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Acting Secretary

July 3, 2013

SENT VIA E-MAIL

Hon. Jeffrey C. Cohen
Acting Secretary
NYS Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350
secretary@dps.state.ny.us

Re: CASE 10-T-0139 - Application of Champlain Hudson Power Express, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City.

Dear Acting Secretary Cohen,

Attached, for filing, in accordance with the Notice of Schedule Regarding Petition for Rehearing, issued in the above-entitled proceeding on June 18, 2013, is the Department of Public Service Staff's Reply Brief to Entergy's Petition for Rehearing. Please feel free to contact me if you have any questions.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'David G. Drexler'.

David G. Drexler
Assistant Counsel
Ph: (518) 473-8178

Attachment

cc: ALJs Casutto and Phillips (Via E-mail)
Active Party List (Via E-mail)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION



CASE 10-T-0139 - Application of Champlain Hudson Power Express, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City.

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE STAFF'S
BRIEF OPPOSING PETITION FOR REHEARING

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Dated: Albany, New York
July 3, 2013

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 10-T-0139 - Application of Champlain Hudson Power Express, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City.

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INTRODUCTION AND SUMMARY

On April 18, 2013, the New York State Public Service Commission (Commission) issued an Order Granting Certificate of Environmental Compatibility and Public Need (Certificate) (April 18 Order), authorizing Champlain Hudson Power Express, Inc. (CHPE) and CHPE Properties, Inc. (collectively, "Applicants") to construct and operate a 1,000 MW high-voltage direct current electric transmission line extending approximately 330 miles from the New York/Canada border to a converter station in Astoria, Queens, along with associated facilities (collectively, "the Project").¹ On May 21, 2013, Entergy Nuclear Power Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC

¹ Case 10-T-0139, Champlain Hudson Power Express, Inc. - Electric Transmission Line, Order Granting Certificate of Environmental Compatibility and Public Need (issued April 18, 2013).

(collectively, "Entergy") filed a Petition for Rehearing of the April 18 Order.

Entergy's Petition for Rehearing claims that the Commission exceeded its authority by "lowering the statutory bar" for issuing the Certificate. Entergy claims that the Commission applied a lower economic standard based on an erroneous "finding that the Project qualifies as a merchant transmission enterprise." Entergy further argues that the Commission did not adequately consider the Projects effects on the competitive energy markets, and that the Commission failed to minimize environmental impacts with respect to sturgeon.

Staff of the New York State Department of Public Service (DPS Staff) opposes Entergy's Petition on the merits because it fails to state an error of law or fact, or new circumstances, warranting rehearing.² Entergy incorrectly suggests that the Commission applied a lower statutory standard to the Project. Entergy's position would require the Commission to make a finding that the Project is "economic" before issuing a Certificate. No such finding, however, is required under Article VII of the Public Service Law (PSL), which provides the Commission with broad authority to make the required statutory findings based on various grounds, such as reliability,

² DPS Staff is designated to represent the public interest in this proceeding

environmental, and public policy reasons. The Commission appropriately found that there was a need for the Project based on several grounds other than economics, and that the Project would serve the public interest, convenience, and necessity.

The Commission also made appropriate findings that the facility would minimize environmental impacts with respect to sturgeon. Entergy relies upon preliminary statements from the U.S. Army Corps of Engineers (ACOE) to suggest that the Project is not compatible with the environment. Those statements, however, do not represent the final determination of the ACOE. Because the Applicants are required to obtain permits from the ACOE, and any conditions or restrictions will be final and binding at the time those permits are issued (See, Certificate Conditions 11 and 17), any inconsistencies between the April 18 Order and the yet-to-be-issued ACOE permits will be addressed in the future.

Entergy's final argument that the Commission did not adequately consider the effects on competitive markets is a policy related matter that does not constitute an error of law or fact. For these reasons, as discussed more fully below, DPS Staff respectfully requests that the Commission reject Entergy's Petition for Rehearing.

DISCUSSION

In petitioning for review of the Commission's April 18 Order, Entergy must demonstrate that the Commission "committed an error of law or fact[,] or that new circumstances warrant a different determination."³ As demonstrated herein, Entergy's Petition fails to meet this standard.⁴

I. The Commission Correctly Applied The Legal Standard Under PSL Article VII In Making The Required Statutory Findings With Respect To Need and the Public Interest

Entergy incorrectly suggests that the Commission applied a different legal standard to the Project given its status as a "merchant" facility. Entergy maintains that "if the Project qualifies as a merchant, it escapes the more stringent Commission scrutiny that attends regulated transmission projects."⁵ Entergy asserts that the Project should not be considered a merchant project because it is "grossly uneconomic" and would therefore require "an extra-market subsidy." According to Entergy, this should disqualify the Project as "merchant," and lead to a conclusion that the project is not needed or in the public interest. DPS Staff, however, demonstrated that the Project could well be economic, depending

³ 16 NYCRR §3.7(b).

⁴ Entergy does not allege any new circumstances warranting rehearing.

⁵ Entergy Petition for Rehearing, p. 6.

upon factors such as gas price forecasts. The Commission properly concluded that Entergy's premise was unproven, and that "by granting the Facility a certificate, we are providing its investors with the option to move forward with construction of the Facility if circumstances such as a revised gas price forecast lead its investors to believe that it will be an economic project."⁶

Entergy's argument, moreover, fails to recognize that the required statutory findings under PSL Article VII are not dependent solely upon whether the Project is "economic." Contrary to Entergy's suggestion that the Project (and presumably any other proposed major transmission projects) must be proven to be "economic" before being certified by the Commission, this standard is absent from Article VII of Public Service Law. The Commission has considerable discretion to base the need and public interest of the Project on a broad range of considerations that must be carefully weighed and balanced.

The record adequately supports findings that the Project is needed to promote reliability by relieving transmission constraints into the congested New York City region, to help support fuel-diversity (particularly the use of renewable hydroelectric generating capacity), and to increase

⁶ Case 10-T-0139, supra, Order Granting Certificate of Environmental Compatibility and Public Need, p. 41.

competition in the concentrated New York City energy markets. All of these factors, weighed along with other relevant considerations, such as economics, led the Commission to correctly conclude that the Project served the public interest, convenience, and necessity. The Commission correctly applied the legal standard under PSL Article VII to the facts in making these findings and issuing the April 18 Order.

II. The Record Adequately Supports The Commission's Finding That The Project Will Minimize Environmental Impacts

Entergy first argues that the ACOE preliminary statements are conclusive evidence that the Project's contemplated use of "concrete mats" is inconsistent with any yet-to-be-issued ACOE permits. Entergy further argues that the Commission inappropriately concluded that the impacts on Hudson River sturgeon will be minimal, since magnetic field studies have not been performed.

Entergy's first argument should be rejected because it relies upon preliminary statements from the ACOE. Those statements do not represent the final determination of the ACOE, and should not be considered controlling in this instance. The issuance of any ACOE permit(s) for the Project, and any conditions attached thereto, is solely at the discretion of the ACOE District Engineer(s). To the extent any inconsistencies arise between the April 18 Order and the final ACOE permits, the

Applicants may need to seek appropriate modifications to the Certificate.

Entergy's second argument should also be rejected because the record contained studies regarding the effects of magnetic fields on fish species, namely the Atlantic and Pacific salmon. Entergy seeks to hold the Project up until a study of the magnetic field impacts on Hudson River sturgeon is performed, while presenting no evidence as to why the studies in the record are not probative of the magnetic field impacts on Hudson River sturgeon. The Commission, however, already addressed Entergy's arguments and discussed in significant detail the record information regarding the potential impacts on sturgeon. This included a discussion of sturgeon habitat, characterization of the probable impacts on sturgeon, the potential effects of magnetic and electromagnetic fields on sturgeon, and management practices to further minimize the probable impacts.⁷ In this case, the Commission had a rational basis to support its finding that the Project will minimize environmental impacts.

⁷ Case 10-T-0139, supra, Order Granting Certificate of Environmental Compatibility and Public Need, pp. 55-71.

III. The Commission Should Reject Entergy's Arguments With Respect To The Effects On Competitive Markets Because They Are Policy Related

Entergy argues that the Commission did not "give meaningful consideration to the risks to competitive wholesale markets posed by certification of the Project." This argument, however, is a policy related matter, and fails to allege any error of law or fact. Therefore this argument is outside the scope of permissible issues for rehearing, and should not be considered.

CONCLUSION

As discussed above, the Commission should reject Entergy's Petition for Rehearing because Entergy fails to assert an error of law or fact, or new circumstances, warranting a modification to the April 18 Order.

Respectfully submitted,



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July 3, 2013