

**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

**RESPONSE OF ENTERGY NUCLEAR POWER MARKETING, LLC  
AND ENTERGY NUCLEAR FITZPATRICK, LLC IN OPPOSITION TO  
CERTIFICATE HOLDERS' REQUEST FOR RECONSIDERATION OF THE ACTING  
SECRETARY'S NOTICE REGARDING ENTERGY PETITION FOR REHEARING**

**GREENBERG TRAURIG, LLP**

William A. Hurst

Doreen U. Saia

Counsel to Entergy Nuclear Power Marketing, LLC  
and Entergy Nuclear FitzPatrick, LLC

54 State Street, 6<sup>th</sup> Floor

Albany, New York 12207

(518) 689-1400

Dated: June 6, 2013  
Albany, New York

## I. INTRODUCTION

Pursuant to Section 3.6(d)(1) of the Commission’s Rules of Practice, Entergy Nuclear Power Marketing, LLC and Entergy Nuclear FitzPatrick, LLC (collectively referred to as “Entergy”), respectfully submit this response in opposition to the May 29, 2013 “Request of Certificate Holders for Reconsideration of Certain Portions of the Commission’s Notice Regarding Entergy Petition for Rehearing”<sup>1</sup> (“Request”). Although denominated by Certificate Holders as the “Commission’s Notice,” Certificate Holders’ Request is directed at the Acting Secretary’s May 23, 2013 “Notice Regarding Entergy Petition for Rehearing” (“Notice”). The Notice, issued by the Acting Secretary at Certificate Holders’ request,<sup>2</sup> allowed Entergy the opportunity to explain the circumstances attendant to its May 20 and May 21, 2013 submissions in this proceeding.<sup>3</sup> In making their May 22 request of the Acting Secretary, Certificate Holders were presumably aware of the possibility that the Acting Secretary would allow Entergy the opportunity to explain its May 20 and May 21 submissions, and should have been aware of Entergy’s rights of administrative and judicial review appertaining to any order entered by the Acting Secretary in response to that explanation.<sup>4</sup> Certificate Holders now ask the Commission

---

<sup>1</sup> 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, “Request of Certificate Holders for Reconsideration of Certain Portions of the Commission’s Notice Regarding Entergy Petition for Rehearing” (filed May 29, 2013).

<sup>2</sup> Id., Certificate Holders’ correspondence to the Acting Secretary filed on May 22, 2013 (identified on the docket as “Request for clarification regarding Entergy’s petition for rehearing.”).

<sup>3</sup> Id., “Notice Regarding Entergy Petition for Rehearing,” p. 1 (issued May 23, 2013).

<sup>4</sup> While the Request focuses almost exclusively on the procedural rights that might arise in the case of an “order rejecting Entergy’s rehearing request as untimely” (Request, p. 3), it appears that Certificate Holders themselves are prepared to seek the same relief were the Acting Secretary to find good cause and accept Entergy’s rehearing petition for filing. Id., “Response of Certificate Holders in Opposition to Entergy’s Brief Seeking Acceptance of its Late-Filed Rehearing Request,” pp. 11-14 (filed June 4, 2013) (essentially claiming, without citing any supporting case law or Commission precedent to support the principle, that the Acting Secretary’s conclusion in the Notice that he “may extend a deadline for filing of a petition for rehearing” is not only incorrect as a matter of discretion, but is ultra vires and completely unauthorized as a matter of law.).

to reconsider the Acting Secretary's May 23 determination. For the reasons set forth below, the Acting Secretary (and/or the Commission) should deny the Request in all respects.

## II. BACKGROUND

The circumstances surrounding Entergy's May 20 and May 21 submissions have been fully vetted on the record in response to the Notice, and will not be reiterated here.<sup>5</sup> Notwithstanding Certificate Holders' acknowledged receipt of Entergy's petition for rehearing on May 21 (which was originally transmitted for electronic filing and service on 3:08 pm on May 20), Certificate Holders' May 22 correspondence requested that the Acting Secretary "state for the record the date and time when Entergy's Rehearing Petition was received for filing and the manner in which such service was made (i.e., by hand, by e-mail, by electronic upload to the Commission's Document and Matter Management System, etc.)."<sup>6</sup> Certificate Holders made this request even though the date that the Secretary's office filed Entergy's rehearing petition (May 21) was revealed by the official docket. The Notice followed.

In the Notice, the Acting Secretary stated, *inter alia*, "Pursuant to Section 22 of the Public Service Law and Section 3.3 (a) (1) of the Commission's rules, the Secretary may extend a deadline for filing of a petition for rehearing, for good cause shown."<sup>7</sup> The Acting Secretary provided a limited period for the submission of Entergy's response to the Notice, and for the submission of responses to Entergy's explanation. The Acting Secretary further ruled:

A further Notice will be issued, determining whether the Petition will be considered timely filed or if good cause for late filing has been shown. Until such

---

<sup>5</sup> See, e.g., Case 10-T-0139, *supra*, Affirmation of William A. Hurst (filed May 29, 2013).

<sup>6</sup> As Entergy explains in its May 29 submissions in this proceeding, its filing on May 21 was timely, taking into account the one-day period added to the applicable 30-day deadline, which is measured from "service of the order." *Id.*, "Brief in Response to Notice Regarding Entergy Petition for Rehearing Submitted by Entergy Nuclear Power Marketing, LLC and Entergy Nuclear FitzPatrick, LLC," pp. 6-7.

<sup>7</sup> Notice, p. 1.

time, no deadline for responding on the merits to the Petition for Rehearing is in effect. Any such deadline for responses will be established by the further notice.<sup>8</sup>

The Acting Secretary thus appropriately stayed the applicable deadline for responding to the substance of Entergy's rehearing petition to allow for investigation into the matters raised by Certificate Holders' May 22 correspondence.

Five days later, on the date that Entergy's submissions were due under the Notice, Certificate Holders filed the Request, but addressed it to a Notice issued by the "Commission."<sup>9</sup> Accordingly, Certificate Holders appear to be asking the Commission to reconsider the Acting Secretary's Notice – something more akin to an appeal than a reconsideration request.

### **III. DISCUSSION**

Typically, a motion for reconsideration or re-argument alleges that the decision-maker misapprehended or overlooked some fact pertinent to the merits of the decision at hand.<sup>10</sup> That is not the case here. Instead, Certificate Holders' Request seeks to avoid the procedural results of Certificate Holders' own inquiry to the Secretary by truncating the process they had instigated by their May 22 request for clarification. In short, the Acting Secretary misapprehended or overlooked nothing, and the Notice grants Certificate Holders exactly the relief they apparently sought, or should reasonably have expected to follow their May 22 correspondence.

---

<sup>8</sup> Id., pp. 1-2.

<sup>9</sup> See, e.g., Request, p. 2 ("In the Notice, the Commission provided Entergy until May 29, 2013 to demonstrate that its rehearing request was in fact filed on a timely basis or to explain why good cause existed for the Commission to accept that rehearing request for filing out of time."). The Request did not challenge the Commission's, or the Acting Secretary's, authority to accept Entergy's rehearing petition for filing, even assuming it was filed one day out of time. Certificate Holders raised that issue for the first time in their June 4 submissions.

<sup>10</sup> See, e.g., N.Y. Civil Practice Law & Rules §2221(d) (stating, in pertinent part, "a motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.") A motion for leave to reargue (alternately referred as a motion for reconsideration) is addressed to the decision-maker's sound discretion. See, e.g., Loris v. S&W Realty Corp., 16 A.D.3d 729 (3d Dep't 2005).

The Request rests on Certificate Holders' speculation as to how the Acting Secretary might rule in response to Entergy's explanatory submissions made on May 29, 2013, and on what legal rights Entergy (or, for that matter, any party aggrieved by the Acting Secretary's determination) may or may not elect to exercise to seek further review of that determination. Certificate Holders then ask the Commission to presuppose a future remand by a New York court,<sup>11</sup> and to consider the consequences thereof vis-à-vis the date by which the instant Article VII proceeding will become administratively final.<sup>12</sup> Certificate Holders effectively ask the Commission to make a series of assumptions, and then to rule on that basis, rather than because the Acting Secretary misapprehended or overlooked some pertinent issue of fact or law. In short, Certificate Holders seek reconsideration of the Notice based on their speculation about the outcome of the process they themselves initiated by the May 22 correspondence.

Had Certificate Holders conferred with Entergy and consented to Entergy's filing upon hearing the reasonable circumstances surrounding it (even assuming it was less than 24 hours out of time, which is not the case), or simply asked the Acting Secretary for an extra day to reply to Entergy's rehearing petition (reasonable relief that Entergy would have consented to),<sup>13</sup> the additional process that Certificate Holders triggered but now express concern over might never have come to fruition. Indeed, the Request itself has engendered additional delay – were the Request not pending, the matter of the timeliness of Entergy's May 20 and May 21 filings would have been perfected for determination by the Acting Secretary on June 4. Now, however,

---

<sup>11</sup> Entergy would note that, if these circumstances were to evolve and a court was to remand back to the Commission, the court presumably would do so because it found good cause and, potentially, that Entergy's claims in its rehearing petition appeared to have merit.

<sup>12</sup> Request, p. 3.

<sup>13</sup> That was exactly the relief the Acting Secretary granted when Certificate Holders (then Applicants) moved to strike the brief on exceptions filed by the Business Council of New York State in this proceeding. In all other respects, the Acting Secretary denied Applicants' motion to strike. Case 10-T-0139, supra, "Ruling on Motion to Strike Briefs on Exception" (issued January 30, 2013).

because the resolution of the Request is inextricably linked to the Acting Secretary's determination of the timeliness of Entergy's submissions, the matter will not be perfected for decision until June 6, at the earliest.

Stated simply, there is nothing to "reconsider" here. At Certificate Holders' request, the Acting Secretary has "state[d] for the record the date and time when Entergy's rehearing petition was received for filing . . ." <sup>14</sup> The Acting Secretary has explained the basis for the Notice, asserted jurisdiction over the timeliness dispute and correctly established the standard of review to be applied. <sup>15</sup> After the Acting Secretary rules on the timeliness of Entergy's May 20 and May 21 submissions, parties will have the right to consider, and possibly pursue, all legal remedies available to them. The Acting Secretary should not deviate from the process set forth in the Notice, nor should the Commission countermand the Acting Secretary's Notice, based on Certificate Holders' speculation and conjecture. Indeed, Certificate Holders have made no evidentiary showing, in the Request, or, for that matter, anywhere else on this record, as to how an aggrieved party's proper exercise of its procedural rights of review of an adverse ruling by the Acting Secretary (or the Commission) will in fact cause Certificate Holders to suffer undue prejudice, or otherwise justifies reconsideration of the Notice by the Acting Secretary or the Commission.

---

<sup>14</sup> May 22 correspondence, p. 1.

<sup>15</sup> Notice, p. 1.

**CONCLUSION**

For all of the foregoing reasons, Entergy Nuclear Power Marketing, LLC and Entergy Nuclear FitzPatrick, LLC respectfully request that the Acting Secretary and/or the Commission deny the Request in all respects.

Dated: June 6, 2013  
Albany, New York

Respectfully submitted,

**GREENBERG TRAURIG, LLP**

/s/ William A. Hurst

William A. Hurst  
Doreen U. Saia  
Counsel to Entergy Nuclear Power Marketing, LLC  
and Entergy Nuclear FitzPatrick, LLC  
54 State Street, 6<sup>th</sup> Floor  
Albany, New York 12207  
(518) 689-1400