STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on September 19, 2013

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Garry A. Brown
Gregg C. Sayre
Diane X. Burman

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.

ORDER DENYING PETITION FOR REHEARING

(Issued and Effective September 24, 2013)

BY THE COMMISSION:

INTRODUCTION

On April 18, 2013, the Commission issued an Order granting a Certificate of Environmental Compatibility and Public Need (the Order) to Champlain Hudson Power Express, Inc. (CHPEI) and CHPE Properties, Inc. (CHPE; collectively, Certificate Holders) to construct and operate a transmission project known as the Champlain Hudson Power Express Project (Project or Facility).

The principal portion of the Project is a High Voltage, Direct Current (HVDC) transmission line extending approximately 330 miles from the New York/Canada border to a converter station in Astoria, Queens. The HVDC transmission line will be underwater in Lake Champlain and the Hudson River,

with underground upland segments. The line consists of two solid dielectric (i.e., no fluids) HVDC electric cables, each approximately six inches in diameter. The cables will be installed either underwater or underground along the entire length of the route, minimizing visual and other potential environmental impacts.

On May 21, 2013, Entergy Nuclear Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC (collectively, Entergy) filed a petition for rehearing of the Order (Petition), which we deny. On the merits, the Petition demonstrates no error of law or fact and no new circumstances that warrant a different determination. Entergy simply repeats the same claims made in its earlier filings in this proceeding, which we have already thoroughly considered and rejected. Further, the Petition is untimely, insofar as it was filed one day late. Entergy has not shown "good cause" for acceptance of its late filing as a procedural matter, and the lack of merit of its arguments further cuts against any finding of "good cause" to accept a late filing.

PROCEDURAL HISTORY

Within 30 days after service of an order, any person may apply for rehearing of any matter determined by the order.[1] A Commission order is effective upon issuance and is served upon

[1] See, PSL §22 and Rule 3.7(a); see also PSL §128(1).

the parties when sent.[2] This Order was served the day of issuance. In this instance, the 30th day following service of the Order was Saturday, May 18, 2013. By operation of law, the effective filing date was Monday, May 20, 2013.[3] On Tuesday, May 21, 2013 Entergy filed its Petition.

The Secretary issued a Notice of Late Filing on May 23, 2013, stating that, pursuant to PSL §22 and Rule 3.3(a)(1), the Secretary may extend a deadline for filing of a petition for rehearing for good cause shown. The Notice further stated that by May 29, 2013, Entergy could file a demonstration why it was reasonably unable to file the Petition in a timely manner or a showing of good cause why the document should still be accepted as timely; alternatively, Entergy could demonstrate that its document was timely filed. Other parties were provided an opportunity to respond to such an Entergy filing by June 4, 2013.

Consistent with the Notice, on May 29, 2013, Entergy filed a brief asserting that its Petition was timely filed, or, in the alternative, that it established a reasonable inability to file the Petition on May 20, 2013 or good cause to accept the Petition for filing on May 21, 2013. Filed with the brief were supporting documents, including the affirmation and affidavits that allegedly show the timeliness of the filing of the Petition for rehearing.

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[2] Rule 3.2(a)(2) provides that an order of the Commission is effective upon issuance. Rule 3.2(a)(1) provides that "[e]very order of the Commission will be filed in the principal office of the commission and served upon all parties to the proceeding in which it is issued ..." Rule 3.2(b)(3) provides that whether served electronically, by mail, or overnight mail, service is deemed complete at the time of sending.

[3] See General Construction Law (GCL), §25-a.

On June 4, 2013, Certificate Holders and Department of Public Service Staff (Staff) filed responses in opposition to Entergy's brief and supporting documents.

Separately, on May 29, 2013, Certificate Holders filed a request for reconsideration of portions of the May 23, 2013 Notice, requesting that the issues of timeliness of Entergy's rehearing request and issues identified in the rehearing request be decided in one order. On June 6, 2013, Entergy filed a response in opposition to Certificate Holders' request for reconsideration of the Notice, and Staff filed a concurrence that the Commission should issue a unified decision on the timeliness and merits of Entergy's Petition.

A June 18, 2013 Notice advised the parties that a decision on the timeliness of the Entergy Petition would be reserved and that timeliness of Entergy's Petition and consideration of its merits would be addressed together at a later date. The Notice set a deadline of July 3, 2013 for responses on the merits to Entergy's Petition. Thereafter Staff and Certificate Holders filed responses opposing Entergy's Petition on the merits.[4]

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[4] Following issuance of the Order, we also received five public comments, four municipal resolutions and one citizen comment, all in opposition to the Project. The municipal resolutions are from the Niagara County Legislature, the Orleans County Legislature, the Town of Somerset, and the Town of Carlton. The resolutions oppose construction of the Facility and call upon elected representatives of the New York Legislature to halt its construction. The Town of Somerset resolution also calls upon the New York delegation in the U.S. House of Representatives and the U.S. Senate to block this Project. All five comments express concern that the Facility represents the loss of jobs to New York communities; the resolutions state that construction of the Facility forces private businesses to compete with foreign state-run monopolies.

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Both Certificate Holders and Staff urged us not to separate consideration of the merits of Entergy's Petition from the question of timeliness of the Petition. The June 18, 2013 Notice of Schedule provided that, in light of the arguments presented by the parties, a decision on the timeliness of the Entergy Petition was reserved and that timeliness of Entergy's Petition and the merits of the arguments in the Petition would be addressed together at a later date. We appreciate the importance of this transmission line and this case to the future of the State's electric infrastructure, and we understand the concern of Staff and Certificate Holders that construction not be delayed or undermined by a remand to consider the merits of Entergy's petition, even where they are moot under our timeliness decision. Consequently, we begin here with a discussion of the merits as we would view them had Entergy's Petition been timely.

We are guided by Rule 3.7, which provides, "Rehearing may be sought only on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination."[5] Entergy has identified no error of law or fact, nor any new circumstances, that would warrant a different determination. Instead, Entergy merely repeats arguments that we have previously considered and rejected on the merits in the Order. Therefore, even if we were to consider the Petition as timely, we would deny the Petition on the merits. We consider first Entergy's economic arguments and, in a following section, its environmental arguments.

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[5] 16 NYCRR 3.7(b).

ENTERGY'S ECONOMIC ISSUES ON REHEARING

Entergy claims that the Commission erroneously concluded that the Project qualifies as a merchant project; impermissibly lowered the statutory requirements for obtaining a Certificate; and did not adequately consider the Project's impacts on competitive markets.

Entergy challenges the definition of "merchant" that we referred to in the Order when upholding the RD.[6] Entergy claims that Mr. Younger's testimony provided sufficient bases to conclude that Certificate Holders would not be financially viable, and that Certificate Holders failed to demonstrate their Project is economically feasible. Entergy therefore asserts that the Commission lacked substantial record evidence to find that the Project is a merchant project or to apply what Entergy terms the "more flexible merchant project need and public interest standards."

Certificate Holders reply that the Commission explained what it meant by a merchant project -- that the project investors are seeking cost recovery through wholesale

[6] Entergy also claims that (1) the Order "glosses over" the fact that ratepayers may bear the costs of the Astoria-Rainey Cable and (2) "the Commission has not identified any other such 'hybrid' transmission project that it had deemed a merchant project overall." Entergy at 6, note 12. In response, Certificate Holders note our findings that Entergy made "no attempt to explain how provisions that prevent free ridership on the HVAC Astoria-Rainey Cable by virtue of cost-based FERC rates and that avoid constraining the existing capacity of Astoria Energy II can have any possible adverse consequences for the public interest … nor … explain how ratepayer subsidy of the Astoria-Rainey cable is possible, given that the costs of the cable will be subject to regulatory scrutiny by us (via the filing provision of Condition 15) and also by FERC." Certificate Holders at 4, note 6, citing Order at 83. Thus, say Certificate Holders, the Commission did not, as Entergy claims, "gloss over" this issue.

power transactions -- and that the Commission also explained that, with one exception (the cost of the Astoria-Rainey Cable), the Project's financing would be provided by its investors without reliance on cost-of-service rates. They add that the Commission has long relied on competition and market mechanisms to guide investment decisions in the competitive wholesale markets, and is not required to rule on the economics of a merchant facility.

Staff also argues that the Commission is not required by PSL Article VII to find that a Project is "economic" before issuing a Certificate. Staff notes that Article VII provides the Commission with broad authority and discretion to make the required statutory findings based on reliability, environmental, and public policy reasons. Here, says Staff, the Commission appropriately found that there was a need for the Project based on several grounds other than economics. Staff adds that 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 competition in the concentrated New York City energy markets.

Entergy argues that the Commission exceeded its authority by "lowering the statutory bar for obtaining an Article VII certificate." It says we cannot place any reliance on our decisions in the Bayonne or HTP Article VII cases because the production cost savings analyses here produced a far

different result than in either Bayonne or HTP.[7] It asserts that not requiring a positive economic outlook is an abrupt departure from administrative precedent, *ultra vires*, and arbitrary.

Certificate Holders assert that Entergy has not identified any specific statutory provision that would expressly require the Commission to make an administrative determination of the financial viability of any Article VII project, and that the Commission has granted numerous Article VII certificates without undertaking the analysis Entergy demands in this case. Certificate Holders cite several administrative cases wherein they argue the Commission found need and/or public interest based on the project's ability to increase or encourage competition, or deliver additional gas or wind or hydro supplies, or reduce harmful air emissions and did not undertake a detailed administrative inquiry into the merchant facilities'

[7] Case 08-T-1245, Bayonne Energy Center, LLC, 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 (issued November 12, 2009) (Bayonne); and Case 08-T-0034, Hudson Transmission Partners, LLC, Order Granting Certificate of Environmental Compatibility and Public Need (issued September 15, 2010) (HTP).

economics.[8] Against this backdrop, they contend that Entergy's proposed requirements constitute an unexplained departure from prior precedent.

Certificate Holders further assert that the Order is entirely consistent with Bayonne and HTP. Certificate Holders note that the reasons cited in Bayonne for awarding a certificate are identical to those cited in the Order. They contend that the words "production costs" do not even appear in the Bayonne Order, so it is untrue that the decision in Bayonne was somehow based on a production cost savings analysis. Certificate Holders argue that Entergy's analysis of HTP also is

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[8] Certificate Holders at 12-17. The following is a partial list of cases cited by Certificate Holders as administrative precedent for granting Article VII certificates without conducting a review of project economics: Case 88-T-132, Application of Empire State Pipeline for Article VII Certificate, Opinion No. 91-3 (issued March 1, 1991) (Commission states that "need" is undefined in Article VII and finds that it is within the Commission's discretion to consider the role a line would play in promoting state policies, including encouraging competition, and that "in the wake of a movement toward deregulation … competition itself is desirable and justifies a finding of need."); Case 99-T-0977, Application of Nornew Energy Supply, Inc. for Article VII Certificate, Order Granting Certificate (issued January 13, 2000)(Commission found that the proposed facility will serve the public convenience and necessity because it will enable a generating facility to receive gas in a timely manner); Case 10-T-0350, Application of DMP New York, Inc. and Laser Northeast Gathering Company, LLC for Article VII Certificate, Order Granting Certificate (issued February 22, 2011) (Commission finds proposed line needed to transport natural gas from certain gas wells to Certificate Holders' proposed Compressor Station Facility located in the Town of Windsor and connect to the existing Millennium Pipeline); and Case 03-T-0515, Application of Flat Rock Wind Power, LLC for Article VII Certificate, Order Adopting Joint Proposal and Granting Certificate (issued April 12, 2004)(Commission finds line would connect the Flat Rock Wind Farm to the New York State Transmission System).

flawed. They assert that HTP did not involve a merchant transmission facility (as the project was supported by a contract HTP had with NYPA) and thus cannot stand for the proposition that merchant transmission projects must be required to pass a "production cost" test. According to Certificate Holders, the Commission made clear that factors other than production cost savings supported its need finding in HTP.

According to Staff, Entergy's claims about the nature of the Project's economics, the level of review that was applied, and the validity of the need and public interest findings fail because Staff demonstrated that the Project could well be economic. Staff adds that the Commission properly concluded that Entergy's premise (that the Project is uneconomic) 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."[9]

Entergy's third assertion is that rehearing must be granted to consider the Project's effect on competitive markets. Entergy argues that the Order oversimplified the impact of an uneconomic project on the competitive market and ignored the possibility that the Project's investors might proceed with an uneconomic project. Entergy also claims that the Commission did not consider how the Project would affect Upstate New York prices.

Certificate Holders respond that the Commission correctly recognized that: (1) blocking entry into otherwise competitive wholesale power markets at the request of incumbent suppliers (like Entergy) poses a threat to competitive markets

[9] Staff at 6, citing Order at 41.

that dwarfs the threat to such markets posed by subsidized uneconomic entry; (2) Entergy's concerns about uneconomic entry were premature, since the Commission's continuing jurisdiction over Con Edison provided ample authority to ensure that Con Edison would not enter into any such anticompetitive agreements; and (3) incumbent generators were fully protected from any threat of uneconomic entry by the installed capacity mitigation measures in the NYISO's Open Access Transmission Tariff (OATT).

They add that the effectiveness of NYISO mitigation measures is clearly established by two sworn statements filed with the Federal Energy Regulatory Commission (FERC) by Mr. Younger.[10] Certificate Holders assert that, in weighing this evidence, the Commission reasonably concluded that the cause of promoting competition in New York's wholesale markets would be better served by granting the Certificate than by withholding it.

Certificate Holders contend that the Commission correctly rejected allegations of harm to Upstate New York consumers because they were based solely on a witness's response to a hypothetical question. Certificate Holders argue that the courts in New York have ruled that such information should not be given probative weight where the facts assumed in the hypothetical are not supported by the record or by the witness's own knowledge.[11] Certificate Holders assert that Entergy failed to provide any record support for the assumption that Hydro-Québec will make the investments required to bring 1,000 MW of

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[10] Case 01-F-1276, Application filed by TransGas Energy Systems LLC. Certificate Holders say Mr. Younger testified that adding the 1,000 MW TransGas facility would make the NYC market significantly less concentrated and more competitive.

[11] Certificate Holders cite Hambsch v. NYC Transit Authority, 63 N.Y.2d 723 (1984).

hydroelectric power to the New York border in the absence of any transmission upgrades in New York State. As a result, Certificate Holders assert that Entergy has failed to reveal any error of law or fact in the Commission's decision to grant the Certificate in this proceeding.

Staff responds by asserting that Entergy's position regarding the effects on competitive markets is a policy-related matter that does not constitute an error of law or fact. Staff contends that, as such, the related arguments are outside the scope of permissible issues for rehearing and should not be considered.

Discussion

In the Order, we focused on determining whether consumers were adequately protected from overpaying for the Facility, as evidenced by the following excerpt:

> The protections embodied in Condition 15 are adequate to protect consumers. The protections clearly prohibit the Facility from receiving cost-of-service rates, and that protection is sufficient to satisfy us that consumers are adequately protected from overpaying.[12]

Entergy, however, proclaims that we erroneously found that this Project was a merchant project and that we erred in doing so because (1) we implicitly found that Mr. Younger's production costs analysis would have shown the Project to be economic if he had used forecasted bus prices and (2) we must find that a project will be economic before we can find that it will be a merchant project. Entergy's assertions lack merit.

In fact, we made no implicit finding about what Mr. Younger's analysis might have concluded if he used forecasted bus prices; instead, we explicitly found and

[12] Order at 81.

determined that "no one can make any definitive statements about the future economics of the Facility."[13] Despite Entergy's insistence on reiterating Mr. Younger's testimony, our (actual) explicit finding holds true.

Entergy also asserts that we should never have determined that this Project is a merchant project (i.e., one where the project investors are seeking to recover their costs through wholesale power transactions) because Mr. Younger's analyses do not support a determination that 100% of the Project's costs will be recovered through wholesale power transactions. However, there are several problems with this argument. First, as we explained in the Order, economic analyses are "but one factor we consider" and, second, we consider that factor when determining need, not merchant status.[14] Third, we expressly found Mr. Younger's production costs analysis to be "inconclusive" because it depended "very heavily on, among other things, the trajectory of actual gas prices" and we knew, from the record and from our experience, that "gas price forecasts can change dramatically in a very short time."[15] Fourth, we found his revenue/cash flow analysis unreliable because it keyed on historical bus prices that fail to "capture key future factors such as gas price forecasts" and that were "artificially depressed by the recent recession."[16]

Entergy fails to identify any specific statutory provision or applicable precedent that, as a prerequisite to granting an Article VII certificate, requires us to find that a project is economic or will recover 100% of its costs from

[13] Order at 38.

[14] Order at 38.

[15] Order at 41.

[16] Order at 41-42.

competitive wholesale power transactions. As discussed in the Order, the Commission previously has granted Article VII certificates to projects where there were sufficient bases to conclude that the majority of the project's costs would be sought from wholesale power transactions.[17] In this case, we similarly concluded that the majority of the Project's costs, with the possible exception of the costs of the Astoria-Rainey Cable, would be sought from wholesale power transactions. With respect to the costs of the Astoria-Rainey Cable, we did not, as Entergy alleges, "gloss over" this issue; we explicitly found that such costs were a small portion of the overall project costs and will be subject to regulatory scrutiny by us (via the filing provision of Condition 15) and also by FERC.[18]

Though Entergy claims that a more stringent standard should have been applied, it offers no support for this claim. Entergy likely did not specify its allegedly "more stringent standard" because the statutory standards for granting an Article VII certificate, found in PSL §126, offer no support for such a position. The relevant provisions of PSL §126 call for findings regarding need, the nature and minimization of environmental impacts, the portion of the line to be underground, and conformance to state and local laws and regulations, a long-range plan, and the public interest. These findings must be made, regardless of the proposed project's economic status, and they were made here. We reviewed all of the arguments and evidence offered relating to these findings, ultimately determining that the various evidence and arguments that all parties had proffered weighed in favor of finding need

[17] See Order at 77-78.

[18] Order at 83.

for this Project and that its approval was in the public interest.

Notably, there were several uncontested bases supporting our need finding, including: (1) the Project will offer additional transmission capacity into the New York City load pocket; (2) by providing a link to abundant hydropower resources, the Project will significantly reduce harmful emissions and will enhance fuel diversity; and (3) due to these and other characteristics, it will help achieve public policy objectives expressed in the 2009 State Energy Plan and New York City's *PlaNYC*, among other documents expressing State policy.[19] We expressly stated that "[t]hese, standing alone, are ample bases for our finding and determination that this Project is needed."[20] We also found that the "Facility's expected emission reduction and fuel diversity benefits and its ability to provide additional transmission capacity into New York City – features of the Facility that are uncontested – more than amply support our finding that the Facility will serve the public interest."[21]

Entergy now claims that there is no "tangible proof" that the Facility can deliver these benefits and that the Order therefore lacks a rational basis. Such a claim is barred due to Entergy's failure to take exception to the Recommended

[19] Order at 22-23.

[20] Order at 23.

[21] Order at 77.

Decision's resolution of these uncontested issues.[22] Our rules provide that any objection to the RD's resolution of an issue is waived when (1) a party fails to except to that issue and (2) the Commission adopts the recommended resolution.[23] Where, as here, these conditions exist, a party may not seek a different resolution of that issue on rehearing. In any event, there is record support for these claims.[24]

Entergy claims that the statutory need and public interest standards were unduly lowered in this proceeding and that the Commission has departed from precedent and cannot place any reliance on its orders in Bayonne or HTP. These claims also lack merit. As we stated above, we cited to and applied the

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[22] In the Recommended Decision (RD), the ALJs state, in relevant part, that: (1) the Facility's "expected and uncontested emissions benefits" (RD at 32-33) support both the need and public interest findings (RD at 30-33 (and record citations therein), 72, and 116); (2) "Entergy's assertions [that the Facility's fuel diversity benefits are "speculative"] should be rejected because the record evidence indicates that the most probable source of the power to be supplied by this facility will come from Hydro-Québec's portfolio of supplies which consist predominately of hydro and wind power" (RD at 34; see also summary of parties' briefs, RD at 33); and (3) "… with respect to capacity, the additional installed capacity that the facility will provide is what should be considered as a factor supporting both the need and public interest findings" (RD at 56-57). Entergy did not except to these recommendations and we adopted them as part of our Order (See Order at 22-23, 77, and Ordering Clause 1).

[23] 16 NYCRR 4.10(d)(2) states "A party's failure to except with respect to any issue shall constitute a waiver of any objection to the recommended decision's resolution of that issue. If the Commission adopts the recommended resolution, a party that has not excepted may not seek a different resolution of that issue on rehearing."

[24] See, e.g., Tr. 246-247, 248, 249, 304 and Hearing Exhibit 204 for evidence concerning expected air emissions benefits and Tr. 307-308 for evidence concerning fuel diversity benefits.

relevant statutory standards that are set forth in PSL §126; Entergy, on the other hand, fails to cite any statutory provision that supports its claims. As Certificate Holders note, numerous Article VII certificates have been granted without undertaking the analysis Entergy demands in this case. Also, in the Order, we properly cited two cases, Bayonne and HTP, as examples that demonstrate, contrary to Entergy's claim, that our decision in this proceeding is consistent with applicable policies and precedent.

We cited and discussed Bayonne and HTP in our Order because the reasons cited in Bayonne and HTP to support the need and public interest findings were similar to the reasons relied on here to support our need and public interest findings.[25] In addition, in HTP, as here, (1) parties provided production cost tests that had conflicting results, including the negative production costs test that ultimately was rejected by the Commission, and (2) a large portion of the project's costs (although not necessarily 100%) were subject to recovery from the competitive wholesale energy market.[26] For these reasons, Entergy's argument that we "misplaced" our reliance on Bayonne and HTP is wrong[27] and fails to support the Petition.

Finally, Entergy's arguments that we must grant rehearing to consider the Project's effect on competitive markets also fail. As Staff correctly observes, Entergy's

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[25] See, e.g., Order at 21-23, 27-28.

[26] Order at 77-78.

[27] Certificate Holders' contention that the Commission made clear that factors other than production cost savings supported the need finding in HTP is accurate (see Order at 22, summarizing HTP Order at 42-47); but its contention that HTP is not a merchant project is inconsistent with the Order at 77-78 and the HTP Order at 45.

arguments are nothing more than a policy-based disagreement and as such do not qualify under 16 NYCRR 3.7 as permissible bases for granting rehearing. And, as Certificate Holders correctly observe, such arguments already were considered. In fact, we afforded full and fair consideration of Entergy's arguments and dismissed them as either unpersuasive or unfounded.

With respect to claims that the Project's investors might proceed with an uneconomic project in hopes of securing an extra-market subsidy to support their investment, we found that "one way to truly harm competitive markets is to deny potential suppliers the certificates they need without having a strong basis for doing so" and that it would be better to avoid "entry-blocking actions that cause more harm than good," especially for this type of rare and unlikely behavior.[28] We found that any future buyer market power issues could be addressed by our exercise of prudence review authority or by relying on the NYISO's FERC-approved buyer market power mitigation measures.[29] We also found that the addition of a new supplier to New York City's existing mix will reduce concentration of ownership of supply in New York City and make for a more competitive market.[30]

As for Entergy's allegations that we failed to consider price impacts for Upstate New York consumers, we considered such claims but found that the position advocated by Entergy and others was refuted by Staff witness Paynter's testimony. Dr. Paynter testified that when large supplies enter a market, they naturally tend to depress prices.[31]

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[28] Order at 50.

[29] Order at 50-51.

[30] Order at 51.

[31] Tr. 171. See also Order at 44-46.

ENTERGY'S ENVIRONMENTAL ISSUES ON REHEARING

In its Petition, Entergy raises five environmental issues. Four of Entergy's arguments are related to minimization of impacts to sturgeon habitat and the fifth pertains to federal environmental permits that Certificate Holders must obtain. First, Entergy asserts that potential adverse impacts to Endangered Species Act sturgeon habitat from use of concrete mats have not been addressed; second, that potential adverse impacts to Endangered Species Act sturgeon habitat outside certain sensitive habitat areas have not been addressed; third, that potential adverse impacts of the emanation of magnetic fields from the cables to Endangered Species Act sturgeon have not been addressed; fourth, that the Order improperly relies upon the post-certification to develop a final facility design that minimizes habitat impacts; and fifth, that, as a matter of law, the Commission is bound by the Army Corps of Engineers (USACE) preliminary opinion on cable burial issues. [32] As discussed below, Entergy's environmental claims on rehearing are without merit.

Entergy has merely repeated arguments made below on these environmental issues, all of which were rejected in the Order. In the Order, upon reviewing the full record in this

[32] We note that, in making its arguments, Entergy has cited the federal Endangered Species Act (federal ESA) rather than the state counterpart. Substantively, there is no difference relevant to the issues here. Under the federal ESA program, the Secretary of the Interior is authorized to enter into a cooperative agreement with any State that establishes and maintains a program at least as protective as the federal ESA program (see 16 USCA §1535, Cooperation with States). New York's Endangered Species Act (State ESA) and implementing regulations are such a program (see ECL §11-0535; see also, 6 NYCRR Part 182). Therefore, we properly considered Entergy's ESA issues under the State ESA.

proceeding, we made statutory findings that the record identifies the nature of the probable environmental impacts of the Facility, and that the Facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of various alternatives, and other pertinent considerations.[33] In its Petition, Entergy misapprehends the record in arguing that the environmental minimization finding is not supported by the record. Moreover, in its Petition, Entergy fails to go beyond conclusory statements in asserting an error of law or fact, or new circumstances that would warrant a different determination regarding the environmental issues.

Concrete Mats

In the Order, we made several important determinations. First, we determined that Entergy had failed to provide any evidence or legal authority to support its claims that the concrete mats to be used in certain locations of the Facility would have any adverse impacts on sturgeon,[34] or that the proposed installation of the mats would result in the adverse modification of sturgeon habitat amounting to a state ESA "take."[35] Moreover, we noted that Entergy's claims regarding the extent of the concrete mats that the Facility would require were overstated.

In the Order, we noted that the route of the Facility had been carefully designed in concert with the New York State Department of Environmental Conservation (DEC) and the New York State Department of State (DOS) to avoid environmentally

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[33] See PSL §§ 126(1)(b) and (c).

[34] Order at 58.

[35] Id.

sensitive fish habitat to the maximum extent possible.[36] We recognized that the parties developed the route over months of collaborative discussions based upon an extensive analysis of river bottom bathymetry, fisheries data, acoustic fish tracking, annual Hudson River surveys of fish distribution, adult and juvenile sturgeon monitoring, submerged aquatic vegetation maps, tidal wetland maps and existing Significant Coastal Fish and Wildlife Habitats (SCFWHs).[37] We determined that the record shows that the disruption to the benthic community resulting from construction of the Facility will be minor and short lived.[38] Further, we noted that approximately 17% of the matting will be installed over existing hard substrate that is similar to the surface of the concrete matting.[39] We found that, in "small sections of the riverbed where concrete mats will be installed … the benthic community is anticipated to redevelop on or around the concrete mats."[40] On the basis of these factors, we concluded in the Order that "the proposed limited installation of concrete mats would not degrade state ESA sturgeon habitat or harm sturgeon."[41]

Entergy's Petition ignores our determination that no permanent loss of sturgeon habitat will occur as a result of the construction of the Facility. Entergy is simply wrong in alleging that this issue has not been addressed. In its Petition, Entergy has failed to present any new or different evidence or legal authority to support its claims.

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[36] Order at 58–59.

[37] Order at 58, 62.

[38] Order at 61.

[39] Order at 56, 59.

[40] Order at 60.

[41] Id.

Potential Impacts Outside Sensitive Habitat Areas

Entergy's claim that routing the Facility around sensitive habitat areas is not sufficient, in and of itself, to avoid harm to sturgeon is erroneous for several reasons. Routing the Facility around sensitive habitat areas is an important factor in minimizing the possible adverse impacts to sturgeon habitat, as described in the Order. Furthermore, on the record below, Entergy failed to present any evidence or legal authority to support its claim that construction of the Facility outside of such sensitive habitat areas would harm sturgeon habitat (other than by the installation of concrete mats, discussed above). On rehearing, Entergy provides nothing new to persuade us to revise our findings.

Emanation of Magnetic Fields from the Cables

On rehearing, Entergy claims that the Order fails to address its arguments regarding potential effects of magnetic fields on Hudson River sturgeon navigation. Entergy claims that studies in the record concerning the effects of magnetic fields on Atlantic and Pacific salmon are not probative of magnetic field impacts on ESA-listed sturgeon in the Hudson. To the extent the Order finds those studies to be probative of the Facility cable's magnetic field effects on sturgeon, Entergy asserts that the finding lacks a rational basis in the record. In sum, Entergy seeks rehearing on the claim that the record does not specifically assess possible effects of magnetic fields on sturgeon navigation and migration.

Both Certificate Holders and Staff assert that the Order provides appropriate findings that the Facility would minimize environmental impacts, including potential magnetic field impacts with respect to ESA sturgeon. The record in this proceeding, they maintain, does contain studies regarding the effects of magnetic fields on fish species, and moreover,

Entergy has presented no evidence as to why the studies in the record are not probative of the magnetic field impacts on Hudson River State ESA sturgeon.

Certificate Holders contend that the Commission finding that the nature of the environmental impact has been assessed and minimized is also supported in the record by the uncontroverted statements of Dr. William H. Bailey of Exponent Inc., regarding potential magnetic fields impacts on aquatic species. Commenting upon the potential magnetic field impact on eggs and larvae, Certificate Holders assert, Dr. Bailey indicated that "[the] data 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."[42] Furthermore, Certificate Holders continue, Dr. Bailey concluded that "research studies on a variety of fish and other marine species have not reported adverse effects of exposure to magnetic fields."[43] Finally, Certificate Holders emphasize Dr. Bailey's conclusion that the research is clear that no single environmental stimulus such as current flow, light, smell, taste, magnetic field, temperature, salinity or other factor dominates migratory behavior; marine organisms have the means to coordinate and make use of multiple cues and resolve discrepancies.[44]

Certificate Holders and Staff conclude that the Commission, in its Order, has already addressed Entergy's arguments, and has discussed in significant detail the record

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[42] Hearing Exhibit 64 at 59.

[43] Id.

[44] Order at 69; Hearing Exhibit 64 at 57.

information regarding the potential magnetic and electromagnetic field impacts on ESA sturgeon.

Upon examining the substantial analysis, testimony and other documents composing the record evidence in this proceeding, we concluded that the magnetic field produced by the Facility would be de minimus or non-existent, based upon the burial depth and configuration of the cables.[45] In addition to the Environmental Impacts Assessment (EIA), the record contains multiple models of expected magnetic and heat fields at varying depths, showing that impacts, if any, will be minimal and will not affect sturgeon.[46]

The Certificate Holders have minimized 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 outside of the Federal navigation channels, to a planned depth of six feet; within the navigation channel, the cables will be buried at least 15 feet below the USACE's authorized navigation channel depth.[47] Any magnetic field generated by the cable would originate at the centerline and lessen as the distance horizontally and vertically from the centerline increases, in proportion to the cable burial depth.[48] As a result, we

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[45] Order at 68.

[46] 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 (Applicant's Letter to New York State Department of State regarding Updated Alternatives Analysis (January 18, 2011); Hearing Exhibit 92, Hearing Exhibit 100 (Certificate Holders' Letter to the New York State Department of State, dated March 18, 2011).

[47] Order at 68.

[48] Id.

concluded that the zone of influence from the cables is small and that "migrating fish could potentially travel the full length of the Hudson without encountering the zone of influence."[49]

We also rejected Entergy's argument, made below in its Brief on Exceptions, that potential effects upon sturgeon have not been adequately studied and documented in the record.[50] As a basis for this determination, we cited the Applicant's EIA, which considered the impact of magnetic field on migration, spawning, feeding and development of aquatic species, including those limited areas using concrete matting.[51]

As we stated in the Order: "Entergy's principal argument, that state ESA sturgeon will respond to the magnetic field that the Facility is anticipated to induce, is contradicted and rebutted by expert record evidence."[52] Both the EIA and expert record evidence support the conclusion that the Facility's magnetic field would have no significant impact.[53] The record evidence shows that potential impacts considered include the impact of the magnetic field on the migration,

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[49] Order at 68-69.

[50] Order at 69 ("We find that the record supports a finding that the magnetic field induced by the Facility will have a minimal impact, if any, on migratory species, including ESA sturgeon, in the Hudson River.").

[51] Order at 68-69; See also, Hearing Exhibit 24 at 10-16, 36-37; Hearing Exhibit 64; Hearing Exhibit 87; Hearing Exhibit 92; Hearing Exhibit 100.

[52] Order at 67.

[53] Order at 68-69, including footnote 121 (referencing Hearing Exhibit 64, Information Response to Request DEC-3 by Dr. William H. Bailey of Exponent, Inc.) and footnote 122 (referencing EIA at 203 – 207).

spawning, feeding, and development of aquatic species.[54] As we found in the Order, the record supports the conclusion that no single environmental stimulus, such as magnetic field, dominates migratory behavior; and, to the extent that the magnetic field may affect navigation abilities of State ESA sturgeon, any such impact would be minimal, including avoidance of the waters nearest the cables.[55]

In sum, as we stated in the Order, both the EIA and other expert record evidence support our conclusion that the low level magnetic field created by the Facility cables will have no significant impact on migratory species, including State ESA sturgeon, in the Hudson River.[56]

Environmental Management and Construction Plan

In the Order, we required that, during the Environmental Management and Construction Plan (EM&CP) Project phase, Certificate Holders must develop a final Facility design that minimizes impacts to the five nearby DOS Significant Coastal Fish and Wildlife Habitats (SCFWHs).[57] Entergy asserts in its Petition that the Order improperly relies upon the post-certification EM&CP requirements to develop a final Facility design that minimizes habitat impacts.

As we explicitly found in the Order, "the Project has avoided or minimized potential environmental impacts in satisfaction of PSL §126, without reference to any further avoidance or minimization that may be achieved from the EM&CP

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[54] Id.

[55] Id.

[56] Order at 69.

[57] Order at 64.

Plan."[58] In the Order, we noted that the Facility design would be finalized during the EM&CP project phase, (as is the design for any project approved under Article VII), when all final construction details are determined. In so doing, we merely acknowledged that there would be a further opportunity, after issuance of a Certificate, for Certificate Holders to ensure that any potential risk to state ESA sturgeon habitat, or any other potential adverse environmental impacts that may be minimized in developing the final construction details, are minimized to the greatest extent practicable.[59] On rehearing, Entergy provides nothing new to persuade us to revise our findings.

The USACE and Cable Burial

In addition to a New York Article VII Certificate, Certificate Holders must obtain federal permits for the Project from the USACE pursuant to Section 404 of the Federal Clean Water Act and Section 10 of the Federal Rivers and Harbors Act.

Entergy renews its argument, on rehearing, that as a matter of law, the Commission is bound by a letter from the USACE to Certificate Holders regarding cable burial issues. Entergy cites a July 5, 2011 letter from the USACE to Certificate Holders regarding the federal permits, which states that the USACE "does not permit permanent Structures within the length of the right of way, including side slopes, of a Federal navigation channel …; laying the cables on lake/river bed in limited areas with protective coverings would not be acceptable …; [and] the cables must be moved outside the NLC [Narrows of

[58] Order at 65.

[59] Order at 65.

Lake Champlain] Federal navigation channel limits."[60] Entergy contends that, because this is the sole position of the USACE in the record, as a matter of law, the Commission is bound by the USACE's preliminary opinion on cable burial issues, and cannot make a finding of minimization of environmental impacts.

Certificate Holders and Staff assert that Entergy's argument, rejected in the Order, should again be rejected to the extent it is considered on the merits on rehearing. Certificate Holders note that the USACE letter was made in the course of preliminary discussions, during an ongoing federal process, that is completely independent and outside of the Article VII process.

In the Order, we recognized the preliminary nature of the USACE letter. We cited the Revised Certificate Conditions, which require compliance with the outcome of that federal process. Compliance with USACE requirements is an express condition of Revised Certificate Condition 11, which states that, prior to construction, the Certificate Holders 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 USACE. More generally, revised Certificate Condition 9 requires the Certificate Holders to obtain all necessary permits and consents before commencing site preparation or construction.

As we stated in the Order, it is simply premature to guess the outcome of the USACE's review.[61] In the Order, we also recognized the USACE's prior precedent for cable burial established in the Bayonne proceeding, in which the USACE allowed cable burial similar to Certificate Holders' proposal.

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[60] Hearing Exhibit 215, Letter of July 5, 2011.

[61] Order at 71.

Entergy misapprehends the status of the pending federal permit process related to Facility construction in the navigation channel. The USACE has not yet made a final determination regarding the proposed placement of the cables (and use of concrete matting). When the USACE does render such a determination, the Certificate Holders will be bound by the determination; pursuant to Revised Certificate Conditions 9 and 11, Certificate Holders are required to obtain all necessary permits and consents. Therefore, to the extent that the federal permits may contain conflicting requirements, Certificate Holders must reconcile the Certificate and federal requirements before the Project can go forward. (To the extent that Entergy relies upon the July 5, 2011 USACE letter regarding Certificate Holders use of concrete mats, discussed above, we reject that argument on the same reasoning.)

In sum, we agree with Entergy's contention that we must defer to the USACE on cable burial issues, but we reject Entergy's misplaced exclusive reliance upon preliminary correspondence from the USACE. Accordingly, Entergy's issue regarding the USACE and cable burial requirements must be rejected.

TIMELINESS AND CAUSE TO ACCEPT LATE FILING

Turning to the procedural issue presented here, Entergy makes three arguments, in the alternative, to assert that its Petition was timely filed, or should be deemed timely filed, and considered on the merits. Entergy's first argument is that the Commission's filing requirements are satisfied when a filing is sent by a party rather than when it is received by the Commission's Secretary. Second, in the alternative, Entergy contends that the Commission misapplied its counting rules in determining that May 20, 2013 was the last day for the

submission of rehearing petitions and should have found that the last day for such filings was May 21, 2013. Third, alternatively, Entergy asserts that it would be unfairly prejudiced if the Commission refused to consider its request for rehearing, because that request was filed only one day out of time and because the failure of the electronic mail system used by Entergy's counsel is "good cause" for extending the deadline in this case by one day. Certificate Holders respond by urging the Commission not to extend the 30-day filing limit for petitions for rehearing in this proceeding.

Entergy explains that on the afternoon of May 20, 2013, it did not send its Petition by e-mail directly to the Secretary (and parties in this proceeding). Instead, Entergy chose to forward its Petition by e-mail to a third-party commercial vendor service, RPost, with which its counsel had contracted for services. RPost creates a permanent record of the time when its customer's message, "registered" with RPost, is delivered to the intended ultimate recipients' servers; in this instance, Entergy's intended ultimate recipients were the Secretary and parties in this proceeding.

However, when RPost received Entergy's e-mail on the afternoon of May 20, 2013, due to the large number of recipient addresses, RPost withheld the e-mail to ensure that it was not impermissible "spam." After concluding that the e-mail was not spam, RPost released the message for delivery to the Secretary (and other parties) during the afternoon of May 21, 2013, resulting in receipt by the Secretary at 12:59 p.m. on May 21, 2013.

In its brief and supporting documentation, Entergy argues that, on May 20, 2013, its counsel was under the misapprehension that he had successfully transmitted the

Petition by e-mail to the Secretary and parties that afternoon, via RPost. On May 21, 2013, however, RPost notified Entergy's counsel of the delay in delivery of the e-mailed Petition to the Secretary (and parties). In response, on the afternoon of May 21, 2013, Entergy's counsel transmitted the Petition by e-mail to the Secretary (and parties) twice more; again via RPost and then separately, directly to the Secretary (and parties).

When a Document is Deemed Filed with the Secretary

Rules 3.2(b)(3) and 3.5(e)(3) both provide that "electronic service is complete on sending." In its first argument, Entergy contends that the Commission's requirements for filings with the Secretary are satisfied when a filing is sent by a party rather than when it is received by the Secretary.

Entergy misconstrues Rules 3.2(b)(3) and 3.5(e)(3) in arguing that its May 21st filing was timely when sent. Rules pertaining generally to service of documents are distinct from rules pertaining specifically to filings with the Secretary. Rule 3.5(d) addresses the filing of documents with the Secretary, providing as follows:

> A document presented for filing electronically will be deemed filed at the time it is received by the Secretary. A document presented for filing in paper form only will be deemed filed at the time it is received at the Commission's Albany office. The Secretary, for the purpose of promoting the fair, orderly, and efficient conduct of the case, may authorize other arrangements.

To give meaning to both Rule 3.5(e)(3) and Rule 3.5(d), the former rule cannot be applicable to filings with the Secretary because that would contradict Rule 3.5(d).

As discussed further below, it is uncontroverted that the Secretary first received Entergy's Petition, by e-mail, at 12:59 p.m. on May 21, 2013.[62] Therefore, Entergy's argument that it properly served its Petition on the Commission's Secretary by e-mail on May 20, 2013 misapprehends the rules and must be rejected.

Whether Timely Filed on May 21st

Entergy's second argument, presented in the alternative, is that its Petition was timely filed on May 21, 2013, consistent with Rules 3.7(a) and 3.5(f). Rule 3.7(a) provides that rehearing requests may be submitted "within 30 days of service of the order [emphasis added]." Entergy contends that Rule 3.5(f), provides that if a document must be served upon parties in the proceeding, the time for any "action taken within a specified number of days from the service of a document" is extended by one day when service is made electronically.

Entergy's argument fails for several reasons. First, as noted by Certificate Holders and Staff, Entergy's reliance upon Rule 3.5(f) is inconsistent with PSL §128, which specifically governs petitions for rehearing of Article VII orders and sets the deadline from issuance rather than service.

Second, Rule 3.5(f) does not apply to documents issued and served by the Commission. A final order granting an Article VII certificate, such as the Order in this case, does not call for a "response," and a petition for rehearing is not to be considered a "response" as used in the Rule. Service of Commission orders is governed by Rule 3.2, subtitled "Service and effectiveness of commission documents," whereas Rule 3.5(f),

[62] Affirmation of William A. Hurst at 5-6.

granting additional time for a response to a document served electronically, is part of Rule 3.5, subtitled "Documents filed with the secretary." These are documents filed by parties and served by parties upon each other, not documents issued by the Commission.

Third, Entergy has miscounted the days in any event. Even if it were granted an extra day to respond, the additional day would have extended the response time from Saturday, May 18 to Sunday, May 19. Thereafter, the deadline would be moved to the next business day, which would still be Monday, May 20.[63] Therefore Entergy's claim of an extra day is to no avail here.

Good Cause and Extension of Filing Date

Lastly, Entergy argues, in the alternative, that it has established a reasonable inability to file its Petition on May 20, 2013 and has established good cause for the Secretary to accept the Petition for filing on May 21, 2013. Entergy cites circumstances surrounding the excused late filing of Briefs on Exceptions to the Recommended Decision (RD) in this proceeding, on January 17, 2013; specifically, Entergy's brief and the Business Council's brief. The Briefs on Exceptions to the RD were due on January 17, 2013 at 4:00 p.m., but Entergy's brief was not filed with the Secretary (i.e., received) until 4:06 p.m. and the Business Council brief until 4:17 p.m. In that instance, Entergy demonstrated that it had transmitted its brief directly to the Secretary at 3:19 p.m., and attributed the 47-

[63] By its terms, GCL §25-A(1) applies only when the period of time for an action falls on a weekend or on a public holiday and serves only to extend the period for performance to the next business day: "When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day …"

minute delay to unspecified "server delay," beyond its control. These late-filed Briefs on Exceptions were accepted despite a motion to strike them due to untimeliness.[64]

In response, Certificate Holders assert that the provisions of PSL §128(1), establishing the 30-day period for requesting rehearing, are part of a statute of limitations that the Commission may not waive or extend. Further, Certificate Holders contend that Entergy's late-filed Petition is attributable to law office failure, and New York's courts have consistently rejected law office failure as a basis for finding good cause.

Certificate Holders assert that Entergy's good cause argument, based upon the ruling accepting Entergy's late-filed Brief on Exceptions in this proceeding, ignores the substantial difference in circumstances between Entergy's late-filed Brief on Exceptions and the Entergy's late-filed Petition. Regarding the late-filed Briefs on Exceptions, Certificate Holders note, the Commission had not yet ruled on the issues in this case or granted a Certificate, and other parties including the Independent Power Producers of New York, Inc. (IPPNY) were raising many of the same claims advanced in Entergy's Brief on Exceptions. Excluding Entergy's late-filed Brief on Exceptions, Certificate Holders reason, would have had little impact, if any, on the subsequent course of this proceeding because other parties' timely-filed briefs would be considered in any event.

Any prejudice resulting from the Commission's acceptance of Entergy's late-filed Brief on Exceptions, Certificate Holders assert, was far less than the prejudice that would result from review on the merits of Entergy's late-filed

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[64] See Ruling on Motion to Strike Briefs on Exceptions, at 3 (issued January 30, 2013).

Petition. By comparison, if Entergy's request for rehearing is granted, Certificate Holders contend, the prejudice to the public interest and themselves will be substantial. Certificate Holders state that Entergy, as a major supplier of electricity into markets in New York City and surrounding areas, will benefit greatly from the higher electricity prices resulting from any delay in commercial operation of the Facility. At the same time, Certificate Holders note, consumers in New York City and surrounding areas will be harmed by deprivation of tens if not hundreds of millions of dollars in energy savings and substantial air emissions reductions attributable to any such delay.

Furthermore, such delay, they contend, would cost the Facility's financial backers millions of dollars in increased financing costs, and could cause the contracts Certificate Holders have negotiated for the construction of the Facility to become stale, potentially resulting in even greater cost increases as Certificate Holders are forced to renegotiate those agreements. The combined effect of these cost overruns, Certificate Holders assert, could jeopardize financial backing and shipper support for the Facility.

Certificate Holders urge the Commission to reject Entergy's contentions that law office failure constitutes good cause to support an extension of the filing deadline justifying acceptance of Entergy's request for rehearing. Entergy's affidavits and related materials provided with its Brief, Certificate Holders argue, make clear that the lateness of Entergy's Petition was entirely due to failures within the exclusive control of Entergy's attorneys. Specifically, Certificate Holders continue, notwithstanding the crucial importance of filing its Petition on a timely basis to preserve its statutory rights in this proceeding, Entergy: (1) adopted a

new and untested method of filing its pleadings with the Commission's Secretary; (2) failed to test that system at any time prior to using it to file its Petition in this proceeding; (3) failed to determine whether that system would be able to handle the large number of e-mail addresses on the service list in this proceeding without delay; (4) waited until 3:20 PM on May 20, 2013 to attempt an electronic filing using that new and untested system; and (5) made no apparent effort to verify with either RPost itself, with the Commission's Secretary, or with any other party on the service list that its Petition had in fact gotten through to its intended recipients. In light of these errors and omissions, Certificate Holders reason, Entergy cannot be allowed to claim that its failure to file its Petition in a timely manner was the result of anything other than law office failure.

Certificate Holders conclude that New York courts have consistently held that law office failure and prejudice to the late filing party alone do not amount to good cause to extend the time limits established in their rules. For all of these reasons, Certificate Holders conclude that the Commission should reject Entergy's request for a waiver of the 30-day filing limit for its Petition.

We reject Certificate Holders' statute of limitations argument suggesting we have no authority to extend the deadline for petitions for rehearing filed under PSL §128. That argument is not consistent with the provisions of PSL §22 and Rule 3.3(a)(1), which provide that the Secretary may extend a deadline for filing of a petition for rehearing, for good cause shown. PSL §128 incorporates PSL §22 insofar as it provides that "any party aggrieved by any order issued on an application for a certificate may apply for rehearing under section twenty-two." Therefore, the Commission can entertain Entergy's request

for an extension of time in which to file its Petition. Here, Entergy has not made a showing of "good cause" justifying an extension of time, so we decline to grant the request.

The Commission expects parties, especially sophisticated parties, to carefully adhere to procedural deadlines in Article VII cases, especially deadlines such as rehearing petitions which carry serious legal consequences. Lack of adherence to these deadlines undermines the orderly conduct of cases and consumes resources with procedural arguments. As a result, departures from these procedural requirements should be well supported. A brief on exceptions is different from a petition for rehearing.[65] As Certificate Holders have argued, it occurs at a different phase of the proceeding and different procedural and substantive consequences flow from it. A delay in filing a brief on exceptions does not raise the exhaustion issues that arise from a failure to timely file a petition for rehearing in compliance with the requirements of PSL §128. The special procedures in §128, requiring rehearing as a predicate for judicial review and restricting the time for taking an appeal thereafter to 30 days,

[65] Moreover, the "server delay" discussed in the ruling allowing the late Briefs on Exceptions was a delay beyond Entergy's control, whereas the delay at issue regarding filing of the Petition was not.

demonstrate legislative intent to expedite siting cases and to ensure the finality of such decisions as a priority.[66]

In this instance, Entergy's own description of the events that led to its late filing, when taken together with its failure to assert any credible substantive reason to revisit our initial decision, does not constitute the showing of good cause we would require to excuse the untimely filing of its Petition.

CONCLUSION

On the merits, we conclude that the Petition fails to demonstrate that an error of law or fact has been made or that new circumstances warrant a different conclusion. Further, Entergy's Petition was untimely, and Entergy has failed to demonstrate good cause for an extension of the deadline. Accordingly, Entergy's Petition is denied.

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[66] The discussion of the Eminent Domain Procedure Law in Matter of Kaur v New York State Urban Development Corp., 15 N.Y.3d 235 (2010), is equally applicable to PSL Article VII. In Kaur, the Court of Appeals noted that, by placing jurisdiction in the Appellate Division and setting a short statute of limitations for review under the EDPL, the Legislature evinced an intent for expeditious review of agency determinations, as reflected in legislative history stating that: "Nor should the construction of public projects be brought to a standstill, as the need for public projects in an advanced urban society is essential." 15 N.Y.3d at 261 & n.12 (interior citations omitted).

The Commission orders:

1. Entergy's Petition for Rehearing is denied.

2. This proceeding is continued.

By the Commission,

Kathleen H. Burgess

Digitally Signed by Secretary
New York Public Service Commission

KATHLEEN H. BURGESS
Secretary