

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.

STAFF’S RESPONSE TO ENTERGY’S MAY 29 FILING

I. INTRODUCTION

On May 29, 2013, a Petition for Rehearing of the Commission’s April 18, 2013 Order in the above-captioned case (“the Petition”) was filed by Entergy Nuclear Power Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC (“Entergy”). This response is being submitted by the Staff of the Department of Public Service designated to represent the public interest in this proceeding (Staff), pursuant to the Notice Regarding Entergy Petition for Rehearing (issued May 23) in this proceeding (“the Notice”).

II. ARGUMENT

A. The Petition was Not Timely Filed.

Entergy argued that it timely filed and served the Petition; however, the question of the timeliness of service is not at issue.¹ As the Notice indicated, 16 NYCRR Section 3.5(d) provides that a document presented for filing electronically is deemed filed at the time it is received by the Secretary. Entergy acknowledged that the Petition was not received by the Secretary until May 21, 2013 but attempted to avoid an adverse result by confusing the concepts of filing and service and the regulations applicable to both.

¹ According to 16 NYCRR Section 1.2(l), electronic filing means “delivery of a document to the Secretary by e-mail or such other electronic means as may be authorized by the Secretary.” (emphasis added) Section 1.2(m) provides that electronic service means “delivery by e-mail, or such other electronic means as may be authorized by the Secretary, of: (1) a notice of web posting providing a web address linking directly to the document being served; or (2) the document itself in a format that permits it to be searched, saved and printed by the recipient.”

To the extent the concept of service comes into play—in 16 NYCRR Section 3.7(a)—the reference is to service of an order. If service of the Commission's April 18, 2013 Order was on April 18, 2013 as specified in 16 NYCRR Section 1.2(m) (2), then parties filing petitions for rehearing of that order had 31 days from service of that order to file such petitions, pursuant to 16 NYCRR Section 3.5(f) cited by Entergy—namely until May 19, 2013 (a Sunday), which period is extended by Section 25-a of the General Construction Law to May 20, 2013. In the context of Article VII of the Public Service Law ("PSL"), however, it does not appear that the reference to service of an order in 16 NYCRR Section 3.7(a) is applicable. PSL Section 128(1) provides, in pertinent part:² "Any party aggrieved by any order issued on an application for a certificate may apply for a rehearing under section twenty-two within thirty days after issuance of the order and thereafter obtain judicial review of such order in a proceeding as provided in this section." Thus, while PSL Section 22 and 16 NYCRR Section 3.7 govern the handling of petitions for rehearing generally, the reference in PSL Section 128 to "issuance of the order" means that the phrase "service of the order" is inapplicable. Given that the Order was issued on April 18, 2013,³ the last day for filing petitions for rehearing was May 20, 2013 (in view of Section 25-a of the General Construction Law.

B. Time Extensions Regarding Statutes of Limitations
Should Be Carefully Weighed.

Entergy contended that the circumstances described in it May 29, 2013 filing show good cause why its Petition should be accepted for filing on May 21, 2013, pursuant to PSL Section 22 and 16 NYCRR Section 3.3(a)(1). According to the regulatory provision just cited, the Secretary must exercise his discretion "for the purpose of promoting the fair, orderly, and efficient conduct of the case." How this standard is to be applied in the context of what is essentially a statute of limitations case is apparently one of first impression.

That the situation confronting the Commission involves the statute of limitations applicable pursuant to PSL Article VII cannot be gainsaid. As the language of

² It is noteworthy that Entergy did not even cite specific provisions of PSL Article VII.

³ According to 16 NYCRR Section 3.2(a)(2), issuance occurs when an order is posted on the Commission's website.

PSL Section 128(1) quoted above shows, in order for a party aggrieved by a Commission order on an application for a certificate to obtain judicial review, that party must first have filed a timely petition for rehearing. Thus, a finding that a petition for rehearing is untimely as filed or because good cause for acceptance of a late-filed petition was not shown closes the courthouse door to a challenge of the certificate by such party.

Courts strictly construe statutes of limitations.⁴ As the Court of Appeals stated in Arnold v. Mayal Realty Company, Inc. et al., 299 N.Y.2d 57 (1949):

A Statute of Limitations is not open to discretionary change by the courts, no matter how compelling the circumstances . . . and when given its intended effect such a statute is one of repose, and experience has shown that the "occasional hardship is outweighed by the advantages of outlawing stale claims." [citations omitted] This is not a situation involving a mistake, omission, defect or irregularity such as may be corrected upon proper showing that a substantial right of a party shall not thereby be prejudiced . . .

Here, it may be concluded that the fair conduct of the case stands in tension with the orderly and efficient conduct of the case. Yet the question of fairness is not one sided. What is fair to Entergy (the only party that attempted to challenge the Commission's Order) may well not be considered fair to the certificate holders or the numerous other parties who supported the grant of a certificate.

C. A Unified Decision Should Be Issued.

A further notice in this proceeding should set a date for responses to the Petition on the merits and provide that the Secretary's decision pursuant to PSL Section 22 and 16 NYCRR Section 3.3(a) (1) will be set forth in a Commission order on rehearing issued after any such responses on the merits have been reviewed, not in a separate decision. This course of action should be taken for the sake of procedural efficiency. It would avoid a possible remand for consideration of the Petition on the merits if a reviewing court were to overturn a separate Secretary's decision that the Petition was not timely filed and that good cause had not been shown warranting

⁴ Courts have much more discretion in other contexts, as indicated in Section 2005 of the Civil Practice Law and Rules regarding excusable delay or default.

acceptance of the late-filed Petition. If the Secretary's decision is that the Petition is not timely, the Commission's order on rehearing should state such decision, then go on to discuss the merits of the Petition. In that way, a reviewing court would be in a position to consider at the same time both the procedural and substantive issues raised.

III. CONCLUSION

For the reasons given herein, the Secretary should conclude that the Petition was not timely filed and conscientiously consider the question of whether Entergy has shown the requisite good cause for the Petition to be accepted late. The Commission should embody the Secretary's decision in an order on rehearing that considers the merits of the Petition after reviewing parties' responses thereon.

Respectfully submitted,

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Dated: Albany, New York
June 4, 2013