STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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 PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City	Case 10-T-0139

POST-HEARING REPLY BRIEF OF ENTERGY NUCLEAR POWER MARKETING, LLC AND ENTERGY NUCLEAR FITZPATRICK, LLC

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INTRODUCTION

The parties to this proceeding agree on two fundamental points. First, pure (that is, more efficient and cost-effective) merchant entry -- irrespective of whether it coincides with an existing reliability-based need -- promotes competition, reduces inefficiencies and can provide benefits to New York consumers.[1] Second, pure merchant entry is assessed by the Commission using a less stringent review standard under NYPSL Article VII than regulated projects to determine whether the statutory need and public interest requirements are met. However, because Applicants have failed to carry their burden of proving that they have proposed (and can sustain) a pure merchant transmission project, none of the assumptions concerning true merchant entry apply and the Project must be analyzed under the regulated project Article VII standard of review -- a standard of review that is more stringent than has been advanced by the Signatory Parties in their Initial Post-Hearing Briefs.

The Project's alleged merchant status cannot be established through bald assurances. Rather, to make that determination, the record in this proceeding must be scrutinized to determine whether the Project is economically viable without any direct *or* indirect

[1] In this proceeding, the individual citizens and businesses of New York have been referred to in their capacity as ratepayers and in their broader capacity as New York consumers. In their capacity as ratepayers, New York consumers pay not only for electric service but also for various programs and initiatives that are assessed as separate, non-bypassable, line-item surcharges on their utility bills. While these charges are technically part of "utility rate base" and New York consumers may not pay these non-bypassable charges strictly in their capacity as "ratepayers," such distinction -- particularly in the current economic climate -- is meaningless to the "bottom line" for, and thus, the public interest of, New York consumers. In certification proceedings, the Commission must find, inter alia, that a proposed project "serves the public interest . . ." PSL § 126.1(g). To do so in the merchant context, the Commission must confirm that New York State consumers (in any capacity) are protected from being required to subsidize the above-market costs of electricity projects. As addressed in more detail, infra, DPS Staff's assertion that the proposed certificate conditions in this proceeding are adequate because they "… ensure the risks associated with financing, constructing and operating the Facility are not shifted to captive ratepayers" (see DPS Staff Initial Post-Hearing Brief, pp. 11-12; emphasis supplied) is patently incorrect on two substantive grounds. First, the provisions entirely fail to protect New York consumers, even in their limited capacity as captive ratepayers, from indirect subsidization. Second, as addressed in Point L.1, infra, DPS Staff far too narrowly interprets Article VII's public interest requirement.

subsidization.[2] Yet despite Your Honors' admonitions to the Applicants that they had the burden of proving "the asserted costs and benefits of the proposed project,"[3] the Applicants have not advanced any economic analysis of their Project, much less one establishing long-term sustainability in the absence of subsidy. Instead, Applicants' Initial Post-Hearing Brief merely repeats many of the arguments against close economic scrutiny that Your Honors explicitly rejected in the May 25 Ruling.[4]

In contrast, the Independent Power Producers of New York, Inc. ("IPPNY") provided a full economic analysis of the Project itself in the Direct Testimony of Mr. Mark D. Younger, measuring its costs and benefits. Mr. Younger also provided production cost savings metric analyses and identified multiple flaws in DPS Staff's and Applicants' analyses. Mr. Younger's analyses demonstrated the Project's grossly uneconomic nature,[5] which supported Mr. Younger's conclusion that the Project could likely only be sustained over the long term if it were subsidized

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[2] The June 4 Certificate Conditions seek to protect against direct subsidization of the Project, and were apparently targeted at a business model in which Applicants would shoulder the full risks of finding a viable market for the services they propose to offer and entering into contracts accordingly. As evidenced by the complementary Energy Highway Initiative ("EHI") submissions of Applicants' affiliate Transmission Developers, Inc., and of Hydro-Quebec Production ("HQ") (Hearing Exhibit 213), that paradigm has changed. The evidence in the record now reveals a business structure in which Applicants intend to shift the risk of finding a market for the power transmitted over the HVDC Transmission System to HQ, which, under that structure, would be the entity contracting with New York utilities or other entities. Consequently, the potential for indirect subsidization of the Project must be examined closely because it would lead to exactly the same harms that ostensibly were meant to be precluded by the June 4 Certificate Conditions -- the imposition of the Project's above-market costs on, and thus subsidy payments by, New York consumers.

[3] Case 10-T-0139, 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 PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City, "Ruling on Motion" ("May 25 Ruling") (issued May 25, 2012), pp. 6, 9.

[4] Applicants' Initial Post-Hearing Brief, pp. 7-11, 30-31; May 25 Ruling, pp. 2-3, 9.

[5] In its Initial Post-Hearing Brief, DPS Staff agrees that, for merchant projects, economic analyses are properly made by the developer and its financial backers. (See DPS Staff Initial Post-Hearing Brief, p. 13) Applicants failed to provide any economic analyses they may have conducted, so IPPNY went forward using reasonable assumptions concerning the Project in support of the only record analysis of whether the Project could be developed on a genuinely merchant basis.

through some form of extra-market supplemental funding mechanism.[6] Thus, IPPNY's Initial Post-Hearing Brief correctly argues that the Project cannot be developed on a merchant basis.[7] Relatedly, Entergy's Initial Post-Hearing Brief established that, because the Project, to cover its above-market costs, would require a subsidy from New York consumers in one capacity or another, it could not be assessed under the less stringent "need" and "public interest" standards applied in the Bayonne Proceeding.[8]

In their Initial Post-Hearing Briefs, Applicants and DPS Staff rely entirely on the June 4 Certificate Conditions and otherwise generally incant their claim that the Project is "purely merchant"[9] (at least to the extent of the HVDC Transmission System and certain, but not all, users of the Astoria-Rainey Cable).[10] The June 4 Certificate Conditions, however, are manifestly

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[6] Mr. Younger also provided testimony establishing that the Project will not provide any capacity or other system benefits. Tr., pp. 513-539. The Initial Post-Hearing Briefs filed by Applicants and DPS Staff reveal that this continues to be the case. For example, addressing the provision of black start service, DPS Staff references the "possibility" that the Project could provide this service and then, remarkably -- despite the significant emphasis that the Commission recently has placed on the provision of this service, particularly in New York City -- merely states that "DPS Staff wants the Applicants to explore this possibility." (See DPS Staff Initial Post-Hearing Brief, p. 9) (emphasis supplied) At the same time, Applicants note the importance of acquiring and maintaining black start service and, without making any firm commitment to do so, state that "the Facility will be uniquely positioned to provide up to 1,000 MW of badly needed Blackstart Service in New York City." (See Applicants' Initial Post-Hearing Brief, p. 27) Absent a firm commitment, the Project's hypothesized ability to provide blackstart service is utterly irrelevant in this proceeding. As Entergy demonstrated in its Initial Post-Hearing Brief, Applicant's claim of "unique position[ing]" falls far short of any actual requirement for the Project to provide black start service. See Entergy's Initial Post-Hearing Brief, pp. 18-19.

[7] See, e.g., IPPNY Initial Post-Hearing Brief, p. 6 ("While the Applicants have promised in this proceeding to operate the HVDC Transmission System on a merchant basis, Mr. Younger's analyses reveal that the Project will not remain a merchant facility because, if approved, it is so uneconomic that the only way it can be developed and operated profitably over the long term is through some form of out-of-market subsidy.").

[8] See Entergy's Initial Post-Hearing Brief, pp. 6-15.

[9] Both DPS Staff and Applicants' Initial Post-Hearing Briefs are replete with references to the Project, e.g., being "purely merchant" or using similar designations. See DPS Staff's Initial Brief, pp. 10, 11, 49-50, 53, 54; Applicants' Initial Post-Hearing Brief, pp. 5, 30, 38, 111, 102.

[10] For example, DPS Staff states, "Even if Certificate Holders were to attempt to modify their business model, proposed Certificate Conditions 15(b) and 15(c) will ensure that the Facility costs will not be shifted to ratepayers, with the limited exception of a portion of the costs associated with the Astoria-Rainey Cable." (See DPS Staff Initial Post-Hearing Brief, p. 53) (emphasis supplied) Inexplicably, in touting the alleged merchant status of the Project while at the same time fully acknowledging that the Applicants are free to seek cost of service rates for at least a portion of the Astoria-Rainey Cable, both the Applicants and DPS Staff give short shrift to the exposure of

inadequate to ensure that the Project will put at risk only the funds of investors, not the hard-earned dollars of New York consumers through some form of indirect subsidy. As IPPNY and Entergy have explained, the June 4 Certificate Conditions, issued essentially contemporaneous with Applicants' and HQ's respective EHI submissions, restrict only what the Applicants may do directly.[11] They do absolutely nothing to prevent the Project's above-market costs from being funded through indirect subsidization -- an issue brought to the forefront by the EHI submissions.[12]

As the evidence shows, for the Project to go forward, the Applicants' shippers most likely will be required to subsidize the Project through the above-market charges they would pay for its use, with such above-market charges correspondingly being recovered by the shippers from New York consumers through some form of extra-market subsidy mechanism. Specifically, the Applicants' and HQ's EHI submissions, taken together, reveal the Applicants' expectation that HQ may supply all debt (i.e., be its main, potentially exclusive, financier) and enter into a long-term contract for as much as 75% of the Project's transmission capacity. The EHI submissions

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ratepayers to foot a bill potentially as high as $213 million for this allegedly purely merchant project. See Tr., p. 76, lines 4-13.

[11] This shortcoming is in addition to the fact that all parties agree that the Applicants are fully authorized under the terms of the JP to make at least a portion of the Astoria-Rainey Cable costs subject to cost based rate recovery and thus, by definition, this aspect of the Project would be permitted to be non-merchant. The Applicants do not dispute this fact. Instead, characterizing their unilateral right to seek cost-based rate recovery for the Astoria-Rainey Cable as a "limited reservation" (see Applicants' Initial Post-Hearing Brief, p. 103), the Applicants attempt to defend this right, in part, by asserting that customers that will use the line are not "captive." However, since the Applicants cannot yet identify those customers, they claim that cost-based rate recovery is required. If anything, the Applicants apparent need to draw these distinctions illustrates the futility of attempting to discern the different capacities under which New York consumers can incur charges. As demonstrated, infra, the pertinent point is that New York consumers will incur the charge.

[12] In its Initial Post-Hearing Brief, DPS Staff erroneously claims, "In fact, the modified Certificate Condition 15 now includes a suggestion proffered by Entergy to agree to a merchant condition that prevents the Certificate Holders from imposing cost-based rates, directly or indirectly, on captive New York ratepayers (See Reply Statement of Entergy Nuclear Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC in Opposition, p. 13-14.)" See DPS Staff Initial Post-Hearing Brief, p. 54. However, as demonstrated, infra, the June 4 Certificate Conditions do not, in fact, prevent indirect subsidization at all.

further reveal HQ's assertions that New York would need to "work creatively" to recognize the "significant value" of HQ energy for HQ to undertake that investment.[13] As a result, the pertinent inquiry shifts to whether the direct harm sought to be prohibited by the June 4 Certificate Conditions (i.e., imposing the Project's costs on New York consumers) can nonetheless be inflicted on New York consumers indirectly. Because the June 4 Certificate Conditions only prevent direct subsidies, New York ratepayers and consumers are undoubtedly at risk in that regard. That fact renders the Project decidedly non-merchant, and serves to further distinguish this case from the Bayonne Proceeding and other cases in which the Commission has applied a less stringent "need" and "public interest" standard.

Given the clear evidence adduced on this record, the potential for the Project's substantial, above-market costs to be imposed on New York consumers through a subsidy cannot be ignored. The solution is equally clear. To adequately protect New York consumers from subsidizing the Project's above-market costs in any capacity, Your Honors should recommend that, were an Article VII certificate ultimately to be granted, the Commission should mandate that the Applicants unconditionally accept the additional certificate conditions proposed by Entergy in its Initial Post-Hearing Brief which are expressly designed to preclude direct and indirect subsidization.[14]

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[13] Hearing Exhibit 213, HQ EHI RFI submission, p. 7 (stating HQ proposes to "work creatively with New York State" and urging New York to "consider innovative ways in which policy and regulation might prioritize and promote incremental hydropower deliveries.").

[14] For example:

1. Applicants, their affiliates and their successors cannot obtain any direct subsidy or payment to defray the cost of the Project from any utility or State, municipal or other governmental agency, authority or other entity;
2. Applicants, their affiliates and their successors cannot seek to include the costs of the Project through cost-of-service rates for delivery services under FERC or NYPSC jurisdiction;
3. To avoid having the Project's costs funded indirectly through an above-market "bundled" power contract, the Applicants shall require each shipper to certify

Adopting these additional certificate conditions is critical to ensure that the Applicants cannot do indirectly -- e.g., through their shippers -- that which they themselves have agreed not to do directly -- shift the risks and above-market costs of their Project onto New York consumers. If the Applicants' claims that their Project will proceed on a truly merchant basis were accurate, the addition of these certificate conditions would at most be superfluous; however, the fact that Applicants are strenuously resisting these modifications is itself an indication that their merchant claims are hollow. Likewise, as the entity "designated to represent the public interest in this proceeding,"[15] DPS Staff also should welcome the addition of these certificate conditions.[16] In fact, only by requiring these additional certificate conditions will all of the above-market risks of the Project lie solely with the Certificate Holders as DPS Staff has

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that the buyers of the shipper's power will not recover the power contract costs (or any portion of them) through a non-bypassable portion of a utility's rates, or in the case of a state power authority through a charge to a customer unless the customer can both legally and practicably avoid the charge by switching suppliers; and

4. To avoid indirect subsidies to the Project through subsidy payments to its shippers, the Applicants, their affiliates and their successors shall require each shipper to certify that it has not received any above-market subsidy or other payment from any utility or State, municipal or other governmental agency, authority or other entity if that subsidy or payment would not have been available but for the shipper's use of the Project to deliver its power.

See Entergy's Initial Post-Hearing Brief, pp. 58-59.

[15] See DPS Staff Initial Post-Hearing Brief, p. 1.

[16] The other entity in this proceeding charged with preserving the public interest of at least a subset of New York consumers, New York City, also states in its Initial Post-Hearing Brief that, if the Project is constructed and operated as proposed (i.e., with all the risk of the Project being entirely borne by developers, not by consumers), it would be "consistent with and would advance important State and City energy policies." (See New York City Initial Post-Hearing Brief, p. 3) New York City, however, is careful to reiterate in its Initial Post-Hearing Brief that its support for the Project is contingent upon the Project remaining purely merchant (see id., pp. 34-35), emphasizing that "any future CHPE proposal to modify its existing business model (i.e., development of the Facility on a merchant basis pursuant to the Joint Proposal) or amend its Certificate to implement cost-based rates would be opposed vigorously." (Id., p. 35) (emphasis supplied). Requiring the adoption of the additional certificate conditions that Entergy has proposed would also meet New York City's stated goals in this proceeding.

posited.[17] The Commission's statutory mandate to find that the Project serves the "public interest, convenience and necessity"[18] before issuing a certificate compels nothing less.

ARGUMENT

I. APPLICANTS HAVE NOT CARRIED THEIR BURDEN TO PROVE THAT THE PROJECT IS MERCHANT, AND THUS, HAVE NOT DEMONSTRATED ANY ENTITLEMENT TO THE LESS STRINGENT REVIEW STANDARD.

A. Introduction and General Considerations.

In their Initial Post-Hearing Brief, the Applicants assert that all of the Project's benefits will "be achieved at no risk to [New York] consumers."[19] Likewise, DPS Staff asserts in its Initial Post-Hearing Brief, "…the Facility will primarily, or exclusively, be a merchant facility with almost all, or all, of the economic risks placed on the Certificate Holders."[20]

"Merchant," however, is more than a mere label. In the context of wholesale energy markets, it is well-understood to mean that the success or failure of a project (i.e., whether a project is viable) depends solely and exclusively on market forces. Your Honors have recognized this undisputed principle numerous times in this case, and have exhorted Applicants to make a factual showing to support their merchant project claims. However, the record in this proceeding reveals that the Applicants have wholly failed to do so.

[17] See DPS Staff Initial Post-Hearing Brief, p. 54.

[18] PSL § 126.1(g).

[19] See Applicants' Initial Post-Hearing Brief, p. 111.

[20] See DPS Staff Initial Post-Hearing Brief, p. 53. Based on the positions expressed elsewhere in DPS Staff's Initial Post-Hearing Brief, it appears that DPS Staff's references to "primarily" and "almost all" relate solely to the potential for the Applicants to secure cost-based rates for a portion of the Astoria-Rainey Cable, not to the exposure to New York consumers that would clearly follow from indirect subsidization of the Project's above-market costs.

For example, on May 25, 2012, Your Honors, responding to the Applicants' fairly modest proposed changes to the then current version of proposed certificate condition 15,[21] correctly observed:

> One of the pivotal and most hotly contested issues in this proceeding is whether the proposed Facility's costs will be recovered solely on a merchant basis (i.e., exclusively through rates set by the competitive market) or whether, as a result of a change in business model requested by Applicants at some future date, or due to future contractual arrangements that Applicants may yet finalize, the costs of the Facility, in whole or in part, will be recovered in rates that are cost-based.[22]

Your Honors thus concluded, "… the factual assertions concerning costs and cost-benefit analyses are material and contested and thus are properly considered at the evidentiary hearing."[23]

Further, Your Honors rejected Applicants' attempt to align themselves with other recently certificated transmission projects:

> When we consider these factors, coupled with (1) Staff's concession that there may be "a possibility" that ratepayers might have to bear some costs in connection with the construction and operation of this project and (2) the current dearth of evidence that there are any firm commitments for the energy and capacity this project would offer, we see a very real distinction between this case and other recent Article VII cases like Cases 08-T-0034 and 08-T-1245.[24]

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[21] On the alleged strength of these modest changes, Applicants' May 18, 2012 Motion for Clarification or for Reconsideration requested that Your Honors: (1) clarify that the JP opponents' allegations concerning the financial viability of Applicants' business model no longer raised any contested issues of material fact as to which a hearing is required; or (2) reconsider that part of Your Honors' May 8, 2012, "Ruling on Issues," that required Applicants to submit evidence fully setting forth the financial viability of their business model.

[22] See May 25 Ruling, p. 5.

[23] Id., p. 6.

[24] Id., p. 7 (citing Case 08-T-1245, Application of Bayonne Energy Center, LLC for a Certificate of Environmental Compatibility and Public Need for the Construction of the New York State Portion (Kings County) of a 6.6 Mile, 345 kV AC, 3 Phase Circuit Submarine Electric Transmission Facility Pursuant to Article VII of the PSL, "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" (Nov. 12, 2009) ("Bayonne Order") and Case 08-T-0034, Application of Hudson Transmission Partners, LLC for a Certificate of Environmental Compatibility and Public Need for a 345 kV Submarine/Underground Electric Transmission Link Between Manhattan and New Jersey, "Order Granting Certificate of Environmental Compatibility and Public Need" (Sept. 15, 2010) ("HTP Proceeding" and "HTP Order," respectively)).

Your Honors then noted that, unlike the instant case, "the risk or possibility that ratepayers might ultimately bear some costs in connection with the construction and operation of those projects was significantly lessened [in the Bayonne Proceeding and HTP Proceeding] by the fact that 50% or more of those projects' output was subject to identified and firm commitments at the time the Commission granted the certificates."[25] In the face of the May 25 Ruling, Applicants' concession in their Initial Post-Hearing Brief that they still "do not have any executed contracts for use of the Facility," is highly significant.[26]

Based on the foregoing findings, the May 25 Ruling also stated that:

> a sufficient and accurate record regarding the costs and benefits of this Facility should be created in this proceeding so that the Commission may independently assess the likelihood and magnitude of any potential ratepayer impact that might occur if Applicants are granted a certificate, build the Facility and sometime thereafter either seek a certificate amendment from the Commission or seek approval from FERC for authority to recover cost-based rates.[27]

In so stating, Your Honors were clearly instructing the Applicants that to obtain the benefit of the Commission's rulings in the Bayonne Proceeding, they must foreclose, if possible, "the risk or possibility that ratepayers might ultimately bear some costs in connection with the construction and operation" of the proposed Project.[28] This directive was wholly consistent with Your

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[25] Id., pp. 7-8 (footnote omitted). As Entergy demonstrated in its Initial Post-Hearing Brief, the merchant standard was appropriately applied in the Bayonne Proceeding because the project at issue in that proceeding went forward without securing any above-market mechanisms to support it. In contrast, the contract awarded to the HTP Project was not issued on a non-discriminatory basis, and therefore was above-market. While regulated utility ratepayers may not have been affected, NYPA's customers will bear those costs, and thus, New York consumers -- not HTP Project investors -- now face some of these costs. Care must be taken in this proceeding to avoid repeating that outcome.

[26] See Applicants' Initial Post-Hearing Brief, p. 41. At the hearing, Applicants' Chief Executive Officer Donald G. Jessome stated that Applicants are "working hard towards" a long-term transmission service agreement with HQ. Tr. p. 89, lines 8-14. The lack of such commitments renders any claimed Project benefits speculative at best and highlights the importance of examining the underlying economics of the Project.

[27] Id., pp. 8-9.

[28] Id., pp. 7-8.

Honors' prior observation that the nature and effect of the Applicants' business model has a "significant bearing" on the standard of review to be applied as the Commission considers the evidence advanced by the Applicants to support the required "need and public interest findings."[29]

Rather than foreclose the possibility that New York consumers may be called upon to subsidize the above-market costs of the Project, the developments in this proceeding since the May Rulings establish that the Project's costs far outweigh its benefits and only serve to exacerbate the likelihood -- indeed, the seeming inevitability -- that the Project's above-market costs will be imposed as a subsidy on New York consumers in some capacity. Specifically, in the June 4 Certificate Conditions, the Applicants have agreed that the Project will not proceed to construction unless Applicants document their receipt of "binding contractual commitments from one or more financially-responsible entities for a combined total of no les than 750 MW of Firm Transmission Service over the Facility for a period of no less than twenty-five (25) years."[30] This circumstance should be viewed as a red flag, and not a worthy concession, as Applicants frame it.

Put simply, the apparent basis of Applicants' willingness to agree to this requirement is revealed by the complementary EHI submissions of Applicants and HQ.[31] Specifically, HQ's EHI response states, in pertinent part, that HQ "proposes to become the 'anchor tenant' for the [P]roject by committing to up to a 40-year purchase of 75% of the transmission rights,

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[29] Case 10-T-0139, supra, "Ruling on Issues," p. 5.

[30] Hearing Exhibit 150, Attachment A, p. 2.

[31] Hearing Exhibit 213. Conveniently, HQ's proposed 75% commitment to the Project -- published just days before the filing of the June 4 Certificate Conditions -- aligns perfectly with the 750 MW commitment set forth therein.

effectively paying for the construction of the line."[32] HQ further states that its willingness to do so is tied to New York State working "creatively" with HQ to revise New York's market structure to "consider innovative ways in which policy and regulation might prioritize and promote incremental hydropower deliveries."[33]

Although Applicants merely gloss over -- in a non-responsive, two sentence statement buried at page 108 of their (110-page) Initial Post-Hearing Brief -- the serious implications to New York consumers that are strongly suggested by the EHI submissions,[34] those implications clearly deserve closer scrutiny. As Your Honors observed in the May 25 Ruling, they bear directly on Applicants' burden of proof and the standard of review to be applied by the Commission.

To determine and evaluate the implications to New York consumers of HQ's involvement in the Project in a meaningful fashion, two avenues of inquiry must be undertaken. First, the Project's costs on a MWh basis must be determined to arrive at an estimate of the fee that the Applicants must secure from shippers for their Project to be viable i.e., the price for transmission service on the line that is at least sufficient to reimburse the Certificate Holders' carrying costs.

[32] Id., HQ EHI submission, p. 3 of 13. In the accompanying footnote, moreover, HQ reveals that it also intends to "invest in new transmission necessary in Quebec to support the full 1,000 MW capacity of the new interconnection." Id., n. 5. Presumably, those costs (estimated to be $346 million) must also be recovered.

[33] Id., p. 7 of 13.

[34] On this core contested point, Applicants merely state: "Applicants also anticipate that IPPNY and/or Entergy will argue that these conditions are not sufficient to prevent shippers using the Facility from entering into contracts with regulated utilities or state agencies or authorities. Significantly, however, no party has submitted any evidence in this proceeding demonstrating that any such contracts will be signed or that their provisions will be in any way inappropriate if they are signed. The Commission has ample jurisdiction to prevent regulated utilities from entering into any inappropriate agreements." See Applicants' Initial Post-Hearing Brief, p. 108. The actions of regulated utilities in this regard, however, are only part of the issue. To adequately protect New York consumers, indirect subsidization of the Project's above-market costs must be proscribed altogether.

Second, an assessment of the value to shippers of using the Project to deliver electricity from Canada to New York City (i.e., the price differential of electricity between these two points) must be undertaken. In other words, a shipper must recover the value of its energy plus any payment that it makes to the Certificate Holders for the rights to 75% of the Project's transmission capacity (presumably in an amount sufficient to cover the Certificate Holders' costs, plus a reasonable rate of return) in the price it charges for the sale of electricity it transmits over the line. If the price the shipper pays to Applicants is above-market, the shipper is likely to seek an above-market contract to engage in this transaction. No party denies that fundamental economic reality. Instead, Applicants merely point to the lack of any "evidence" that this will be the case.[35]

The sole analysis in the record that attempts to address these two drivers was performed by IPPNY witness Mark Younger.[36] Indeed, Applicants have advanced **no** alternative measure for making that determination, nor have they furnished this Tribunal with any other basis by which to judge the Project's financial viability.[37] Thus, Applicants have not met their burden of

[35] Applicants' Initial Post-Hearing Brief, p. 108. This claim is circular. The Applicants have no contracts with any shippers; therefore, their shippers have no pertinent contracts with New York consumers that could be used as such "evidence." Therefore, any evidentiary gap is due, again, to inadequacies in the record of Applicants' own making. For that reason, IPPNY and Entergy, without assuming the burden of proof on any of the issues in this case, have commended Your Honors to the reasonable inferences that may be drawn from the evidence that is in the record, such as the Applicant's and HQ's EHI submissions and Mr. Younger's testimony and findings.

[36] Tr., pp. 474-476; 501-506. As with the merchant label, Applicants' position on the economics of their Project seems to be that the Project is financially viable merely because they say it will be. However, Applicants' conclusory statements, standing alone, furnish no basis for Commission issuance of an Article VII Certificate for the Project.

[37] For example, Applicants and DPS Staff take issue with Mr. Younger's adoption, for purposes of his cash flow analysis, of the readily adaptable 16% annual carrying charge which he derived from the NYISO's CARIS process. The only purported "proof" that another rate might be appropriate, however, is Mr. Paynter's statement that "CHPE anticipates other sources of financing, presumably at more favorable terms, including HQ, whose business model involves long-term investments in hydroelectric projects and associated transmission lines." Tr., p. 188, lines 12-17. Yet because Applicants have provided no record evidence, the best he can conclude in the absence of actual proof -- of which there is none -- is that "CHPE's financing costs may be well below the generic financing costs assumed by the NYISO." Id., lines 17-19. In other words, Your Honors are incredibly being asked to eschew Mr. Younger's analysis, which is based on the only readily identifiable and easily transferable metric in the record, in lieu of some

proof and, in fact have done virtually nothing to allay Your Honors' "primary concern [of] whether there is sufficient evidence in the record regarding the asserted costs and benefits of the proposed project."[38] That omission alone warrants denial of an Article VII Certificate for the Project.

To address the first driver, Mr. Younger accepted (for purposes of his analysis) the $2.2 billion dollar Project cost and 90% capacity factor advanced by the Applicants and utilized by DPS Staff in their economic analyses. When the Applicants acknowledged that there was also an additional $346 million in Canadian interconnection costs that must be taken into account in the economic modeling, Mr. Younger updated his figures accordingly (as did DPS Staff) and showed the Project to be even more uneconomic.

To address the second driver, Mr. Younger used publicly available clearing price information. As reflected by the record evidence, the price that a shipper would receive for its electricity using the Project (i.e., the price differential between Quebec and New York City) is far less than the fee the shipper would have to pay the Applicants to recoup the Project's costs. Thus, the Project is grossly uneconomic.[39]

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as-yet-unknown "more favorable" financing terms that "may" some day be extended to the Certificate Holders by some entity, perhaps HQ. Indeed, if those "more favorable" financing terms are below-market, that would simply furnish another example that the Project is being subsidized for which additional recovery may be sought from New York consumers.

[38] May 25 Ruling, p. 6.

[39] The term "uneconomic" is another term that has been frequently used but has been given a different meaning by some parties -- at least in the context of this proceeding. Mr. Younger utilizes the generally accepted meaning of this term as applied to project development. Based on prevailing methodologies used to estimate a project's annual carrying costs (i.e., the amount of income the Certificate Holder must receive from shippers to break even on the initial $2.2 billion investment), viewed in light of the price differential at either end of the transmission line (which is an index of the amount a willing shipper would pay in a truly market-based transaction), no rational minded shipper (not otherwise subsidized) would pay the $51.54 per MWh required for the Project to break even. To be entirely clear, that construction and operation of the Project might, over the course of 35 years, prove to be $400 million less expensive than construction and operation of a similarly scaled combined-cycle facility (as DPS Staff witness Mr. Thomas Paynter's analysis found) does not by any means establish that it is an economic project, i.e., one that can generate income from the market sufficient to cover its costs without the benefit of direct or indirect subsidy. Cf., Staff's Initial Brief, pp. 12-17.

The consequences of Mr. Younger's findings are clear -- to cover the Certificate Holders' costs, a shipper must pay an above-market rate for firm transmission service on the line. Because the market, acting rationally, will not support that shipper's above-market investment -- i.e., will not pay the shipper a price for power transmitted over the line in amounts sufficient to reimburse it for what it paid to obtain firm transmission rights in the Project -- the shipper cannot rely on market forces alone for that purpose. For example, as HQ pronounces, albeit euphemistically,[40] in its EHI submission, New York State must "work creatively" to recognize the "significant value" of its power (i.e., HQ must obtain additional, out-of-market payments under some form of above-market mechanism to recover its costs).[41] And as chief financier of the $2.2 billion Project with an additional $346 million of additional Canadian transmission infrastructure required, HQ, assuming it proceeds forward with the Project as outlined in its EHI submission, would have much financial ground to make up in this above-market arrangement. The exposure to New York consumers -- where the "buck" will ultimately stop -- is severe. Thus, just as Your Honors alluded to months ago, "future contractual arrangements that Applicants may yet finalize,"[42] will very likely lead to exactly the same harm that would follow if Applicants themselves obtained cost-of-service rates -- the Project's above-market costs will

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[40] Hearing Exhibit 213, HQ EHI submission, p. 7 of 13.

[41] DPS Staff's Initial Brief alludes to another way in which the Project can be indirectly subsidized -- by qualifying some or all of the hydropower transmitted over the Project as eligible under New York's Renewable Portfolio Standard ("RPS"). See Staff's Initial Brief, pp. 34-35 (stating, inter alia, "the Commission should consider including the energy delivered over the Facility as contributing toward the RPS program goals."). The RPS program is supported by non-bypassable RPS program charges on New York consumers' utility bills. Remarkably, DPS Staff then jumps to the conclusion that, because they believe that some or all of the hydropower transmitted by the Project should be RPS-eligible (a determination that the Commission previously expressly rejected and, in any event, can only now be made following a full SAPA rulemaking), "transmission of such [assumed eligible] power … is entirely consistent with and supportive of the State Energy Plan and the Commission's policy of increasing New York State's supply of renewable resources." Even assuming this power were somehow to become eligible under the RPS program, it must be awarded an RPS contract received on a non-discriminatory basis among all other renewable projects (e.g., the solicitation cannot favor electricity delivered over the Project).

[42] May 25 Ruling, p. 5.

be subsidized, in whole or in part, by New York consumers (including ratepayers). Therefore, it is not a pure merchant project.

In short, Applicants have done nothing in the intervening three months since the May 25 Ruling to prove -- as they must to obtain the benefit of the Commission's merchant project review precedents -- that the Project will proceed as, and remain, purely merchant. Instead, they and other Signatory Parties baldly assume throughout their Initial Post-Hearing Briefs -- tellingly, absent a single record cite to support the conclusion -- that the Project is merchant. On the strength of that unsupported assumption, they further conclude that the Commission's prior orders, specifically in Cases 08-T-0034 and 08-T-1245, apply with equal force here, both in terms of the applicable standard of review and the quantum of proof needed for the Commission to render the requisite need and public interest findings.[43] This ipse dixit rationale should be rejected outright. Therefore, the less stringent standard of review cannot be applied in this proceeding.

J. Public Interest, Convenience and Necessity.

(1) Wholesale Energy Price Savings/Production Cost Savings.

Ratepayer savings analyses, even when properly conducted, are not a valid basis for a public interest determination. While the label "ratepayer savings" may be attractive in the abstract, the concept simply measures a transfer of surplus from generators to consumers.[44] As

[43] Entergy does not materially disagree with the Signatory Parties' description of the Commission's ruling in the Bayonne Proceeding. The fundamental disagreement lies in the question -- which Applicants and others have failed to answer -- of whether that precedent can apply at all here given the much different factual predicates underlying these two cases. Clearly, it does not.

[44] See Entergy's Initial Post-Hearing Brief, pp. 49-52. This is not an advocacy position expressed by Entergy -- it is the consensus of every expert witness who has testified on that topic in this case, including Applicants' witness Ms. Julia Frayer. See Tr., pp. 400-401. Indeed, as the record reflects, DPS Staff has, for that reason, among others, long disfavored wholesale energy price savings analyses in prior certification proceedings. See, e.g., Entergy's Initial Post-Hearing Brief, p. 49 n. 136.

DPS Staff has consistently acknowledged, those transfer payments do not reflect any net savings or other benefit to society as a whole. Thus, ratepayer savings analyses do not inform the core finding that the Commission must render in this proceeding -- whether the Project "serves the public interest convenience and necessity."[45]

In addition, other shortcomings compel marginalization, if not complete rejection, of ratepayer savings analyses as an index of public interest or benefit.[46] For instance -- as the JP explicitly concedes -- ratepayer savings analyses are flawed because they assume no market response to the project being studied.[47] At best, ratepayer savings analyses provide just an instantaneous snapshot of ephemeral savings. Indeed, DPS Staff again confirms this fact in its Initial Post-Hearing Brief.[48]

Further, even favorable findings in a ratepayer savings analysis are inextricably tied to the question regarding the Project's alleged merchant status. As Mr. Younger's fact-based

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[45] See PSL § 126.1(g).

[46] Even before reaching these points, it is worth noting that the record now contains wildly divergent findings on both ratepayer savings and production cost savings. Applicants have long had the opportunity to support their case with appropriate, defensible studies, or develop and publish those studies before or contemporaneous with the filing of the JP -- assuming such information could ever be produced. Instead, however, Applicants and Staff stood pat on fundamentally flawed studies, filed a JP that purportedly "resolved all issues," took the benefit of seeing the parties' Initial and Reply Statements opposing the JP, as well as subsequent discovery requests, then waited even longer -- until, in Applicants' case, the filing of direct testimony and in DPS Staff's case until rebuttal testimony -- to jettison their reliance on those earlier studies in their entirety. Tr., pp. 218-219 (Paynter); 395-400 (Frayer). Their new studies, which no party disputes were corrected to address many of the fundamental errors identified by IPPNY and Entergy during the pre-hearing phase, arrive at dramatically lower results, and, more importantly, implicitly lend credibility to Mr. Younger's findings. In other words, if Mr. Younger's analyses of the Project were as far off as Applicants and others now suggest, no reasonable expert would have corrected her/his study to address his concerns, as occurred here, at least in part. Addressing all of Mr. Younger's concerns would have substantially reduced LEI's and DPS Staff's earlier findings. See Tr., p. 218, line 23 through p. 219, line 4; Tr. p. 395, line 14 through p. 400, line 15.

[47] JP ¶ 135 ("These [wholesale energy price] forecasts, therefore, do not address how long these savings could be expected to last, since they neglect potential supply and demand responses to lower prices resulting from the Facility.").

[48] See DPS Staff Initial Post-Hearing Brief at 46, stating: "Staff's analyses do not address how long these savings could be expected to persist since they do not consider potential supply and demand responses to lower prices resulting from the Champlain Hudson project proposal. It should be repeated that these benefits are short-term in nature and would be reflected in the energy market."

analyses show, the Project is only supportable by an above-market contract with a shipper. This subsidy, in turn, will be borne by New York consumers in some capacity -- which would, on balance, vitiate the proferred estimates of ratepayer savings. Consequently, Your Honors have, on the one hand, credible data showing that the Project is economically unsustainable on a pure merchant basis and so must indirectly impose its above-market costs on New York consumers, and, on the other hand, a theoretical and inherently limited model of alleged ratepayer savings.[49] Clearly, the fact-driven conclusions must prevail.

(2) Production Cost Savings Analysis.

Similarly, the record has become somewhat obfuscated as to the production costs savings metric. First, the only complete analyses of production cost savings come from Mr. Younger -- who conducted a full production cost savings analysis using the same analytical model traditionally used by DPS Staff (GE MAPS) and reported the same production cost savings metric traditionally relied upon by DPS Staff in prior certification proceedings -- and, belatedly, from Ms. Frayer -- who used a proprietary "transport" model known as "POOLMOD"[50]and reported her production cost savings metric results in full for the first time in her pre-filed Direct Testimony. The third so-called "economic" analysis in the record, Mr. Paynter's production cost

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[49] This conclusion pertains irrespective of which ratepayer savings analysis results are used.

[50] Mr. Younger's testimony to the effect that "[t]he New York utilities and the State moved away from using transport models to represent the transmission system years ago" (Tr., p. 42, lines 5-6) and identification of other substantive limitations in that model (id., p. 42, lines 4-13), stand unrefuted on this record. This is yet another example of Applicants relying on outdated or unreliable proof to prop-up a key aspect of their case. Applicants could have, just as IPPNY has, conducted a GE MAPS analysis to ensure the Commission's ability to compare "apples to apples." See Tr., pp. 393-394. Instead, the Commission was first offered (in Figure 1 of the JP), a confusing range of results derived from the different models used by DPS Staff and LEI, and is now merely offered the divergent results of LEI and DPS Staff without any real attempt at reconciliation.

comparison, is instead merely a comparison of the "all in" costs of constructing the Project to the "all in" costs of constructing a similarly scaled combined-cycle facility.[51]

In their Initial Post-Hearing Briefs, neither Applicants nor DPS Staff meaningfully addressed the fundamental flaws in Ms. Frayer's production cost savings analysis that Mr. Younger had identified. For example, in response to Mr. Younger's observation that Ms. Frayer's underlying assumption of zero marginal cost for Canadian power was patently unreasonable, Applicants merely claim that HQ's existing interties with New York are limited.[52] That is a complete red herring. As Mr. Jessome acknowledged in his pre-filed testimony and again during the hearings, HQ is not limited to selling its existing (or future) capacity to New York over existing New York interties. To the contrary, HQ has many other opportunities. It is an active participant in the "New England, Ontario [and] Atlantic Canada markets," and is currently involved in the similarly conceived Northern Pass Project.[53] Thus, HQ's power indisputably has an opportunity cost that must be taken into account when measuring the production cost savings metric for the Project.

Likewise, Applicants' Initial Post-Hearing Brief fails to justify Ms. Frayer's erroneous inclusion of fictional retirements in her production cost savings analysis. The proof before Your Honors is undeniable -- not every facility that files a notice of an intent to mothball a facility in New York actually moves forward and places their facility in mothball status (much less, as Ms.

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[51] Compare JP ¶¶ 107-121 and Tr., pp. 197-199. As such, this analysis is misnamed because it does not actually identify net production cost savings on the system that would result if the Project were added, as did Mr. Younger's analysis. The latter record cite shows that, using appropriate and up-to-date natural gas prices and other updated inputs, the purported difference in cost between the two options -- importantly, when measured over a <u>35-year</u> period -- drops from an estimated $1.2 billion to just $400 million.

[52] <u>See</u> Applicants' Initial Post-Hearing Brief, pp. 36-37.

[53] Tr., p. 68, line 12 through p. 69, line 7; Tr. p. 88, line 8 through p. 89, line 7.

Frayer apparently concluded, do all such facilities actually retire). The notices simply are not binding.

L. Proposed Certificate Conditions.

(1) Sufficiency of Condition 15

In its Initial Post-Hearing Brief, DPS Staff asserts that one of the key factors supporting its recommendation that the JP is in the public interest was that the JP "…protects ratepayers by relying on private investments for financing and providing provisions to minimize the possibility that captive ratepayers will be required to contribute to cost recovery."[54] But in fact the June 4 Certificate Conditions would not prohibit the recovery of the Project's above-market costs from captive ratepayers through a shipper contract with a utility or state agency. In addition, DPS Staff's focus solely on the impact to "captive ratepayers" is too limited. A sole focus on captive ratepayers would not prohibit a direct state subsidy to a shipper. If the Project is being subsidized by New York consumers in any capacity whatsoever, by definition, the Project's investors are no longer solely and exclusively bearing the risks of the Project. Thus, the certificate conditions must be comprehensively structured to ensure that no subsidy dollars come from New York consumers -- either directly or indirectly. The June 4 Certificate Conditions do not accomplish that.

For their part, the Applicants indicate that they were anticipating that IPPNY and Entergy would assert that the June 4 Certificate Conditions are not sufficient to prevent indirect subsidization using the Project's shippers as the vehicle. Rather than proposing to correct this flaw in the current conditions, however, the Applicants instead attempt to defend the adequacy of the June 4 Certificate Conditions on two fronts. First, they claim that no party has provided

[54] See DPS Staff Initial Post-Hearing Brief, p. 6.

evidence that such a contract between a shipper and another entity will be signed.[55] Second, they claim that prohibiting indirect subsidization would be unenforceable.[56] Applicants' positions in this regard are wholly without merit and will unnecessarily expose New York consumers to bear the Project's substantial, above-market costs.

Contrary to the Applicants' conclusory assertions, the record does, in fact, identify the likely indirect subsidization path that will be pursued. Specifically, Hearing Exhibit 213 demonstrates that HQ may provide all Project debt and intends to enter into a long-term transmission service agreement for 75% of the HVDC Transmission System's capacity.[57] The record also reveals HQ's apparent prerequisite to doing so -- it must "work creatively" with New York to "consider innovative ways" for New York to "prioritize and promote" incremental hydropower deliveries, i.e., to subsidize its participation in the Project and, indirectly, the Project itself.[58] While there is no "smoking pen" -- not yet anyway, guideposts have certainly been laid to define the likely path that must be pursued for the Project to proceed forward. Those guideposts lead -- albeit indirectly -- to the pocketbooks of New York consumers.

Applicants' second claim is equally unavailing -- in fact, it is entirely refuted by the Applicants' statements elsewhere in their Initial Post-Hearing Brief. Pointing with favor to the new requirement in the June 4 Certificate Conditions that the Applicants will not proceed forward with the Project unless they receive a firm commitment for at least 75% of the Project's capacity, the Applicants claim that resolution of such complex issues that will define the cost of

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[55] See Applicants Initial Post-Hearing Brief, p. 108.

[56] Id.

[57] Tr., p. 89, lines 8-14.

[58] Hearing Exhibit 213, HQ EHI RFI submission, p. 7.

power for consumers can be addressed through arms-length negotiations.[59] Yet 100 pages later, the Applicants summarily assert that these very same arms length negotiations -- which had been so capable of addressing complex issues -- are somehow entirely ineffectual for identifying the actions of its contracting counterparties, thus making an indirect subsidization prohibition "completely unenforceable."[60]

In short, Applicants have repeatedly claimed that the Project is -- and will remain -- a purely merchant project. Applicants request that the Commission accordingly apply the less stringent review standard to their Project. To secure that benefit, however, Applicants must be held to their merchant commitments. To adequately protect New York consumers from indirectly subsidizing the Project's above-market costs, Your Honors should recommend that the Commission include the additional certificate conditions identified by Entergy in its Initial Post-Hearing Brief as a core component in the event that the Commission ultimately determines that any Article VII certificate may be issued for the Project.[61]

II. APPLICANTS STILL HAVE NOT FURNISHED AN ADEQUATE RECORD ON WHICH TO RENDER THE REQUIRED ENVIRONMENTAL FINDINGS.

D. Probable Environmental Impacts.

As Riverkeeper, Inc. and Scenic Hudson, Inc. correctly state in their joint Initial Post-Hearing Brief, "[t]he Hudson River is an invaluable resource in terms of its ecological

[59] See Applicants' Initial Post-Hearing Brief, pp. 11-12.

[60] Id., p. 108. The Applicants' further claim that the NYISO's capacity market buyer-side market power mitigation rules render an indirect subsidization certificate condition unnecessary (see id., pp. 108-09) reflects either a misunderstanding or a blatant misrepresentation of these rules. If mitigated, these rules require a new entrant to bid its capacity at a price at or above a pre-defined floor. Thus, these rules define whether -- and the degree to which -- a new entrant is able to make capacity sales. They do not, however, prevent a developer (e.g., one being subsidized) from nonetheless going forward with its project.

[61] See footnote 14, supra.

productivity and its historical and cultural value."[62] It is also indisputable that this Project proposes to make an unprecedented use of that "invaluable resource," including as a permanent repository for their transmission line at the end of its useful life -- a point not meaningfully addressed in any of the Signatory Parties' Initial Briefs. Beyond that glaring omission, the Signatory Parties' Initial Briefs fail to address numerous other points raised by Entergy, as discussed below. The Signatory Parties' failure to address these concerns now -- as opposed to merely deferring their resolution to the EM & CP phase, or, worse yet, simply pointing to the Mitigation Fund as the panacea for all adverse impacts -- makes it impossible for the Commission to identify the "nature of the probable environmental impact."[63] And, if the Commission is not informed as to the probable environmental impacts, it necessarily can make no determination as to whether such impacts would be adequately mitigated.[64]

(1) Underwater Environmental Impacts.

(i) Cable Burial Depth.

In its Initial Statement opposing the JP, Entergy clearly indicated that certain aspects of the Project -- in particular the proposal to surface lay the cable over extended reaches of the bed of Lake Champlain and other water bodies, and proposal to linearly occupy the Federally-Maintained Navigation Channel -- were at odds with the determinations of the United States Army Corps of Engineers ("ACOE") concerning the Project.[65] Entergy indicated its intent to

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[62] See Joint Initial Brief of Riverkeeper, Inc. and Scenic Hudson, Inc., p. 4.

[63] PSL § 126.1(b).

[64] PSL § 126.1(c). Indeed, because the PSL already compels mitigation of adverse environmental impacts before a certificate may be issued, the Mitigation Fund adds nothing to the record unless it is intended to support studies over and above those that may already be required to meet the statutory requirements. Pointing to the Mitigation Fund as a means of satisfying the statutory mitigation standard post-certification, as the Signatory Parties have done here, has it exactly backwards.

[65] See Entergy's Initial Statement in Opposition to the Joint Proposal, pp. 25-26.

demonstrate that the ACOE had prohibited both of those options. The only response offered at that time -- repeated again in DPS Staff's Initial Post-Hearing Brief -- was that because the ACOE has not yet issued a final permit (largely due to Applicants' request that it place consideration of the application in abeyance), ACOE's expressed concerns were completely irrelevant.[66]

Your Honors now have before you the ACOE's July 5, 2011 additional information request.[67] Apart from DPS Staff's regurgitation of the "no final permit" claim[68] -- which falls into the "see no evil, hear no evil" category -- the Signatory Parties have done nothing to explain, minimize or mitigate the impact of this clear federal agency position -- one which, if finalized, could have a significant impact on Project costs, and, by extension, the Project's financial viability (which, as noted, supra, impacts on the Applicants' burden of proof and the applicable standard of review) and its overall constructability. In other words, the ACOE's position has a direct and substantial bearing on many different aspects of this proceeding. It cannot merely be marginalized or ignored, as DPS Staff seems to suggest it should be. Perhaps tellingly, Applicants' Initial Post-Hearing Brief does not address the ACOE correspondence at all.

Substantively, Entergy's Initial Post-Hearing Brief also demonstrates that the record contains insufficient characterization and assessment of the impact of surface laying the cable,

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[66] See, e.g., DPS Staff's Initial Post-Hearing Brief, pp. 19-20.

[67] Hearing Exhibit 215, Attachment D. See also Entergy's Initial Statement in Opposition to the Joint Proposal, pp. 29-30 (summarizing ACOE's position as set forth in the July 5, 2011 additional information request).

[68] Staff's Initial Post-Hearing Brief, pp. 19-20. Additionally, on page 18 of their Initial Post-Hearing Brief, DPS Staff note the alleged absence of a "scintilla" of contrary evidence "in the record." In response, two points are in order: (1) the absence of record evidence submitted by opposing parties does not absolve the Applicants from meeting their burden of both establishing the probable impacts, and minimizing them, which has not been done here; and (2) the record, including Applicants' own submissions, including the ACOE's July 5, 2011 notice, undermines their position, as do Applicants' concessions concerning potential ESA-listed species impacts. Stated another way, DPS Staff appear to be under the mistaken impression that successful opposition is required for an applicant to fail - a claim that turns the applicable burden of proof on its head.

assuming such method is ever allowed by the ACOE.[69] On pages 43-44 of their Initial Post-Hearing Brief, Applicants concede that the cables may not be buried in all circumstances, including as a result of "rocky substrate" and utility crossings, and that the use of concrete mats may result in: (1) slightly altered hydraulic conditions; (2) localized sediment deposition or scouring; and (3) changes in local topography.[70] Thus, the Signatory Parties' categorical statements about how impacts are reduced through burying of the cable tell only part of the story. In short, the areas of "rocky substrate" and utility crossings where the cable will be surface laid and covered with concrete mats have not been quantified (except by Entergy)[71] or evaluated, with the result that there is no evidence in the record supporting the conclusion that the conceded effects will be slight, minor or small.

(ii) Impact on Endangered Species.

The statement, on page 45 of Applicants' Initial Post-Hearing Brief, that many of the threatened or endangered species, including ESA-listed species, "are not expected to occur within the construction area of the facility," is at once false and irrelevant. It is false because Atlantic and shortnose sturgeon occupy and, more importantly, potentially spawn in, the depths and bed of the Hudson River -- exactly where the cable is to be buried.[72] It is irrelevant because the Endangered Species Act is not concerned with whether "most" or "many" of the affected species are addressed, but is instead a categorical prohibition against certain impacts to any listed

[69] See Entergy's Initial Post-Hearing Brief, pp. 32-36.

[70] At page 9, the Initial Post Hearing Brief of Riverkeeper and Scenic Hudson offers the same concession.

[71] See Entergy's Initial Post-Hearing Brief, pp. 34-35.

[72] Id., pp. 32-33.

species.[73] Finally, Applicants' argument that the species are "highly mobile" likewise seems to be relying not on their ability to limit the Project's effects through mitigation, but rather on the ability of species to manage their own fate; it is the functional equivalent of saying that we should not worry about crime because human beings -- a "highly mobile" species -- can elect to stay indoors and protect themselves. The proposition strains credulity and so should be rejected.

Regarding potential EMF impacts to protected species, Applicants' position appears to be entirely based on the flawed proposition that the buried cable causes no EMF concerns whatsoever. However, that conclusion is not supported by the record, and ignores the fact, noted in Entergy's Initial Post-Hearing Brief, that the Applicants have not adequately quantified the EMF impacts of the cable -- particularly on sturgeon -- where it will not be buried.[74] Thus, Applicants have not sufficiently addressed the impacts of the unburied segments of the cable, but simply discounted them entirely.

2. Overland Environmental Impacts.

(i) Astoria Converter Station Site.

It is revealing that DPS Staff and NYSDEC apparently felt compelled to avoid Applicants' witness Sean Murphy, Ph.D.'s testimony in their Initial Post-Hearing Briefs and to instead rely, almost exclusively, on an extrinsic report that Your Honors had already excluded from the record on August 21, and again on August 30 (in response to DPS Staff's and

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[73] Applicants go to great lengths to discuss Hearing Exhibit 109, titled "Karner Blue Butterfly Impact Avoidance and Minimization Report," yet have no similar report concerning Atlantic or shortnose sturgeon -- also federal and state ESA-listed species and likely, based on the extent of underwater cabling, more significantly impacted ones. See Applicants' Initial Post-Hearing Brief, pp. 59-60.

[74] See Entergy's Initial Post-Hearing Brief, pp. 39-40 (noting that Applicants' conclusions pertain to Pacific and Atlantic salmon, and not Atlantic or shortnose sturgeon).

NYSDEC's renewed joint motion).[75] They did so in a failed attempt to prop-up the utterly unsupported (and patently unrealistic) conclusion that, notwithstanding over 100 years of industrial operations on the same property where they intend to construct a substantial converter station/ring bus complex, and a decade-old, ongoing environmental investigation of the same site, Your Honors need not understand existing site conditions to determine the "nature of the probable environmental impact"[76] or be concerned with the impact of potential environmental liability or clean-up costs on the Project's economics.

Alternatively, the Signatory Parties rely on Dr. Murphy's opinion that "[t]he preponderance of the evidence is that there is not significant contamination at the site."[77] Virtually in the same breath, however, Dr. Murphy stated, "I take your point that the studies were conducted at an earlier period of time."[78] Mr. Murphy's latter statement, essentially ignored by the Applicants and DPS Staff, makes Entergy's point -- the "evidence" on which his opinion rests is outdated. Stated simply, a "preponderance" of stale and outdated evidence proves nothing.[79]

Indeed, were the data Dr. Murphy cited to support his opinion reliable, DPS Staff and NYSDEC would presumably not have gone to the lengths they have (including citing to the prohibited report in their Initial Briefs) to get yet another dated, draft report into the record.

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[75] Case 10-T-0139, supra, "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), pp. 2-4; "Ruling on August 22 Motions to Incorporate by Reference or Take Official Notice Filed by DEC and Staff" (issued August 30, 2012).

[76] See PSL § 126.1(b).

[77] Tr., pp. 153-154.

[78] Tr., p. 154.

[79] By comparison, under CERCLA, 42 U.S.C. 9601, et seq., and its implementing regulations, an environmental site assessment is obsolete for due diligence purposes (referred to there as "all appropriate inquiries") after one year. See 40 C.F.R. § 312.20(a).

Indisputably, as the record now stands, any finding by the Commission as to the underlying site conditions at the Astoria Converter Station site would be based on reports more than a dozen years old, some of them draft, that Dr. Murphy acknowledged on cross-examination raise more questions than they answer.[80] In short, the current environmental conditions at the Astoria converter station site are unknown. There is thus no record basis for any Commission findings in that regard.

CONCLUSION

For all of the foregoing reasons, and for those stated in Entergy's Initial Post-Hearing Brief, and otherwise established on the record in this proceeding, Entergy respectfully requests that: (i) Your Honors recommend that the Commission deny the Article VII petition in all respects; and (ii) Your Honors recommend that, were the Commission nonetheless to find that a Certificate can be granted, the Commission require the Applicants to unconditionally accept additional certificate conditions that prevent the Project from being subsidized indirectly.

Dated: September 7, 2012
Albany, New York

Respectfully submitted,

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[80] Tr., pp. 148-149.