues that the Applicants have not done enough to characterize the possible nature of impacts to shortnose and Atlantic sturgeon due to the installation of concrete mats and exposure to electromagnetic fields ("EMF"). This contention ignores months of collaborative discussions between the Applicants and the Signatory Parties, including the NYSDEC, NYSDOS, DPS Staff, Riverkeeper, Scenic Hudson and Trout Unlimited, concerning the avoidance or minimization of impacts to threatened and endangered species and their habitats.

Working in collaboration with the NYSDEC and other Signatory Parties, the Applicants have developed a route for the Facility that avoids, to the maximum extent possible, areas recognized as sensitive habitat for aquatic species.⁵¹ In their Conditional Concurrence with Consistency Certification, the New York State Department of State ("NYSDOS") noted: "The most certain way to minimize the impact on benthic habitats is by siting the cable route to avoid

⁵⁰ Entergy IB at 31-36.

⁵¹ Paragraph 51 of the JP requires Applicants to "take all necessary measures consistent with this Joint Proposal, the Proposed Certificate Conditions, the BMPs and the EM&CP Guidelines, to avoid and/or minimize impacts to threatened or endangered wildlife species listed at 6 N.Y.C.R.R. Part 182 ("TE species") and their occupied habitats that are found to be located in the Construction Zone."

Paragraph 54 of the JP provides, in pertinent part, that "NYSDOS, Division of Coastal Resources, together with the NYSDEC, has designated seventeen (17) Significant Coastal Fish and Wildlife Habitats ('SCFWHs') within or in the vicinity of the HVDC Transmission System area. The routing as outlined in this Joint Proposal would avoid directly transiting twelve (12) of these areas. Within the remaining five (5) SCFWHs (Kingston Deepwater Habitat, Esopus Estuary, Poughkeepsie Deepwater Habitat, Hudson River Mile 44-56, and Lower Hudson Reach), the settlement parties have identified certain 'Exclusion Zones' (Appendix B) that will be avoided to the maximum extent possible. The overall installation plan and construction windows will be designed to accommodate location-specific and season-specific restrictions intended to avoid and/or minimize potential impacts on TE species." (footnote omitted).

particularly sensitive habitats.”⁵² Significant Coastal Fish and Wildlife Habitats, including Haverstraw Bay and those located in the upper Hudson River, were avoided to the extent practicable and a general assessment of the potential impacts on each has been developed and is in the record in this proceeding.⁵³ As discussed in the Applicants Initial Brief,⁵⁴ the Signatory Parties also identified certain “Exclusion Zones” to be avoided by the Applicants to the maximum extent practicable. These “Exclusion Zones” were proposed by the NYSDEC for the specific purpose of going above and beyond identifying legally protected habitats to include other areas that NYSDEC considered to be areas of high quality habitat.⁵⁵ The record is clear that the Applicants have avoided important habitats identified by the Signatory Parties to the maximum extent practicable. Therefore, Entergy’s apparent assumption that all supposedly impacted benthic habitat is also sturgeon foraging habitat is completely speculative and unsupported.⁵⁶

Entergy’s Initial Brief also grossly exaggerates the portions of the Hudson River in which concrete matting will be required. Entergy cites data provided to the NYSDOS by the Applicants’ consultants as support for its claim that the impact of concrete matting represents

⁵² Letter from the New York State Department of State to Applicants regarding Conditional Concurrence with Consistency Certification (June 8, 2011) at 6, *available at* http://docs.dos.ny.gov/coastal/cd/F-2010-1162%20CondCCR_web.pdf.

⁵³ *Id.*

⁵⁴ Applicants’ IB at 48.

⁵⁵ Hearing Exhibit 102 (Description of Protected Areas within Hudson River); Hearing Exhibit 127: Revised Certificate Condition ¶ 156(b)(1).

⁵⁶ Proposed Condition 159(t) requires Applicants to include in their EM&CP “a work plan for reducing magnetic fields, which will include documentation of the calculation of anticipated average magnetic field levels, overland and underwater with the Facility in operation.” The record makes clear that magnetic field strength can be reduced to very low levels by Applicants’ commitment to bury the Facility’s two HVDC cables together in a single trench. *See* Hearing Exhibit 116 at 5 (“when the cables are touching, the magnetic field strength level at one meter above ground is well under the 200 mG standard.”).

“approximately 6.41 miles of indeterminate width.”⁵⁷ However, as the concrete matting will function in essentially the same manner as the hard substrate in terms of habitat, the effective length of impact is 25% less than Entergy argues.⁵⁸ Even this level is an overstatement, as the same letter to the NYSDOS specifically points out that the final design will “optimize the placement of protection to minimize the area of the bottom covered by concrete mattresses or other protective devices” and that “[t]he actual area of additional protection is likely to be substantially less than the total width of the cable/pipeline area as depicted on the NOAA charts.”⁵⁹ The Applicants have therefore demonstrated that not only is the known extent of matting limited, but that the final design will further reduce this metric. The Applicants have also agreed under Revised Certificate Condition 163 to perform a pre- and post-energizing survey of benthic organisms to compare current and post-energizing benthic communities. Finally, Entergy has provided no information that would suggest that the level of matting proposed is “significant” in relation to the existing habitat.

Regarding the potential impacts of EMF, contrary to Entergy’s unsubstantiated arguments, the Applicants have developed multiple models of expected EMF and heat fields at varying depths showing that impacts, if any, will be minimal.⁶⁰ The majority of this work was completed by Dr. William H. Bailey of Exponent Inc., a nationally recognized expert in the field.

Commenting on the potential EMF impact on eggs and larvae, Dr. Bailey stated that “[the] data

⁵⁷ Entergy IB at 35.

⁵⁸ See Hearing Exhibit 121 at 193 (“In areas of hard bottom, the mats will create similar habitat, and in soft bottom areas the mats will, in essence, create small artificial patch reefs. The surface of the mats may develop an epibenthic community over time as well as provide structure that is important for some benthic species and fish. The mats will have an insignificant effect on near bottom hydrodynamics, which may be similar to the conditions found in rocky bottom areas.”).

⁵⁹ Hearing Exhibit 92 at 3 (Letter to New York State Department of State dated February 18, 2011).

⁶⁰ Hearing Exhibit 24 at 10-16, 36-37 (Appendix B: Requests for Additional Information (Appendix B to the Supplement)), Hearing Exhibit 64 (NYSDEC-1 through NYSDEC-6), Hearing Exhibit 87 (Applicants’ Letter to New York State Department of State regarding Updated Alternatives Analysis (January 18, 2011)), Hearing Exhibit 92, Hearing Exhibit 100.

suggests that much greater magnetic fields are required than the proposed cable will produce, in order to create deleterious effects on eggs and larvae” and that “as a percentage of the overall spawning numbers, the area of potential effect is small and extremely weak.”⁶¹ The Applicants have further demonstrated their willingness to minimize the effects of the cables by agreeing to “install the cables to the maximum depth achievable that would allow each pole of the bi-pole to be buried in a single trench using a jet-plow”⁶² outside of the Federal navigation channels, which will further reduce EMF.⁶³ The Environmental Management and Construction Plan (“EM&CP”) will also include “a work plan for reducing magnetic fields . . . overland and underwater with the Facility in operation.”⁶⁴ Lastly, the Applicants have agreed to perform a pre- and post-energizing study of magnetic fields to compare predicted values against actual field strength.⁶⁵ Accordingly, the Applicants, after having undertaken extensive studies, concluded that the EMF produced by the Facility would have a minimum adverse impact consistent with the requirements of PSL §126.

Based on the information available in the record in this case, the Applicants have identified and avoided or minimized environmental impacts to ensure that the Facility represents a minimal adverse environmental impact consistent with PSL §126. The Facility is specifically routed to avoid the important foraging habitats, and impacts from the concrete mattresses or EMF, if any, in the remainder of the route will be minimal. Accordingly, Entergy’s claims should be rejected and a Certificate should be granted for the Facility.

⁶¹ Hearing Exhibit 64 at 59.

⁶² Hearing Exhibit 127: Revised Condition ¶ 95(a)(ii).

⁶³ Hearing Exhibit 100 at 2-3.

⁶⁴ Hearing Exhibit 127: Revised Condition ¶ 159(t).

⁶⁵ Hearing Exhibit 127: Revised Certificate Condition ¶ 163.

2. **Overland Environmental Impacts**

a. **Astoria Converter Station Site**

- i. **The testimony and exhibits presented in the evidentiary hearing demonstrate that the environmental risks of the Luyster Creek Site, if any, are not significant and have been properly identified by the Applicants.**

In its Initial Post-Hearing Brief,⁶⁶ Entergy describes the Luyster Creek Site (“Site”) as “heavily contaminated” without providing any factual documentation for this characterization of the Site. In fact, the evidence in the record shows that while other portions of the Astoria site may be heavily contaminated by virtue of their previous use as a site for a Manufactured Gas Plant (“MGP”), the proposed site of the Facility’s converter station is more than half a mile away from that former MGP site and has not been used for the kinds of operations likely to result in substantial soil contamination as Entergy suggests. Specifically, Hearing Exhibit 108 states that:

Although the parcel identified as the proposed location for the Luyster Creek converter station lies within the MGP Site currently being investigated under the DEC Region 2 RCRA Corrective Action Program, the Luyster Creek Site is more than 3,000 feet from the location of the former MGP and former sintering plant, both of which were located on the western side of the MGP Site. Historical records of the Luyster Creek Site indicate that the location of the proposed converter station consisted primarily of undeveloped land prior to 1959. Since 1959, the Luyster Creek Site has been used for concrete casting operations, storage of materials associated with Con Edison’s maintenance of electrical systems, storage and transfer of di-electric fluids, and storage of maintenance materials. Due to existing facilities on the parcel containing the Luyster Creek Site, sampling occurred on the periphery of the parcel and indicates only low levels of contaminants associated with former uses. Potential contamination on the remainder of the Luyster Creek Site can be addressed through existing NYSDEC programs and requirements and the proposed construction of the converter station at the parcel should

⁶⁶ Entergy IB at 37-39.

not conflict with any planned investigation or environmental remediation of the MGP Site.⁶⁷

The Applicants have justifiably relied on Hearing Exhibit 108 and have also provided testimony summarizing certain environmental reports made available to them by the owner of the site.⁶⁸ While an environmental report submitted to Con Edison in November of 1999 did not provide definitive information on the location and closure of six abandoned underground storage tanks (“USTs”), available mapping suggest that it is not likely that a UST will be unearthed during construction activities.⁶⁹ The Applicants would note that the proper removal of such a tank, if located, would be beneficial to the environment as compared to having it break down and leak its contents over time. An additional independent review of the available information by a third party concluded in 1999 that “the proposed development of the site would not be anticipated to require any extensive modifications to typical construction practices.”⁷⁰ The NYSDEC’s review of the best environmental information available during that same time period did not result in any additional remediation activities being proposed in the location of the proposed converter station site.⁷¹ Accordingly, the record is clear that the typical environmental issues associated with a historically industrial site have been assessed and that the installation of the converter station would have a minimum adverse impact, if any.

In 2001, the New York City Industrial Development Corporation (“NYCIDC”) conducted a review of the project’s environmental impacts pursuant to the State Environmental

⁶⁷ Hearing Exhibit 108 at 28029.

⁶⁸ TR at 14-19 (Murphy Direct).

⁶⁹ TR at 15, line 21 to 16, line 2 (Murphy Direct).

⁷⁰ Hearing Exhibit 135 at 2 (SM-2 Sean Murphy Direct Testimony Exhibit 2).

⁷¹ TR at 17, lines 8-18 (Murphy Direct).

Quality Review Act.⁷² The review was coordinated, meaning the Commission was duly notified and included as an involved agency. The NYCIDC initially designated the project as a Type I Action, which carries a presumption of significant environmental impact that must be affirmatively rebutted in order to avoid the preparation of an in-depth Environmental Impact Statement (“EIS”). In the course of its review, the NYCIDC concluded that even though there was contamination present on the Site, its proposed use for industrial and manufacturing purposes would not pose any significant environmental impacts, and therefore no EIS was necessary; this conclusion was memorialized in a July 10, 2001 Negative Declaration, the issuance of which ended the environmental review process. In its 2002 Order, the Commission expressly acknowledged and concurred with NYCIDC’s finding of no significant environmental impacts and the decision not to require an EIS.⁷³ Accordingly, the Commission made its own determination, premised directly upon NYCIDC’s assessment, that it would not be necessary to conduct any additional environmental review relating to the Site’s use for industrial/manufacturing purposes. On April 26, 2012, the New York Court of Appeals held that the Commission’s 2002 Order was not exclusively conditioned upon the Site’s use for only one specific use, *i.e.* an envelope factory, thereby implying that the Applicants could use the Site for the Facility under the same environmental conditions.⁷⁴

Entergy has presented no evidence whatsoever that environmental conditions on the property have substantially changed so as to disturb or even call into question the previous Commission decision. In the absence of such evidence, and given the Court of Appeals’ express

⁷² Case 02-M-0741, *Petition of Consolidated Edison Company of New York, Inc. for approval of the Transfer of Approximately 21.3 Acres of Land Located in its Astoria Complex, Borough of Queens, New York City, to Luyster Creek, LLC*, “Order Approving Transfer Subject to Conditions” at 5 (Nov. 25, 2002).

⁷³ *Ibid*, at 15.

⁷⁴ TR at 9, lines 4-10 (Murphy Direct).

refusal to construe the Commission's 2002 Order so narrowly as to foreclose the Site's use for other industrial purposes, the Applicants' proposed use of the Site for the Facility is entirely consistent with and conforming to the conclusions reached in both the NYCIDC's environmental review and the Commission's express concurrence with that review.

Entergy further argues that the nature of environmental impacts associated with the converter station cannot be understood without the Applicants completing their own on-site investigation. Again, they offer no evidence or even suggestions as to how conditions at the Site might have changed so as to require such investigation. Given the extensive record of previous environmental studies in the area as well as the NYSDEC's concurrence in the Joint Proposal for Settlement and their Initial Post-Hearing Brief⁷⁵ in this proceeding regarding the suitability of the Site, it is unclear how any proposed development could meet the standard which Entergy would have the Commission set.

- ii. **The revised Certificate Conditions and the Environmental Management and Construction Plan ("EM&CP) that will be developed based on the EM&CP Guidelines ensure that contamination found at the Luyster Creek Site, if any, is addressed in an environmentally safe and responsible manner.**

In addition to the ample documentation contradicting Entergy's characterization of contamination at the Luyster Creek Site as "heavy," the record shows that the Applicants have given due consideration for public and worker safety during soil excavation activities. The Record contains the following measures that will ensure that environmental contamination, if any, at the Site will have a minimum adverse impact consistent with PSL §126:

Revised Certificate Condition 64 requires that appropriate measures to minimize fugitive dust and airborne debris from construction activities be implemented and that appropriate state

⁷⁵ Entergy IB at 14.

agencies be contacted if contamination is discovered that could lead to volatilization or off-gassing. This Condition also requires the Certificate Holders to comply with NYSDEC remediation requirements and to “conform to practices and procedures described in the DER-10/ Technical Guidance for Site Investigation and Remediation and the NYSDOH Generic Community Air Monitoring Plan, to the extent applicable.

Revised Certificate Condition 146 requires that the final design plant conform to the requirements of, among other agencies, the U.S. Occupational Safety and Health Administration (“OSHA”), NYSDEC, and the New York State Department of Labor.

Revised Certificate Condition 14 of the Proposed EM&CP Guidelines and Section 12.5.1 of the Proposed Best Management Practices (“BMPs”) both require the development of a comprehensive Soil Management plan that includes “procedures for identifying, sampling, and handling contaminated soils,” with the BMPs noting that any construction activities at a site where the contamination was located “will be conducted in accordance with all conditions issued by the NYSDEC and DPS.” This standard of care is more than adequate to ensure the public and worker safety will remain a priority concern during construction activities. In the event of contamination, any remediation plan will be developed in consultation with NYSDEC and DPS.

The information provided in testimony and the hearing record demonstrates that the Applicants have justifiably relied on previous investigations of the Site. Furthermore, the Revised Certificate Conditions mentioned above will adequately address contamination, if any, found at the Site. Accordingly, use of the Site will have a minimum adverse impact consistent with PSL § 126.

3. **Communications**

4. **Electric Fields**

5. **Magnetic Fields**

- a. **The testimony and exhibits presented in the evidentiary hearing demonstrate that there will be an insignificant, if any, effect on the habitat or migration of Atlantic or shortnose sturgeon.**

In its Initial Post-Hearing Brief,⁷⁶ Entergy makes a series of statements with regards to the potential impacts of the facility on aquatic species. Entergy's claim is based entirely on its inaccurate characterization of the record as lacking adequate studies and input from experts in the field regarding the inconsequential impacts of the magnetic field on aquatic species. Entergy contends that the Applicants have not assessed the influence of the magnetic field on sturgeon in deepwater habitat and sturgeon orientation and migration. Yet this very issue is discussed in numerous documents, most notably in an interrogatory response to the NYSDEC.⁷⁷ As Dr. Bailey notes, science is incapable of "proving the negative," i.e. that there will be no impact, but the research is clear that that no single environmental stimulus such as current flow, light, smell, taste, magnetic field, temperature, salinity, or other factors dominates migratory behavior.⁷⁸ Marine organisms have the means to coordinate and make use of multiple cues and resolve discrepancies.⁷⁹ As Dr. Bailey concludes, "research studies on a variety of fish and other marine species have not reported adverse effects of exposure to magnetic fields."⁸⁰ Therefore, there is no basis to assume that there would be an impact on migration. Nonetheless, the Applicants have agreed under Revised Certificate Condition 163 to conduct a Pre- and Post-Energizing

⁷⁶ Entergy IB at 39-44.

⁷⁷ Hearing Exhibit 64 at 56-58.

⁷⁸ *Id* at 57.

⁷⁹ *Id.*

⁸⁰ *Id.*

study of Atlantic sturgeon as well as an Environment Trust fund with a nominal value of \$117 million to address any aquatic impacts associated with the construction and operation of the Facility.⁸¹

Entergy also claims that “[t]here is abundant evidence on this record of potential adverse effects from exposure to EMF, in particular to DC EMF, on aquatic organisms in general.”⁸² This statement is not supported by citation to any evidence in the record in this case. In fact no such record evidence exists. Instead, the only record evidence bearing on the issue of the effects of EMF on aquatic organisms is a literature review provided by Dr. Bailey.⁸³ In that analysis, Dr. Bailey concluded, based on the best available information, that it would require greater magnetic fields than would be produced by the proposed cable for there to be a deleterious effect on eggs and larvae.⁸⁴ It should be noted that Dr. Bailey’s conclusions were reached when the Facility was proposed to be installed to a three-foot burial depth, compared to the presented expected depth of six feet. Thus, the Facility’s magnetic fields at the bottom of the Hudson River will be substantially below the levels considered by Dr. Bailey when he reached this conclusion.

Entergy also contends that the expected magnetic field in areas where the cables cannot be buried cannot be ascertained from the record, which demonstrates a lack of understanding of the science involved. EMF emissions are not dependent on the surrounding environmental conditions such as soils or sediments. Instead, the intensity of the magnetic field is a function of distance from the cables. The record provides ample modeling data on the intensity of the

⁸¹ Hearing Exhibit 127; Revised Certificate Condition ¶ 163.

⁸² Entergy IB at 41.

⁸³ Hearing Exhibit 64 at 58-59.

⁸⁴ *Id* at 59.

magnetic field at varying distances from the cables as well as the expected configuration of various protective covering options, which provides the basis for concluding that the effects, if any, due to magnetic fields in those limited areas where the cables are not buried will be minimal.

Entergy's claim that a decision pursuant to PSL §126 must start with the assumption that the Facility will generate a magnetic field sufficient to have more than a minimum impact is wholly unsubstantiated and commits the logical fallacy of assuming that which is to be proven. The Applicants have offered peer-reviewed studies and expert analysis demonstrating that the Facility's magnetic fields will not have any significant adverse impacts on aquatic species, consistent with PSL §126. Entergy has provided no documents that counter the Applicants' proof and indeed did not even raise magnetic fields as a specific issue during its Initial Statement in Opposition. Accordingly, this claim must be rejected.

E. MINIMUM ADVERSE ENVIRONMENTAL IMPACT

1. **Alternative Technologies**
2. **Alternative Routes**
3. **Alternative Locations for Converter Station**
4. **Alternative Methods to Fulfill Energy Requirements**

Entergy alone criticizes the JP for failing to consider alternative methods to supply the energy and capacity that would be provided to New York City and surrounding communities by the Facility. Entergy contends that Applicants should be required to demonstrate that the Facility is superior to locally sited new generation units and also criticize the consideration of demand side alternatives in the JP.⁸⁵ Both these claims must be rejected.

⁸⁵ Entergy IB at 46.

At the outset, it is crucial to keep in mind that the JP provides for development of the Facility on a purely merchant basis with no reliance on cost-based rates set by any federal or state regulatory authority and no reliance on contracts between Applicants and any regulated utility or governmental entity. In contrast, additional demand-side measures must either be supported by ratepayer funds or required by new legal mandates.⁸⁶ Because the Facility will not be supported by ratepayer funds or legal mandates, programs such as increased reliance on demand-side management that do require such additional funding or new mandates cannot be counted on to provide the benefits that will be provided by the Facility. To state the same point another way, to the extent that the Commission is prepared to commit additional rate-payer funds or state or local authorities are prepared to adopt new legal mandates to promote these programs, approval of the Facility will not stand as an obstacle to any such programs. Because the Facility will not interfere in any way with the ability of the Commission or other governmental authorities to pursue these non-market programs, these non-market programs cannot be considered to be “alternatives” to a merchant project such as the Facility.

Entergy’s claim that the supporters of the JP have failed to consider local generation as an alternative to the Facility is incorrect. In fact, all of the benefits analyses in this case consist of a base case in which energy requirements are met using local generation without the Facility and a project case in which the Facility supplements and/or displaces local generation. Thus, for example, Ms Frayer’s analysis of the air emissions benefits of the Facility, compared to producing a similar amount of electricity using local generation, provides clear evidence of the environmental superiority of the Facility over local generation. Similarly, Dr. Paynter’s comparison of the long-run costs of the Facility to those of an equivalent gas-fired generating

⁸⁶ See Hearing Exhibit 3 at 6 (“Further energy conservation would require additional legislative or regulatory incentives or mandates.”).

facility in New York City clearly establishes the superiority of the Facility from the overall perspective of social costs. Entergy's suggestion that the Commission should *ignore* Dr. Paynter's testimony comparing the Facility's overall production costs to those of a combined-cycle gas turbine generating facility in New York directly contradicts Entergy's claim in Section J.1 below that the Commission should focus *exclusively* on evidence of such Production Cost Savings in evaluating the benefits of the Facility to society. Accordingly, this claim must be rejected.

F. UNDERGROUNDING CONSIDERATIONS

G. CONFORMANCE TO LONG-RANGE PLANS FOR EXPANDING THE GRID

Notwithstanding the Energy Price Savings, Production Cost Savings, air emissions reductions and employment benefits of the Facility, the Incumbent Generators, Central Hudson, and IBEW all urge the Commission to reject the Facility on the ground that it is merely "an extension cord running from a source of power in Canada directly to a voltage source converter station in Astoria, Queens, New York" with no "on ramps" for existing or new generation in upstate New York.⁸⁷ Significantly, however, these parties fail to explain how this fact brings the Facility into conflict with long range plans for expanding the NYS Transmission System or otherwise justifies rejection of the Article VII certificate at issue in this proceeding. In fact, the Commission has granted Article VII certificates to a number of other projects that serve only to connect a supply source located outside the New York Control Area ("NYCA") to loads within the NYCA. In each of these cases, the Commission has found the proposal before it to be in the public interest and consistent or not inconsistent with long range plans for expanding the NYS

⁸⁷ Entergy IB at 47; IPPNY IB at 12; Central Hudson IB at 12; IBEW IB at 11.

Transmission System.⁸⁸ Indeed, Entergy impeaches its own claims in this regard when it urges the Commission to apply the precedents set in one of these cases to its review of the Facility.⁸⁹

These parties also assert that the Facility will do nothing to relieve any of the constraints that exist today on the New York State Transmission System, but again fail to cite to any record evidence to support that assertion. In fact, the record makes clear that the Facility will reduce congestion over New York's constrained Total-East interface, as Mr. Younger acknowledged on cross examination:

Q. In light of your testimony here today, do [you] agree with the statement that, "The project will not alleviate existing congestion"?

A. I would say that some of the existing congestion would be reduced because of less pressure to flow power into New York City.⁹⁰

IBEW in particular complains that because the Facility is not designed to provide "any access to the line to generation resources in Western and Upstate New York," that the Facility would "negatively impact existing jobs and cripple economic development in Western and Upstate New York."⁹¹ Central Hudson similarly claims that the Facility would "blockade"

⁸⁸ Case 08-T-1245, *Application of Bayonne Energy Center, LLC for a Certificate of Environmental Compatibility and Public Need for the Construction of the New York State Portion (Kings County) of a 6.6 Mile, 345 kV AC, 3 Phase Circuit Submarine Electric Transmission Facility Pursuant to Article VII of the PSL*, 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 Certification, slip op. at 19 (Issued and Effective November 12, 2009)("The Transmission Facility conforms to a long-range plan for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems, which will serve the interests of electric system economy and reliability."); 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, slip op. at 57 (Issued and Effective September 15, 2010)("Thus, the HTP facility is neither fully consistent nor entirely inconsistent with the achievement of the SEP's objectives. Undoubtedly, the facility will serve the interests of electric system economy and reliability.").

⁸⁹ Entergy IB at 7-9.

⁹⁰ TR at 589 lines 20 to 25.

⁹¹ IBEW IB at 10-11.

existing generation in upstate New York.⁹² Neither of these claims can withstand scrutiny. Critically, IBEW and Central Hudson fail to explain how generators in western and/or upstate New York will be worse off if the Facility is constructed than they are today. To the extent that those existing generating facilities currently have access to downstate markets, that access will not be cut off and will in fact be enhanced by the reductions in congestion over New York's constrained Total-East interface resulting from the Facility. To the extent that those existing generating facilities are currently cut off from downstate markets by congestion on New York's HVAC transmission system, the Facility will not be the cause of their lack of access to those downstate markets. Moreover, the reduction in congestion over New York's Total-East interface resulting from the Facility will actually enhance their access to downstate markets. In addition, because the Facility will be developed on a merchant basis and without the need for any financial commitment by New York State or any subdivision or agency thereof, any state funds that may be available for upgrades to address existing constraints on New York's HVAC system will remain fully available once the Facility is built.

Many of these parties also contend that the Facility should be held to a stricter standard because of its innovative use of submarine cable technology to locate its lines beneath the Hudson River and Lake Champlain. Entergy in particular claims that the Facility would transmit "unnecessary electricity directly from Canada to New York City along valuable and arguably 'once in a lifetime' rights of way without any credible showing that consumers will benefit."⁹³ Entergy's claim that the electricity supplied by the Facility is "unnecessary" is directly contradicted by Mr. Younger's admission that the Facility would provide Production Cost Savings⁹⁴ and by

⁹² Central Hudson IB at 9.

⁹³ Entergy IB at 47-48.

⁹⁴ TR at 509 lines 3 to 4 (Younger Rebuttal).

Ms Frayer's testimony revealing the Energy Price Savings implicit in Mr. Younger's own studies.⁹⁵ Entergy offers no citation to the record to support its claim that the Facility would foreclose the future use of any under water rights-of-way by future projects, nor does Entergy suggest any other productive use for those rights-of-way other than for the Facility's transmission lines. The remainder of Entergy's discussion in this section is simply a cross-reference to the Incumbent Generators' uneconomic entry claims, which have been fully addressed above.

IPPNY also contends that the Facility is at odds with New York's State Energy Plan, which IPPNY characterizes as primarily focused on supporting the development of in-state generation to improve "energy independence and fuel diversity."⁹⁶ This contention is without merit for several reasons. To begin with, IPPNY has fundamentally mis-stated the objectives of the State Energy Plan. The Commission summarized the goals of that plan in its order granting an Article VII certificate to Hudson Transmission Partners in Case 08-T-0034:

[T]he 2009 State Energy Plan (SEP) provides five policy objectives and presents five strategies for achieving its objectives. The objectives, as they pertain to the energy section, are: to assure a reliable energy system; to reduce greenhouse gas emissions and avoid climate change; to address energy affordability for residents and businesses with rising energy bills; to reduce the health and environmental risks associated with energy production and use; and, to develop in-state energy supply resources to improve the State's energy independence and fuel diversity.⁹⁷

The Facility will assist in achieving each of these objectives by providing reliable, low-cost electric power to consumers in New York City while avoiding the emissions of air pollutants

⁹⁵ TR at 360 line 8 to 361 line 4 (Frayer Rebuttal).

⁹⁶ IPPNY IB at 10.

⁹⁷ 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, slip op. at 56 (Issued and Effective September 15, 2010).

such as SO_x and NO_x, as well CO₂, a potent greenhouse gas, while at the same time reducing the fuel diversity risks associated with generating that power using natural gas or other fossil fuels. Thus, IPPNY's suggestion that the Facility somehow conflicts with the objectives of the State Energy Plan must be rejected as wholly without merit.

H. SYSTEM RELIABILITY IMPACT STUDIES

I. CONFORMANCE WITH STATE AND LOCAL LAWS AND REGULATIONS

J. PUBLIC INTEREST, CONVENIENCE AND NECESSITY

Entergy begins this section of its Initial Brief by repeating its claim that the Facility will harm consumers in upstate New York, who Entergy contends will be deprived of abundant supplies of low-cost Canadian power that, in Entergy's view, will flow across New York's existing transmission facilities to consumers in upstate markets if the Facility is not constructed.⁹⁸ Applicants have previously addressed this contention in Section B.1 of this Reply Brief above, but need to respond to yet another mis-statement in Entergy's claims: specifically Entergy's claim that Dr. Paynter acknowledged in his testimony that, in the absence of the Facility, "we should expect to see a reduction at the border of prices." This wholly distorts what Dr. Paynter said.

When counsel for Entergy first asked Dr. Paynter if such price reductions were likely to occur, Dr. Paynter made clear that he believed that HQ would develop other markets for its increasing electrical output:

- Q. [I]sn't it true that if the CHPE project is built, it will cause market prices at the existing border to substantially decrease?
- A. Well, this gets into the timing of the decisions here. In general, if HQ commits to build projects and simply sells the additional output at the border, then that would tend to

⁹⁸ Entergy IB at 49-50.

depress the border price. Alternatively, if HQ were to finance transmission upgrades that allowed it to receive to avoid some of the congestion and reach higher price markets, then basically you would not see the price reduction, or at least as much price reduction at the border.⁹⁹

In his very next question, counsel for Entergy asked Dr. Paynter to assume hypothetically that HQ was unable to develop any alternative outlets for its power, and Dr. Paynter correctly responded that if one were to assume that New York was the only outlet for that additional power, then one would be forced to conclude that prices in upstate New York would be reduced:

Q. Let's say the status quo stays the same and HQ goes ahead and finishes the project and it does have to sell its existing interfaces that haven't been upgraded. Are you testifying that that would cause prices to drop?

A. At the border, yes.

Q. So, if nothing happens and the Champlain Hudson project isn't built and everything stays the same, we should expect to see a reduction at the border of prices?

A. In general, yes.¹⁰⁰

Entergy's claim that Dr. Paynter's response to this hypothetical question somehow demonstrates that HQ will in fact be unable to develop any alternative markets for its incremental power supplies is entirely inappropriate and stands in direct conflict with Dr. Paynter's rejection of this claim in his rebuttal testimony:

Q. Do you agree with Mr. Younger that HQ would rather sell at its border price than help finance CHPE?

A. No; such an assumption is belied by the public interest expressed by both HQ and CHPE, for example in their responses to the New York Energy Highway Request for Information; see Exhibit____ (TSP-1) and Exhibit____ (TSP-2). Moreover, CHPE could help HQ recoup its

⁹⁹ TR at 213 lines 12 to 25.

¹⁰⁰ TR at 214 lines 1 to 10.

investment in large new hydroelectric projects, which are expected to come on-line over the next few years. This is the flip side of the risk faced by CHPE if it were to build before HQ. The decision to develop additional hydro-electric resources in Quebec was made years ago, when market prices (and forecasts) were higher; now the costs of those projects are largely sunk. Were HQ to simply sell this additional energy at its border, this could cause a substantial reduction in the market price at the border, which would be exacerbated by transmission constraints within the New York system. Similar concerns would apply to exports to other regions. Moreover, this reduction in price would impact HQ's existing exports as well, representing a significant risk to HQ's profitability. CHPE could help minimize this risk to HQ. Thus HQ could address a number of its concerns by offering to help finance CHPE.¹⁰¹

Thus, Entergy has once again committed the fallacy of assuming that which is to be proven. The Commission must reject Entergy's attempt to bootstrap its own hypothetical into support for the very matter that Dr. Paynter was asked to assume for the purposes of that hypothetical question.

1. Wholesale Energy Price Savings/Production Cost Savings

a. Energy Price Savings

The Incumbent Generators urge the Commission to ignore all testimony on the Energy Price Savings resulting from the Facility on legal and policy rather than factual grounds. This is hardly surprising in light of Ms Frayer's testimony that the Energy Price Savings implicit in Mr. Younger's analysis of the Facility's Production Cost Savings are similar to the levels of Energy Price Savings calculated by both Ms Frayer and DPS Staff witnesses Gjonaj and Wheat.¹⁰² Specifically, the Incumbent Generators contend that Energy Price Savings should be disregarded because they are transitory¹⁰³ and are not a measure of total benefits to society.¹⁰⁴ Neither of

¹⁰¹ TR at 174 line 8 to 175 line 12 (Paynter Rebuttal).

¹⁰² TR at 360 line 8 to 361 line 4 (Frayer Rebuttal).

¹⁰³ Entergy IB at 50-51; IPPNY IB at 31-32.

¹⁰⁴ Entergy IB at 49; IPPNY IB at 32.

these objections provides a basis for disregarding the benefits to consumers of these Energy Price Savings.

The Incumbent Generators' claims that the Commission has a "long-expressed" position of ignoring evidence of Energy Price Savings is addressed in Section J.1.a of Applicants' Initial Brief. It is worth noting, however, that Mr. Younger previously testified that such Energy Price Savings were a factor that the Siting Board *should* consider in granting an Article X certificate to a proposed new generating facility.¹⁰⁵ Ms Frayer expressly addressed the impact of changing market conditions on Energy Price Savings in her analysis, which shows the amount of these benefits decreasing over time as a result of new entry.¹⁰⁶ Even with these effects taken into account, however, the Facility will provide consumers with Energy Price Savings of approximately \$ 3.4 billion (nominal) during the period from 2017 to 2026.¹⁰⁷

Moreover, as Applicants noted in their Initial Brief, there are several reasons for the Commission to give particular weight to evidence of Energy Price Savings. First, Energy Price Savings properly measure the economic benefits that this merchant facility will provide to consumers in New York City and surrounding areas.¹⁰⁸ Second, as Ms Frayer explained in her rebuttal testimony, Energy Price Savings can be determined without having to address the complex issue of HQ's alternative markets for the electricity that would otherwise be delivered by the Facility.¹⁰⁹ Thus, contrary to the suggestion of the Incumbent Generators, there is no reason to ignore this important benefit of the Facility.

¹⁰⁵ See Hearing Exhibit 164 at 14 line 8 to 17 line 13.

¹⁰⁶ TR at 277 lines 3 to 4 (Frayer Direct).

¹⁰⁷ TR at 277 lines 8 to 11 (Frayer Direct).

¹⁰⁸ TR at 325 line 16 to 327 line 16 (Frayer Direct).

¹⁰⁹ TR at 325 line 22 to 326 line 2 (Frayer Direct).

b. Production Cost Savings

All of the claims of the Incumbent Generators and IBEW with respect to the Production Cost Savings that the Facility will provide were fully addressed in Applicants' Initial Brief.¹¹⁰ In summary, those claims must be rejected because Mr. Younger improperly assumed an inflated and unrealistic "production cost" for the electricity delivered into the Facility, because Mr. Younger improperly modeled interchanges between New York and neighboring control areas and made other modeling errors as well, and because even with all these errors, Mr. Younger could not avoid a finding that the Facility would provide over \$580 million in Production Cost Savings in New York State over a ten year period. Even this truncated estimate of the Facility's Production Cost Savings is fully sufficient to justify approval of the Facility in light of the provisions of the JP making clear that the Facility will be developed without cost-based rates (except in the unlikely event that the HVAC Astoria-Rainey Cable is used by shippers not using the rest of the Facility) and without any contract between Applicants and any regulated utility or state agency or authority. Any doubt on this score was fully resolved by Mr. Younger's own testimony before the Siting Board in Case 01-F-1276 support certification of a far more environmentally disruptive 1,000 MW CCGT in New York City that Mr. Younger estimated would yield annual Production Cost Savings of only \$36 million annually, or \$360 million over ten years.¹¹¹

2. Capacity Price Savings

The Incumbent Generators' claims that the Facility will provide no Capacity Price Savings are based on the same contentions as its claims that the Facility will provide no Energy Price Savings: (1) that the Facility is not "needed" and will therefore be so uneconomic that it

¹¹⁰ Applicants' IB at 86 to 93.

¹¹¹ Hearing Exhibit 164 at 18 lines 4 to 7.

will be subject to buyer-side mitigation under NYISO's rules; and (2) that competitive markets will respond to new entry by the Facility, diluting any Capacity Price Savings over time. These contentions were fully addressed in Applicants' Initial Brief.

3. Employment Benefits

IPPNY contends that the employment benefits quantified by Ms Frayer will not occur for three reasons: (1) IPPNY claims that Applicants' estimate of the Energy Price Savings and Capacity Price Savings of the Facility are overstated; (2) IPPNY claims that the Facility will be uneconomic and any subsidy required to permit it to go forward will cause the loss of more jobs than the Facility will create; and (3) IPPNY claims that there will also be offsetting job losses at existing generating facilities in New York City. All of these issues were also fully addressed in Applicants' Initial Brief.

4. Environmental Benefits

5. Reliability Benefits

6. Economic Benefits

In this section of its Initial Brief, IPPNY presents an analysis of its reasons for believing that any Energy Price Savings resulting from the Facility will be largely offset by factors such as energy hedging agreements, the hedging impacts of grandfathered Transmission Congestion Contracts ("TCCs") and the manner in which payments to the New York Transmission Owners for the use of their facilities are determined under the NYISO OATT. All of these claims are directed to the amount of the Energy Price Savings created by the Facility, rather than to the impact those Energy Price Savings will have on economic activity and Gross Domestic Product ("GDP"). As such, these claims were addressed in full in Section J.1 of Applicants' Initial Brief.

7. Merchant/Non-Merchant Facility

The Incumbent Generators contend that the Facility cannot be regarded as truly merchant despite the fact that the certificate conditions proposed in the JP would impose far greater obligations on Applicants than are imposed on Entergy or on any of IPPNY's members, all of whom also claim to be "merchant" providers. Specifically, Certificate Condition 15(b) requires, except for certain users of the Astoria-Rainey Cable as described below, that Applicants develop, finance, construct and the Facility: (1) with no reliance on cost-of-service rates set for Applicants by any state or federal regulatory authority; and (2) with no reliance on any contractual arrangement between Applicants and any agency, authority or other entity of the State of New York, any municipal subdivision of New York, any utility subject to cost based regulation or an instrumentality of any of the foregoing.¹¹²

The Incumbent Generators contend that these requirements are insufficient to permit the Facility to qualify as a "merchant" project for two reasons: (1) because they fail to restrict the ability of shippers using the Facility to enter into contracts with utilities and/or government agencies or authorities; and (2) because they expressly allow Applicants to propose cost-based rates for shippers using the Astoria-Rainey Cable who do not also use the HVDC Transmission System. Both these contentions are entirely without merit.

By far the most obvious flaw with the Incumbent Generators' claim that further certificate conditions are required to permit the Facility to qualify as a merchant facility is the simple fact that none of their existing facilities, and none of the new projects now under development by IPPNY's members in New York City and surrounding areas, are subject to any limitations whatsoever on their right to propose cost-based rates or to enter into contracts with

¹¹² Hearing Exhibit 150 at 9.

utilities or state agencies or authorities. Because the certificate conditions proposed by Applicants in this case provide protections that the Incumbent Generators have to date been unwilling to provide, the Incumbent Generators' claims that the Facility should be regarded as in any way less of a merchant facility than their own operations must be rejected. Moreover, as Applicants have demonstrated in Section B.5 of both their Initial Brief and this Reply Brief, the Incumbent Generators' concern that shippers using the Facility will be allowed to obtain uneconomic power supply agreements from utilities or state agencies or authorities has been addressed to their complete satisfaction by NYISO's buyer-side mitigation rules. Accordingly, the Incumbent Generators have failed to demonstrate any need to impose a stricter standard on the Facility than presently applies to their own existing and proposed merchant facilities.

The Incumbent Generators' claim that Commission should regard all aspects of the Facility as a cost-based project rather than as a merchant facility simply because Applicants reserved the right to charge cost-based rates for shippers using the Astoria-Rainey Cable who do not also use the HVDC Transmission System is equally without merit. As Applicants demonstrated in their Initial Brief, this provision is required by Applicants' inability to prevent shippers from using the HVAC Astoria-Rainey Cable without Applicants' consent and without an agreement to pay Applicants for the use of that facility. Moreover, any cost-based rates that may be established for such shippers are limited by both Certificate Condition 15(c) requiring further Commission review if the costs of the Astoria-Rainey Cable exceed forecasts by more than ten percent and by FERC's previously noted obligation under FPA §§ 205 and 206 to ensure that all rates for transmission services are just and reasonable. In such circumstances, the only way for Applicants to recover the costs attributable to the use of that line by such shippers is through cost-based rates.

8. Other Considerations

i. Competitive Generation

K. PROPOSED FINDINGS

L. PROPOSED CERTIFICATE CONDITIONS

1. Condition 15(b)

Entergy's objections to Certificate Condition 15(b) relate to the issue of whether the Facility qualifies as a "merchant" transmission line.¹¹³ This issue is addressed in Section J.7 of this Reply Brief above.

2. Other Certificate Conditions

Central Hudson objects to a number of certificate conditions. Central Hudson prefaces its assault on these conditions with its claim that because Applicants have agreed to assume all of the financial risks of the Facility, they should be regarded as having agreed to assume all of the operating risks associated with any facilities owned or operated by Central Hudson located anywhere close to the Facility. This claim unfairly distorts Applicants' position and seeks to insulate Central Hudson from operating risks that it is compelled by the Commission to manage and must therefore be rejected.

For Your Honor's convenience, the certificate conditions discussed below are presented in the order in which they were raised in Central Hudson's Initial Brief rather than in numerical order.

a. Conditions 27 to 29

The only utility opposing the provisions of the JP designed to protect existing infrastructure along the Facility's right-of-way ("ROW") was Central Hudson. In contrast, the

¹¹³ Entergy IB at 56-59.

Vermont Electric Power Company (“VELCO”) became a limited signatory to the JP for the express purpose of supporting those provisions, and NYPA also expressed support for those provisions in its Initial Brief.¹¹⁴ Two other utilities, Niagara Mohawk and Con Edison, actively participated in this proceeding but took no position on these certificate conditions.

Central Hudson’s opposition to these provisions appears to be based on a fundamental misunderstanding of how those provisions are intended to work. In the early phases of this proceeding, the Applicants and Central Hudson disagreed with respect to Central Hudson’s insistence that the Facility should in all cases be installed beneath Central Hudson’s existing infrastructure in the Hudson River. In the JP and proposed certificate conditions, however, the Signatory Parties took a different approach. Specifically, Certificate Condition 28 now requires Applicants to conduct a detailed site survey after consultation with infrastructure owners and, based on that study, prepare a proposed EM&CP filing for review by the affected utilities. The utility would then have a full six months to review this submission. If Applicants and the utility disagree over how the work should be performed, that disagreement would be submitted to the Commission for resolution. Condition 29 requires Applicants to compensate the utility for the cost of reviewing these materials and for any repairs to utility infrastructure necessitated by any studies, surveys, testing, sampling, preliminary engineering, pre-construction activities, construction, operation, maintenance or repair of the Facility.

These certificate conditions supersede Applicants’ previous position as quoted in Central Hudson’s Initial Brief¹¹⁵ and will provide full protection to Central Hudson’s existing facilities without unduly burdening Applicants with requirements that may or may not be required once the full facts concerning each individual crossing of Central Hudson’s facilities are known.

¹¹⁴ VELCO signed the JP for the express purpose of supporting these provisions.

¹¹⁵ Central Hudson IB at 13-14.

Thus, Central Hudson’s claim that “Applicants insist on crossing on top of [Central Hudson’s] existing facilities”¹¹⁶ does not fairly state Applicants’ current position. Instead, Applicants’ current position is that the final determination on how the Facility will cross any existing infrastructure owned or operated by Central Hudson will be determined in the EM&CP based on detailed site information and in a process in which Central Hudson will have ample opportunity to comment and to present its concerns to the Commission if Applicants and Central Hudson are unable to agree on how such crossings should be constructed. Because this more fact-specific approach is plainly in the public interest, it should be approved without modification or condition.

Applicants agree with Central Hudson that these certificate conditions apply only to Applicants and do not constrain or limit any other rights that Central Hudson may otherwise have in law or in equity. Applicants oppose Central Hudson’s request that the reimbursement provisions of Condition 29 be expanded to include personal injury and to remove the reasonable limitations on these reimbursement rights imposed by Condition 29(c). Applicants see no need for the Commission to address the issue of personal injury for the simple reason that all construction operations should be conducted in a manner designed to ensure that no such injuries occur. If any such injuries do occur, existing tort laws are fully adequate to require the responsible party to bear the costs incurred by its actions and/or inactions. Central Hudson’s request for a change in these provisions must therefore be rejected as an improper attempt to shift responsibility for its actions to Applicants.

Central Hudson’s objections to the reasonable limitations on Applicants’ reimbursement obligations must also be rejected. These provisions simply require Central Hudson or any other

¹¹⁶ Central Hudson IB at 3-4.

infrastructure owner to provide Applicants with a good faith estimate of the costs it intends to incur before those costs are incurred, and not to exceed that estimate by more than 25% without discussing the reasons for the cost overrun with Applicants, while providing for adjudication of any disputes over these matters by the Commission. Expenses incurred in a situation involving unscheduled electric outages or an imminent risk to health, safety, property or the environment are specifically excepted from these requirements. Central Hudson has failed to provide any good reason why it alone should be exempted from these reasonable requirements.

Central Hudson's claim that Condition 29(d) deprives it of the right to pursue its remedies in court is also without merit.¹¹⁷ All that this provision does is require Central Hudson to bring any claim it may have *under the Certificate* before the Commission. Thus, to the extent that Central Hudson has any legitimate claims against Applicants either in contract or in tort law, nothing in this provision limits Central Hudson's right to pursue those remedies in court. If Central Hudson is claiming that the Commission must allow Central Hudson a direct right of action in civil court to enforce the provisions of the Certificate against Applicants, that contention must be rejected as inconsistent with the Commission's exclusive jurisdiction over siting matters under PSL Article VII.

b. Condition 162

Central Hudson's objections to Condition 162 suggest that Central Hudson views this provision in isolation from Conditions 27 to 29 to which it relates. Contrary to Central Hudson's suggestion, Condition 162 is not simply a "reporting" requirement."¹¹⁸ Rather, this provision describes the construction plans to be included in Applicants' EM&CP when construction operations are likely to impact collocated infrastructure. If these construction plans are approved

¹¹⁷ Central Hudson IB at 18-19.

¹¹⁸ Central Hudson IB at 19-20.

by the Commission, Applicants' will construct the Facility in accordance with this Commission-approved EM&CP as required by Article VII. To the extent that Central Hudson or any other infrastructure owner has concerns about Applicants' EM&CP proposal, they will have a full six months to study that proposal as provided in Certificate Condition 28 and will be reimbursed for that study as proposed in Condition 29. If at the end of that process Applicants and the utility cannot reach agreement on a proposed course of action or on the extent to which any compensation is due to the utility, the Commission will resolve that dispute. These provisions are clearly in the public interest and should be approved.

c. Condition 5

Central Hudson's objections to this proposed certificate condition are not entirely clear.

Condition 5 simply provides that:

The portions of the Allowed Deviation Zone to be occupied by the Facility once construction is complete are referred to herein as the Facility ROW. The Certificate Holders shall also acquire and maintain the continuing right to enter onto and use certain additional lands immediately adjacent to the Facility ROW needed for repair and maintenance purposes, including preclusion of vegetative encroachment, on terms prohibiting the owners of such land from taking any action on that land that would interfere with such repair and maintenance activities.

These requirements are plainly appropriate for an HVDC transmission line that will supply 1,000 MW of electricity to consumers in New York City and surrounding areas.

Central Hudson's claim that "it is unjustified to require Applicants to acquire land interests that may not be needed"¹¹⁹ cannot be reconciled with the clear language of this condition, which by its terms only requires Applicants to obtain access rights to such additional lands immediately adjacent to the Facility as are "needed for repair and maintenance purposes."

¹¹⁹ Central Hudson IB at 25.

Central Hudson’s suggestion that this provision conflicts with what it claims to be its “currently unfettered” rights is also without merit. Even if Central Hudson’s broad assertion of its rights were correct – which is plainly not the case – Central Hudson has not shown that Applicants will be unable to acquire the access rights required to repair and maintain the Facility without infringing on Central Hudson’s rights to repair its existing infrastructure. Moreover, if any such concerns arise in the future, the Commission will be available to resolve any disputes that the parties are unable to resolve among themselves. Accordingly, Central Hudson’s objections to this certificate condition must be rejected.

d. Condition 139

Condition 139 requires Applicants to provide DPS Staff with as-built design drawing for each Segment of the Facility following final completion of construction of that Segment. Central Hudson has asked to receive copies of these as-built design drawings for the portions of the Facility in its service territory.¹²⁰ Applicants have no objection to this request, so long as Central Hudson agrees to maintain the confidentiality of any Critical Infrastructure Information contained in those drawings.

M. EM&CP GUIDELINES

N. WATER QUALITY CERTIFICATION

O. RESPONSE TO ADDITIONAL CONTENTIONS ADVANCED BY CENTRAL HUDSON

1. Central Hudson’s Claims Concerning Energy Deliverability.

Central Hudson claims in its Initial Brief that the benefits of the Facility are premised on achieving 1,550 MW of energy deliverability out of NYPA’s Astoria Annex and that Applicants have failed to prove that this level of deliverability will be achieved. This contention is

¹²⁰ Central Hudson IB at 26.

completely inconsistent with the evidence in this proceeding. Applicants Deliverability Panel, which consisted of Mr. Clement E. Nadeau and Mr. Larry Eng, testified that the Astoria Annex PAR, together with NYPA's two existing lines and the Astoria-Rainey Cable, would be able to deliver more than 1,550 MW of electric energy out of the Astoria Substation.¹²¹ Any doubt on this issue was fully resolved by the stipulation between Applicants and Con Edison in which Con Edison agreed that this deliverability target had in fact been met.¹²²

2. Central Hudson's Objections To The JP

Because Central Hudson did not sign the JP in this proceeding, it may not claim any of the rights provided therein. For that reason alone, the Commission should reject all of Central Hudson's objections to the JP. If Central Hudson had signed the JP, Applicants would have been willing to delete the word "directly" in Section 5(a) of the JP as Central Hudson proposes. Applicants would have no objection to that change as it relates to any of the Signatory Parties, but do object to this change to the extent that Central Hudson seeks to claim the status of a party to that agreement.

Central Hudson also claims that the remainder of Section 5 of the JP violates the "separation of powers." This claim ignores the plain language of that provision, which simply states that "Nothing in this Joint Proposal or any appendix thereto is intended to" Thus, this provision does not seek to limit the preexisting legal rights of any party or non-party to the JP, but rather to make clear that the JP and its appendices: (1) do not limit any rights Applicants may have in law or in equity; (2) do not obligate Applicants to pay for damage to existing infrastructure attributable to an existing defect or require Applicants to restore such facilities to better condition than that existing immediately prior to commencement of construction; and (3)

¹²¹ TR at 577 line 11 to 578 line 7 (Eng-Nadeau Direct).

¹²² Hearing Exhibit 151.

do not obligate Applicants to pay for damage to CI that could have been avoided by the exercise of reasonable care by the owners and/or operators thereof. Since all of these provisions merely limit Applicants' obligations under the JP and its appendices, Central Hudson's claim that they are beyond the Commission's jurisdiction under Article VII and conflict with the doctrine of "separation of powers" must be rejected.

Central Hudson also complains about the provisions of paragraph 7 of the JP, which provides for resolution of disagreements over the interpretation of the JP by the Signatory Parties. Because Central Hudson is not a Signatory Party, it is properly excluded from participating in this process for resolution of disputes concerning the provisions of the JP.

Central Hudson's concerns with respect to paragraphs 11 and 12 of the JP raise no issues that require adjudication. These provisions merely describe the Facility and summarize the relevant provisions of the proposed Certificate Conditions. Applicants have already addressed Central Hudson's misplaced claims with respect to the provisions of Condition 5 governing the acquisition of certain property rights immediately adjacent to the Facility ROW.

Central Hudson also states that it "questions various aspects" of JP paragraphs 107 to 119, 122, 136 to 138 and 140, but does not identify these concerns with sufficient specificity to permit Applicants to respond.

Central Hudson claims not to understand JP paragraph 132, which simply provides that the permitting requirements applicable to construction of the portion of the Facility located within the City of New York will not be preempted by the Commission. This will permit CNY to continue to apply those requirements, subject to review by the Commission to ensure that they are applied to the Facility in an appropriate manner. This issue is addressed in greater detail in Condition 18 of the Certificate Conditions for the Facility proposed in the JP.

P. CONCLUSION

WHEREFORE, for the above-stated reasons, Applicants Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. respectfully request that the Joint Proposal filed in this case on February 22, 2012, as amended by the Stipulations between Applicants and the Consolidated Edison Company of New York, Inc. filed in this proceeding on June 4, June 26 and July 11, 2012, and as further amended by the Stipulation Among Signatory Parties To The Joint Proposal Entered Into February 24, 2012 To Add Office Of Parks, Recreation And Historic Preservation To The Governance Committee Of The Trust filed in this proceeding on September 7, 2012, be approved and that a Certificate of Environmental Compatibility and Public Need be issued for the construction and operation of the Facility in accordance therewith.

Respectfully submitted,

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