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August 28, 2012

Via E-Mail

Hon. Michelle Phillips, ALJ
Department of Public Service
Three Empire State Plaza, 3rd floor
Albany, New York 12223

Hon. Kevin Casutto, ALJ
Department of Public Service
Three Empire State Plaza, 3rd floor
Albany, New York 12223

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 Judges Phillips and Casutto:

The purpose of this letter is two-fold. In it the Staff of the Department of Public Service designated to represent the public interest in this proceeding (Staff) responds to the motion for partial reconsideration of Your Honors' August 21, 2012 ruling submitted by Entergy Nuclear Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC (Entergy) on August 22, 2012. Staff also responds to the Applicants' motion to strike portions of the initial briefs of Central Hudson Gas & Electric Corporation (Central Hudson), the Independent Power Producers of New York, Inc. (IPPNY) and Entergy submitted on August 23, 2012.

We believe that reasons supporting denial of Entergy's motion also support granting the Applicants' motion in part. These common reasons are set out first, followed by additional reasons for denying Entergy's motion.

First, proceedings like this case pursuant to Article VII of the Public Service Law (PSL) are by definition adjudicatory proceedings,¹ or at least licensing proceedings,² to which the provisions of SAPA Article 3 apply. As such, this case differs from a rate case or other proceeding, whether called quasi-judicial or rulemaking, in that the evidentiary record is a subset of the record as a whole.³ Extra-record factual material may not be considered, unless the decision is made to take official notice of factual matters, pursuant to SAPA §306(4).⁴

Second, Your Honors gave ample opportunity for parties to specify the factual issues that they contend should be the subject of the evidentiary hearing, most recently in the February 22, 2012 ruling.⁵ Your Honors then specified disputed factual issues in a May 8, 2012 ruling,⁶ concerning which no party filed an interlocutory appeal to the Commission. Your Honors further clarified the law of the case in the June 7, 2012 ruling.⁷ Therefore, the evidentiary record in this case is limited to evidence in support of the Joint Proposal and evidence regarding the three disputed factual issues specified by Your Honors.

¹ PSL §123(1) provides, in pertinent part: "Upon the receipt of an application with respect to an electric transmission line that complies with section one hundred twenty-two, the commission shall promptly fix a date for the commencement of a public hearing thereon not less than sixty nor more than ninety days after such receipt." State Administrative Procedure Act (SAPA) §102(3) provides, in pertinent part: "'Adjudicatory proceeding' means any activity which is not a rule making proceeding or an employee disciplinary action before an agency, . . . in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing.

² SAPA §102(5) provides: "'Licensing' includes any agency activity respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, recall, cancellation or amendment of a license." SAPA §401(1) provides: "When licensing is required by law to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning adjudicatory proceedings apply. For purposes of this act, statutes providing an opportunity for hearing shall be deemed to include statutes providing an opportunity to be heard."

³ SAPA §302(1) provides, in pertinent part: "The record in an adjudicatory proceeding shall include . . . (b) evidence presented; [and] (c) a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose . . ."

⁴ If a document is received by incorporation by reference pursuant to SAPA §306(2), it becomes part of the evidentiary record.

⁵ The ruling provided, at p. 2: "To assist us in determining the scope and duration of the evidentiary hearings, any party who files an initial opposing statement must set forth its reasons and bases for opposing the JP and issuance of a certificate and must state whether each such basis is asserted as a material issue of fact for which the party intends to provide expert testimony or other evidence at the hearing."

⁶ The ruling on issues provided, at p. 3: "The factual issues that may be addressed in the pre-filed testimony and the evidentiary hearings are:

1. Deliverability . . .
2. The Proposed Luyster Creek Converter Station Site . . . [and]
3. Cost/Benefit Analyses, Facility Costs."

⁷ The ruling provided at p. 5: "We remind the parties that argument in briefs should marshal the record evidence in this proceeding. Briefing citations to evidentiary material outside the record would be improper and will not be considered."

At this late date, it would be extremely prejudicial to the parties if the evidence to be admitted or factual matters to be officially noticed were expanded.⁸ Consequently, Entergy's motion should be denied and the Applicants' motion should be granted with respect to the portions of Central Hudson's initial brief cited by the Applicants, the portion of IPPNY's initial brief on p. 11, and the portions of Entergy's initial brief on pp. 17, 18, 32, 33 and 42.

By contrast, the matters on pp. 36 and 37 of IPPNY's initial brief and on pp. 49 and 50 of Entergy's initial brief appear to be within the scope of Issue 3 in Your Honors' May 8, 2012 ruling. As such, it might be proper to consider inclusion of these matters in the parties' respective initial briefs essentially as subject to motions for incorporation by reference or official notice and to grant such motions, given that there is still time for the parties to respond in their reply briefs to the points made by IPPNY and Entergy.

In addition to the foregoing reasons for denying Entergy's August 22 motion, the following notes from the documents Entergy's motion seeks to have Your Honors treat as evidence also support denial of the motion: The Department of Interior (DOI) Final Report entitled "Effects Of EMFs From Undersea Power Cables On Elasmobranchs And Other Marine Species" ("the EMF report") is a review of information regarding offshore marine species in offshore environments, as studied by the US DOI, Bureau of Offshore Energy Management, Research and Enforcement ("BOEMRE"). BOEMRE is studying potential impacts due to development and operation of offshore renewable energy projects, including offshore marine wind energy projects. The Applicants' Facility is proposed to be located within the Hudson, Harlem and East Rivers, which is not an offshore marine environment; rather, it is a riverine-estuarine environment with characteristics significantly different from those encountered in offshore marine settings. The EMF Report indicates that elasmobranch fishes are potentially sensitive to electric field strengths.⁹ Other species are considered to have some sensitivity to magnetic fields.¹⁰

None of the species cited in this summary statement as being of particular sensitivity to electric or magnetic fields include the sturgeon species that Entergy is reportedly concerned about.¹¹ The behavioral study cited in the EMF Report as the basis of this sensitivity is the paper authored by Gertseva and Gertsev from 2002. The Gertseva and Gertsev (2002) paper, also attached to the Entergy Motion, does not report effects of underwater DC cables, as otherwise argued by Entergy. While the Gertseva and Gertsev (2002) paper itself does not clearly indicate the details of the electric transmission line studied, as Staff argued in its response to an earlier

⁸ Indeed, another evidentiary hearing would likely have to be held.

⁹ Elasmobranchs include sharks and rays (EMF Report, p. 1).

¹⁰ The EMF report states at page 14: Species with magnetosensitivity are more likely to be able to detect EMFs from DC cables than from AC cables. Taxa include:

- Sea turtles
- Some marine mammals
- Some decapod crustaceans.

¹¹ The EMF Report indicates at Table ES-4 that "Sturgeons" as a species group (the "teleost" or "bony" fishes) are sensitive to electric or magnetic fields based on results of one or two sensitivity studies.

Entergy Motion, the EMF Report clearly identifies that study.¹² The EMF Report also provides an annotated bibliography.¹³

Based on the studies performed to date, the EMF Report provides this summary statement:

On a qualitative basis, the weight of the evidence available suggests that elasmobranchs and sea turtles have the highest likelihood of being affected by exposure to power cable EMFs.¹⁴

As shown above, the report and study Entergy seeks to introduce are not only outside the scope of the issues set for evidentiary hearing but are also totally immaterial to this proceeding.

Very truly yours,

/s/

Steven Blow
Assistant Counsel
Department of Public Service

cc: Jaclyn A. Brillling, Secretary
All Parties

¹² The EMF Report states, on P. 78: "Several reports suggest potential behavioral response of sturgeon when exposed to AC electric fields from electrodes in the water (Basov 2007) and to AC magnetic fields from overhead power lines (Gertseva and Gertsev 2002, Poddubny 1967 as cited in Gill et al. 2005)" (emphasis added).

¹³ The bibliography notes that "[t]he authors do not elaborate on their methods used to study sturgeon distribution relative to power transmission lines." (DOI, page A-89).

¹⁴ EMF Report, p. 10.