

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 DENYING MOTION TO INCORPORATE OR TAKE OFFICIAL NOTICE

(Issued January 30, 2013)

On January 17, 2013, the Independent Power Producers of New York (IPPNY) moved, "to incorporate by reference or to take official notice of the 2013 AEO."<sup>1</sup> IPPNY asserts that "[g]ood cause exists to incorporate by reference or take official notice" of the 2013 AEO Early Release Overview. IPPNY says that the 2013 AEO Early Release Overview, published after the record was closed in this proceeding, constitutes an official update to the 2012 AEO gas forecasts used both by Staff witness Paynter and IPPNY witness Younger in this proceeding, and represents the most recent data available. IPPNY contends that the data is directly relevant because it updates certain assumptions used by Staff and Mr. Younger in assessing the project's economics. IPPNY asserts that, by the same logic that

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<sup>1</sup> The motion is in IPPNY's Brief on Exceptions, p. 11, n. 24. Though purporting to rely, in part, on a rule (16 NYCRR §85-2.7) that expressly states that, when incorporating by reference, "a party ... shall clearly identify the material to be incorporated," IPPNY instead referred to the document in question as "gas forecasts published after the Record closed" or "2013 AEO at pp. 15-16" or "2013 AEO forecast." The document subsequently was identified by Champlain Hudson Power Express, Inc., and CHPE Properties, Inc. (Applicants) in their opposition to the motion as "AEO2013 Early Release Overview" - a document issued by the Energy Information Agency of the United States Department of Energy (EIA) on December 5, 2012 (hereafter, the 2013 AEO Early Release Overview).

was employed in the Ruling on Motion to Incorporate or Notice (issued October 10, 2012), wherein the 2012 Reliability Needs Assessment was incorporated by reference, the Commission should incorporate by reference the 2013 AEO Early Release Overview.

In their January 23<sup>rd</sup> opposition to IPPNY's Motion,<sup>2</sup> Applicants state that the EIA's website description of the 2013 AEO Early Release Overview makes clear that the document does not present the full scope of EIA's examination of future gas prices and that additional information will be included in EIA's final report. Applicants highlight the following, found on the first page, in the first paragraph of the document:

This overview presents the AEO2013 Reference case and compares it with the AEO2012 Reference case released in June 2012 (see Table 1 on pages 15-16). Because of the uncertainties inherent in any energy market projection, the Reference case results should not be viewed in isolation. Readers are encouraged to review the alternative cases when the complete AEO2013 publication is released, in order to gain perspective on how variations in key assumptions can lead to different outlooks for energy markets.

Applicants note that the Administrative Law Judges (ALJs), when confronted with similar requests, consistently declined to incorporate by reference or to take official notice of preliminary materials that remain subject to change.<sup>3</sup> Because the 2013 AEO Early Release Overview remains subject to further revision, Applicants argue that the document does not qualify for incorporation by reference into the record of this case.

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<sup>2</sup> In the January 18<sup>th</sup> Notice Establishing Abbreviated Motion Response Date (issued January 18, 2013), January 23<sup>rd</sup> was established as the deadline for responses to the IPPNY motion.

<sup>3</sup> Applicants cite Ruling on Motions to Incorporate or Take Notice of NYISO Draft Reliability Report (issued August 17, 2012) (August 17<sup>th</sup> Ruling) and Ruling on Motions to Incorporate by Reference or Take Notice filed by DEC, jointly with Applicants and Staff; and, Separately, by IPPNY and Entergy (issued August 21, 2012) (August 21<sup>st</sup> Ruling).

Applicants observe that SAPA §306(4) permits administrative agencies in adjudicative proceedings to take official notice of "all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency." Applicants note that IPPNY neither specifically contends that judicial notice could be taken of the gas price forecasts contained in the 2013 AEO Early Release Overview, nor claims that the subject matter of the 2013 AEO Early Release Overview -- future prices for natural gas -- is a matter within the Commission's specialized knowledge.

Applicants assert that the Commission has specialized knowledge regarding the use of such forecasts in the exercise of its regulatory powers, when the forecasts have been properly introduced into evidence; however, they contend that the Commission does not have the specialized knowledge of market conditions affecting such future prices or the manner in which such forecasts are or should be prepared. Applicants assert that such knowledge would be required to bring the making of such forecasts within the scope of the Commission's specialized knowledge, especially where, as here, (1) the forecast is part of a preliminary report that is designed to provide a first look at part of a broader forecast to be released in the future; (2) the agency releasing the forecast has expressly stated that the forecast should not be used in isolation but should be reviewed in the full context of its as-yet-unreleased final report; and (3) the agency preparing the forecast has made clear that it has modified its fundamental forecasting methodology in ways that cannot be fully understood and evaluated.

Applicants close by requesting that IPPNY's motion be denied and all contentions made by IPPNY in reliance on the extra-record material be disregarded by the Commission.

Applicants' opposition is supported by Department of Public Service Staff.<sup>4</sup>

Discussion

IPPNY claims that applying the logic employed by the ALJs in their October 10<sup>th</sup> Ruling on Motion to Incorporate or Notice should lead to a decision by the Commission to grant the present motion. However, in the October 10<sup>th</sup> ruling, the ALJs cite to their Ruling on Motions to Incorporate or Take Notice of NYISO Draft Reliability Report (issued August 17, 2012) when stating:

we previously rejected a similar motion to incorporate or notice the NYISO's draft [Reliability Needs Assessment (RNA)], stating that it would not be appropriate to incorporate or take notice of the NYISO Draft 2012 RNA at that time, because it was subject to further review and possible modification.

Indeed, a review of the ALJs' rulings in response to various motions to incorporate or to take notice that were submitted in this proceeding affirm Applicants' assertion that the ALJs in this proceeding consistently declined to incorporate by reference or take official notice of preliminary materials that were subject to modification.<sup>5</sup> Thus, applying the logic set

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<sup>4</sup> See Applicants' Opposition, p. 1, n. 1.

<sup>5</sup> See rulings on motions to incorporate or take notice issued August 17, 21, and 30, 2012, and October 10, 2012. The August 17<sup>th</sup> ruling, for example, denied motions to incorporate or take official notice of a draft RNA; while the August 21<sup>st</sup> ruling denied motions to incorporate or take official notice of a draft Resource Conservation and Recovery Act report; a Department of the Interior, Bureau of Ocean Energy Management, Regulation and Enforcement study; and a report cited in the Department of Interior study; and granted a motion to incorporate a notice filed by Astoria Generator Company, L.P., in a separate PSC proceeding, pursuant to a PSC order.

forth in the ALJs' prior rulings, and consistent with IPPNY's request that I apply the same logic that the ALJs did in their October 10 Ruling, IPPNY's request to incorporate by reference a preliminary document that is characterized as an "early overview" and is subject to completion in the future must be denied.

Given the preliminary nature of the document at issue, IPPNY's request to take official notice also is denied.

(SIGNED)

JEFFREY C. COHEN  
Acting Secretary