

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.

RULING ON AUGUST 22 MOTIONS TO INCORPORATE
BY REFERENCE OR TAKE OFFICIAL NOTICE
FILED BY DEC AND STAFF

(Issued August 30, 2012)

MICHELLE L. PHILLIPS, Administrative Law Judge:

This ruling addresses motions filed on August 22, 2012, by the Department of Environmental Conservation (DEC) and Department of Public Service Trial Staff (Staff). DEC and Staff renew their requests that we incorporate by reference or take official notice of a Resource Conservation and Recovery Act (RCRA) Draft Report prepared by Consolidated Edison Company of New York (Con Edison) in February 2008 and submitted to the DEC as part of its Corrective Action Program. The motions are denied, with prejudice.

Background

In our Ruling on Motions to Incorporate by Reference or Take Notice Filed by DEC, Jointly with Applicants and Staff; and, Separately, by IPPNY and Entergy (issued August 21, 2012), we denied, without prejudice, a previous Joint Motion to incorporate or take official notice of the RCRA report due to its draft, non-final status and our concerns about the timing of the motion. We stated that if the movants wanted to renew their motion, they should address our concerns about the timing of the motion and should clearly identify the specific information or facts to be incorporated by reference or officially noticed.

On August 22, 2012, DEC and Staff renewed their requests that we incorporate by reference or take official notice of the RCRA draft report. Responses to the motions were filed by Entergy Nuclear Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC (Entergy), opposing the motions; Champlain Hudson Power Express, Inc., and CHPE Properties, Inc. (Applicants), supporting the motions; and Con Edison, taking no position on the motions, but providing factual background on the RCRA draft report and authenticating it as genuine and accurate as of the time of its submission.

DEC and Staff Motions

DEC states that the narrative of the RCRA report "is not expected to be finalized in the near term." DEC adds that the data in Section 4.37 of the RCRA report and the attached Figures 4.37-1 through 4.37-7 are not going to change and are currently being evaluated by DEC staff. DEC also states that its staff diligently evaluated the proposed converter station site as expeditiously as possible upon learning of it.¹ Finally, DEC counsel reports that, because, the RCRA document was maintained as a non-public document, she sought the release of the report and associated data relating to the facility for purposes of this proceeding, and, after securing Con Edison's consent, immediately filed the August 2, 2012, Joint Motion.

In its motion, Staff asserts that "no plans exist for finalizing the 2008 RCRA report" and its status as a public document was only clarified at the close of the evidentiary

¹ As part of the Joint Proposal, a section of the Luyster Creek property was identified as the site for the proposed converter station. According to DEC, Staff and Applicants, the RCRA draft report would assist the Commission in evaluating Entergy's concerns with respect to the Luyster Creek site. See August 2, 2012, Joint Motion, at 2.

hearing. If we do not grant the request to incorporate or take notice of the entire RCRA report, both DEC and Staff ask that we decide, pursuant to State Administrative Procedure Act §306(2) or (4), to incorporate by reference or take notice of the facts contained in Figures 4.37-1 through 4.37-7.

Entergy argues that the renewed motions should be denied on the grounds of unreasonable delay and undue prejudice, and further on the ground that the draft report is not final and is subject to change. Entergy contends that since the "facts" contained in the draft RCRA report were never finalized, they are not reliable. Entergy also asserts that it is not even clear that the Eastern Parcel that is depicted in the RCRA report is on the same portion of the Luyster Creek property as the proposed converter station. Lastly, Entergy asserts that, because the "facts" in the draft RCRA report are sample results from an environmental investigation into historic solid waste management and disposal practices at a former industrial site, they are not within the "specialized knowledge" of Staff, and thus, are not suitable for official notice under the parameters of the State Administrative Procedure Act (SAPA).

Discussion

While we do not doubt DEC's claim that it expeditiously pursued the release of the draft RCRA report after the Stipulation on Converter Station Location was filed on July 11, 2012, we must also credit its statement that the narrative portions of the report are not yet final.² As we previously found, incorporation or taking official notice of

² DEC and Staff appear to have different views regarding plans for finalizing the draft report. We are relying on DEC's characterization of the report's status since it is the agency charged with requiring and reviewing such reports. In addition, we note that Con Edison also characterizes DEC's review as "ongoing" (see Con Edison's Response at 3).

draft documents would be inappropriate, and neither DEC nor Staff have provided persuasive justification for modifying our prior findings in this regard.

Incorporating or taking official notice of the information contained in the draft report, under the circumstances presented here, would undermine our efforts to provide for the fair and orderly conduct of this proceeding. As we observed in our August 21st ruling, the issue of Luyster Creek's suitability as a proposed converter station location was set forth for evidentiary hearing months ago, in our May 8, 2012, Ruling on Issues. We further observed that parties had ample notice of Entergy's claim that the proposed site is unsuitable due to the potential for "significant" remediation costs (see e.g., Entergy's Initial Statement in Opposition to Joint Proposal, dated March 16, 2012, at 6). And, there was at least one party at the evidentiary hearing who had conducted discovery and relied on that discovery to conduct examination on this issue. As a result, we find that it would be unduly prejudicial to incorporate or take notice of this draft report or any of the facts contained therein after the hearings, and without the sponsorship of a qualified witness.

In addition, Entergy correctly notes that there is no proof in the record to correlate the proposed converter station footprint shown in Hearing Exhibit 130 with the footprint of the Eastern Parcel depicted in the figures cited by DEC and Staff.³ The lack of apparent correlation seems to be confirmed by Con Edison's statement that "the Converter Station, as agreed to in

³ In fact, when comparing the proposed converter station footprint as depicted on Hearing Exhibit 130 with the footprint of the Eastern Parcel as depicted in Figure 4.37-1, it appears that even if the footprints might overlap to some extent, they mostly cover different sections of the Luyster Creek parcel.

this proceeding, is proposed to be located on a **portion of** the Eastern Parcel" (Con Edison's August 28th Response, at 3, emphasis supplied).

Finally, both DEC and Staff rely on SAPA §306(2) or (4) to request, in the alternative, that we incorporate by reference or take notice of the facts contained in Figures 4.37-1 through 4.37-7. However, we decline to do so given that the documents were not prepared by a governmental agency, are still being reviewed by the responsible government agency and, but for the fact that they were provided as an attachment to the Joint Motion, are not documents that can generally be found in a public, governmental repository.

For the reasons noted above, and in our August 21, 2012 Ruling, the DEC and Staff motions are denied with prejudice.

(SIGNED)

MICHELLE L. PHILLIPS