

**BEFORE THE
PUBLIC SERVICE COMMISSION
STATE OF NEW YORK**

Application of Champlain Hudson Power)
Express, Inc. and CHPE Properties, Inc. for)
a Certificate of Environmental Compatibility)
and Public Need Pursuant to Article VII of)
the Public Service Law for the Construction,)
Operation and Maintenance of a High-)
Voltage Direct Current Circuit from the)
Canadian Border to New York City.)

Case No. 10-T-0139

**OPPOSITION OF CHAMPLAIN HUDSON POWER EXPRESS, INC.
AND CHPE PROPERTIES, INC. TO REQUEST OF ENTERGY NUCLEAR POWER
MARKETING, LLC AND ENTERGY NUCLEAR FITZPATRICK, LLC FOR
RECONSIDERATION OF ITS MOTION FOR
INCORPORATION BY REFERENCE OR OFFICIAL NOTICE**

Champlain Hudson Power Express, Inc. (“CHPEI”) and CHPE Properties, Inc. (CHPE Properties,” and, collectively with CHPEI, the “Applicants”) submit this Opposition to the Request of Entergy Nuclear Power Marketing, LLC and Entergy Nuclear FitzPatrick, LLC (collectively, “Entergy”) for Reconsideration of its Motion for Incorporation by Reference or Official Notice pursuant to section 3.6 of the Commission’s Rules, 16 N.Y.C.R.R. § 3.6 (2012).

**INTRODUCTION AND
SUMMARY OF POSITION**

Entergy’s Motion for Reconsideration (the “Entergy Request”) of its previous Motion for Incorporation by Reference or Official Notice represents no less than the fourth submission by Entergy seeking the right to refer to factual matters relating to electromagnetic fields (“EMF”) contained in documents not included in the evidentiary record in this adjudicative proceeding. For the reasons described below, none of the contentions raised by Entergy in its latest Request

provide a basis for reversing Your Honors' three previous rulings rejecting this improper proposal.

ANALYSIS

I. YOUR HONORS PROPERLY REJECTED ENTERGY'S REQUEST TO INCORPORATE AS UNTIMELY

In contending that Your Honors should reverse your previous rejection as untimely of Entergy's proposal to incorporate the EMF Report¹ and the Gertseva Article² into the evidentiary record in this case, Entergy comes perilously close to the textbook definition of "chutzpah."³ Entergy admits: (1) that it failed to raise the EMF impacts of the Facility as a contested issue of material fact to be addressed at the hearing; and (2) that it also failed to make any effort to introduce these documents into the record at the hearing. Rather than attempting to justify these failures, Entergy claims instead that the very fact of its failure to comply with Your Honors previous rulings establishing these requirements now precludes Your Honors from requiring Entergy to comply with the time limits applicable to other parties who did offer evidence into the record at the hearing:

[U]nder the Ruling on Issues, which established that "the issue of EMF impacts is not a fact issue for hearing," there simply was no basis for Entergy to request incorporation of these reports by reference in connection with the issues that Your Honors had identified as disputed factual issues. To the contrary, the EMF [Report] and Gertseva [Article] do not address any of the issues set for hearing. Therefore, there was no basis for seeking their admission at the hearing.⁴

¹ Normadeau Associates, Inc., *Effects of EMFs from Undersea Power Cables on Elsamobranchs and other Marine Species* (2011).

² V.V. Gertseva and V.I. Gertsev, *A model of fish population distribution in the space of inhabitation*, 147 *Ecological Modeling* 161 (2002).

³ See L. Rosten, *The Joys of Yiddish* (1991)(defining chutzpah as "that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan.").

⁴ Entergy Request at 11-12.

Your Honors must reject this contention. Entergy has accepted Your Honors' ruling that EMF was properly excluded from the contested issues of material fact as to which parties were allowed to offer evidence at the hearing in this case and so must be prevented from placing evidence regarding that issue into the record in this proceeding at this late date.

II. THE SUPPORTERS OF THE JP WOULD BE SEVERELY PREJUDICED IF YOUR HONORS WERE TO GRANT ENTERGY'S REQUEST FOR INCORPORATION OR OFFICIAL NOTICE

Contrary to Entergy's assertion,⁵ Applicants and the other supporters of the JP would in fact be severely prejudiced if Your Honors were to yield to Entergy's persistent requests for incorporation or official notice. In light of the determinations made by Your Honors in your Ruling on Issues dated May 8, 2012 (the "Ruling on Issues"), Applicants and other supporters of the JP had no reason to believe that any party would be allowed to enter evidence into the record relating to EMF. Rather, Applicants and the other parties supporting the JP reasonably expected that the issue of EMF would be regarded by Your Honors as involving only "legal or policy matters, for which no facts are in dispute, and which are appropriately addressed by argument."⁶

Granting Entergy's request to incorporate evidence on EMF into the record at this time would severely prejudice Applicants and the other supporters of the JP. The effect of granting Entergy's Request would be to inject a new factual issue into this case after the hearings had been conducted and the record had closed, and as to which Entergy alone would be allowed to submit evidence. That evidence would not be subject to discovery or cross-examination, nor would any party be allowed to offer evidence to rebut Entergy's claims. This result would plainly deprive Applicants and other sponsors of the JP of their due process rights in this adjudicative proceeding.

⁵ Entergy Request at 13.

⁶ Ruling on Issues, slip op. at 3 n.7.

III. ENTERGY'S CLAIMS CONCERNING THE PROBATIVE WEIGHT OF ITS DOCUMENTS MUST BE REJECTED

Entergy has materially misstated the probative value of the materials it seeks to introduce into the record in this case. Entergy's claim that the EMF Report is "an official, public, federal agency report" are simply not true.⁷ In fact, the "Disclaimer" section of the EMF Report makes clear that this document was only "funded" by the United States Department of Interior.⁸ Accordingly, that document cannot be regarded as official agency action as Entergy suggests. Moreover, this document is not even a report of original research performed by the paid consultants, but rather consists largely of a survey of existing works prepared by other authors.⁹ This literature survey performed by a group of paid consultants cannot be regarded as official agency action by DOI simply because DOI funded that work and posted the results on its web site.

The Gertesva Article is equally unreliable. As Your Honors noted in the Ruling issued on August 21, 2012, the Gertesva Article fails to specify whether the electric lines studied were AC or DC, whether those lines were overhead or underground, and whether those lines ran parallel to or perpendicular to the Volga River.¹⁰ Entergy fails to address these concerns in any way in its latest Request.

Entergy's claim that the Gertseva Article must be regarded as authoritative simply because it was cited by the authors of the EMF Report must be rejected for two reasons: First, the EMF Report has not been shown to be authoritative for the reasons noted above. Second, the

⁷ Entergy Request at 10.

⁸ EMF Report at i.

⁹ See EMF Report at 23 (describing the "Literature Search Methods" used by the authors).

¹⁰ First August 21 Ruling, slip op. at 6 ("[I]t is not clear what kind of transmission lines were reviewed in the Gertseva Report of the Caspian Sturgeon in the Volga River, i.e., whether the transmission line was AC or DC; or overhead, underground, or subaquatic.").

EMF Report expressly references the Gertseva Article as involving a high-voltage alternating current (“HVAC”) transmission line. Thus, if Your Honors ascribe any weight whatsoever to the EMF Report, then the Gertseva Article must be rejected as having no relevance whatsoever to the Facility’s high-voltage direct current (“HVDC”) line.¹¹

IV. ENTERGY WILL NOT BE PREJUDICED BY REJECTION OF ITS REQUEST

Finally, Your Honors should not lose sight of the fact that Entergy’s interest in this proceeding arises exclusively from its concerns about the impacts of the Facility on its nuclear generating station at Indian Point. Such purely economic impacts do not constitute the “environmental injury” required to give Entergy judicial standing to contest these purely environmental issues.¹² In applying the State Environmental Quality Review Act (“SEQRA”), New York’s Court of Appeals has established a two-part test for determining when a party has standing to contest administrative action: a petitioner needs to show (1) “that the administrative action will in fact have a harmful effect on the petitioner” and (2) “that the interest asserted is arguably within the zone of interest to be protected by the statute.”¹³ The Court of Appeals has also ruled that the environmental harm claimed must be “different in kind and degree from the community generally.”¹⁴ In *Mobil Oil Corporation v. Syracuse Industrial Development Authority*, 76 N.Y.2d 428 (1977), the Court of Appeals found that this requirement of “environmental injury” was not satisfied by claims of purely economic injury:

Mobil makes absolutely no showing in its petition that it would suffer any environmental injury as a result of the proposed

¹¹ EMF Report at 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).”).

¹² *C.f. Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 778 (1991) (“[E]conomic injury does not confer standing to sue under SEQRA. Economic injury is not by itself within SEQRA’s zone of interests.”)

¹³ *Dairyalea Coop. v. Walkley*, 38 N.Y.2d 6, 9 (1975).

¹⁴ *Sun-Brite Car Wash v. Board of Zoning & Appeals*, 69 N.Y.2d 406, 413 (1987).

development; rather, the petition cites only the economic costs to are relocated.¹⁵

Applicants recognize that the Commission has generally adopted a broader approach to standing in its administrative proceedings than that exhibited by these cases dealing with judicial standing. Nevertheless, the Your Honors should give little or no weight to claims of prejudice raised by parties such as Entergy, seeking to raise issues as to which they clearly have no actual interest, solely for their own wholly unrelated economic interests.

CONCLUSION

WHEREFORE, for the above-stated reasons, Your Honors should once again reject Entergy's untimely and inappropriate request for incorporation or official notice.

Respectfully submitted,

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¹⁵ 76 N.Y.2d at 434.