

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 ENTERGY MOTION FOR RECONSIDERATION

(Issued August 30, 2012)

KEVIN J. CASUTTO,
Administrative Law Judge:

On August 22, 2012, Entergy filed a Motion for Partial Reconsideration, its third motion repeating its request to incorporate by reference or take official notice of the report prepared by consultants to the United States Department of Interior (DOI) entitled "Effects of EMFs from Undersea Power Cables on Elsamobranchs and other Marine Species" (EMF Report) and a report cited in the EMF Report, titled "A Model of Fish Population Distribution in the Space of Inhabitation," Gertseva and Gertsev, 147 Ecological Modeling 161 (2002) (Gertseva Report).

With its motion, Entergy seeks reconsideration of the Ruling issued August 21, 2012 that denied its request for incorporation by reference or official notice. Staff, the Applicants, and DEC filed responses in opposition to Entergy's motion for reconsideration.

The parties' closing briefs were filed on August 22, 2012, and reply briefs are due on September 7, 2012.

As discussed below, Entergy's motion is denied.

Proceedings

In a Ruling dated May 8, 2012, Judge Phillips and I concluded that the factual issues to be addressed in the evidentiary hearings in this case included: 1) deliverability; 2) availability and suitability of the proposed Luyster Creek converter station site; and 3) facility costs and cost/benefit analyses.

By Motion dated May 23, 2012, Entergy requested clarification or reconsideration of a portion of the May 8th Ruling, inquiring whether Entergy could address, in closing briefs, the Facility's potential adverse environmental impacts, including potential adverse impacts on federally and State regulated endangered species. Entergy also asked whether it could cite publicly available information in support of its legal or policy argument on sufficiency of the application regarding potential environmental impacts. Specifically, Entergy inquired about its proposed use of the EMF Report.

By Ruling dated June 7, 2012, we clarified the scope of legal or policy issues that may be briefed, denied Entergy's request for reconsideration, and clarified the parties' use of publicly available or government sponsored studies in closing briefs. In the June 7th Ruling, we also stated that in order for Entergy to use the proffered EMF Report in its briefs on legal or policy issues,

Entergy must successfully move the report into the record. Because the issue of EMF impacts is not a fact issue for hearing, we will not allow testimony on the issue. During the hearing, Entergy could request that we take official notice of the report. However, the Applicants and Riverkeeper raise credible concerns about the admission of such information as evidence.

Entergy failed to make any request for incorporation or notice of the EMF Report or the Gertseva Report during the evidentiary hearing, which was held from July 18 through July 20, 2012. Instead, on August 17, 2012, almost a month after the evidentiary hearing had concluded, Entergy filed a motion seeking to incorporate by reference or take official notice of the EMF Report and the Gertseva Report. Entergy offered no explanation for its failure to make such a request at hearing.

By a Ruling dated August 21, 2012, we denied Entergy's motion, essentially finding that the opposing parties' credible concerns about the admission of such information warranted denial of Entergy's motion. In the ruling, we indicated that the motion was untimely and also that it was not clear what kind of transmission lines (AC or DC, overhead, underground, or sub-aquatic) were reviewed in the Gertseva Report.

In its motion response, Staff has clarified that the Gertseva Report pertains to offshore, not estuarine, environments. Staff states that the EMF Report is a literature survey reviewing offshore marine species in offshore environments, and the Gertseva Report does not report effects of underwater DC cables. Therefore, Staff concludes, the EMF Report and Gertseva Report are not relevant or material to any issues in dispute.

DEC states that Joint Proposal, Attachment 4, the "Atlantic Sturgeon Pre-Installation and Post-Energizing Hydrophone Scope of Study" and future research and enhancement projects identified in the Joint Proposal Environmental Trust are designed to address the site-specific nature of any potential adverse impacts of EMF exposures to aquatic species (including endangered Sturgeon). The study and related research, DEC asserts, will be performed over the next few

decades and will provide invaluable information about how the habits and behaviors of aquatic life in the Hudson are affected by the installation, operation and maintenance of the Applicants' linear HVDC cables.

DEC contends that Entergy's late motion to enter the EMF Report and Gertseva Report into the record has not been timely raised and should be denied. DEC concludes that to allow the EMF Report and the Gertseva Report into the hearing record would be improper and would be prejudicial to other parties, who would not be able to respond adequately.

Discussion

As we have noted previously, Entergy had an opportunity to offer the EMF Report or the Gertseva Report into evidence in a timely manner, during the hearing, but inexplicably failed to do so. Entergy's recent motion for reconsideration remains untimely.

I find the opposing parties' arguments in opposition, as summarized above, to be meritorious. All three opposing parties have asserted they will be prejudiced, should the motion be granted at this late time in the proceeding, after the hearing is concluded and when the parties are preparing their closing reply briefs.

Entergy's motion for reconsideration is denied.

(SIGNED)

KEVIN J. CASUTTO