

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

Application of Champlain Hudson Power)	
Express, Inc. and CHPE Properties, Inc. for)	
a Certificate of Environmental Compatibility)	
and Public Need Pursuant to Article VII of)	Case No. 10-T-0139
the Public Service Law for the Construction,)	
Operation and Maintenance of a High-)	
Voltage Direct Current Circuit from the)	
Canadian Border to New York City.)	
)	

**OPPOSITION OF CHAMPLAIN HUDSON POWER EXPRESS, INC.
AND CHPE PROPERTIES, INC. TO MOTIONS TO
INCORPORATE OR FOR OFFICIAL NOTICE**

Champlain Hudson Power Express, Inc. (“CHPEI”) and CHPE Properties, Inc. (“CHPE Properties” and, collectively with CHPEI, the “Applicants”) submit this Opposition to the Motions to Incorporate or For Official Notice of the Independent Power Producers of New York, Inc. (“IPPNY”) pursuant to Rule 3.6(d) of the Commission’s Procedural Rules, 16 N.Y.C.R.R. § 3.6(d) (2012), and the Notice Establishing Abbreviated Motion Response Date issued by the Commission’s Secretary in this proceeding on January 18, 2013.¹

**INTRODUCTION AND
SUMMARY OF POSITION**

In its Brief on Exceptions filed in this proceeding on January 17, 2013, IPPNY included several references to forecasts of natural gas prices contained in a document entitled *AEO2013 Early Release Overview* (the “Early Release Overview”) issued by the Energy Information Agency of the United States Department of Energy (“EIA”) on December 5, 2012. Because

¹ Counsel for Department of Service Staff (“DPS Staff”) has authorized the Applicants to state that DPS Staff supports this Opposition.

these forecasts contained in the Early Release Overview were not introduced into evidence at the hearing in this proceeding or admitted into the record by Administrative Law Judges Michelle Phillips and Kevin Casutto (the “ALJs”) prior to the issuance of their Recommended Decision in this case issued December 27, 2012 (the “RD”), IPPNY has requested in a footnote to its Brief on Exceptions that the Commission incorporate the Early Release Overview into the record in this proceeding or that the Commission take official notice thereof.² Because the Early Release Overview is preliminary in nature and does not include all of the information required to understand the gas price forecasts contained therein, Applicants respectfully request that the Commission reject IPPNY’s requests.

ANALYSIS

I. THE COMMISSION SHOULD NOT INCORPORATE OR TAKE OFFICIAL NOTICE OF THE FACTS CONTAINED IN EIA’S EARLY RELEASE OVERVIEW

A. The Commission Should Not Incorporate EIA’s Early Release Overview By Reference

Section 85-2.7 of the Commission’s Procedural Rules, 16 N.Y.C.R.R. § 85-2.7 (2012), authorizes the Commission to incorporate by reference information contained in any filing with the Commission or in any other public document. Significantly, however, § 306(2) of the State Administrative Procedure Act (“SAPA”) requires that the materials to be incorporated be “available for examination by the parties before being received into evidence.”

The description of EIA’s Early Release Overview provided on EIA’s website makes clear, however, that the Early Release Overview does not present the full scope of EIA’s

² IPPNY Brief on Exceptions at 11 n.24.

examination of future gas prices and that additional information will be included in EIA's final report which is not available at this time. Specifically EIA states, in pertinent part, that:

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.³

Without access to these alternative cases, Applicants and other parties are unable to meaningfully compare the preliminary gas price forecast provided by EIA in its Early Release Overview to the forecasts provided in EIA's previous reports.

Moreover, EIA's web site also makes clear that key modeling assumptions were changed from the previous estimates of future gas prices referenced by various parties in this case, including:

A shift from using regional natural gas wellhead prices to using representative regional natural gas spot prices as the basis of the natural gas supply price. Due to this change, the methodology for estimating the Henry Hub price was revised.⁴

Again, without access to the full EIA report, Applicants and other parties are unable to meaningfully assess the impacts of these changes on the gas price forecast contained in EIA's Early Release Overview.

The ALJs were confronted with similar requests to incorporate preliminary reports into the record in this case on several occasions. In each instance, they declined to do so on the ground that such preliminary materials remain subject to change and, hence, are not appropriate

³Available at: http://www.eia.gov/forecasts/aeo/er/early_introduction.cfm

⁴ *Id.*

for inclusion in the record in this case. For example, in their Ruling on Motions to Incorporate or Take Notice of NYISO Draft Reliability Report issued August 17, 2012, the ALJs ruled that:

[T]he draft RNAs are subject to further review and possible modification; therefore, we concur that incorporation or taking official notice of the drafts would be inappropriate, and deny the requests to include draft versions of the RNA in this record.⁵

Similarly, in their 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, the ALJs refused to incorporate a draft report on environmental conditions at the Luyster Creek site into the record in this case, despite their findings that the draft report was submitted to DEC in its capacity as a regulator and that the information in that draft report was relevant to an issue in this proceeding.⁶

Because EIA's Early Release Overview does not constitute EIA's complete and final 2013 Annual Energy Outlook, does not contain information that by EIA's own admission is essential to a proper understanding of the forecasts presented therein or the changes in forecasting methodology adopted by EIA in the preparation of those forecasts, and remains subject to further revision by EIA until released at some future date, EIA's Early Release Overview does not qualify for incorporation by reference into the record in this case.

⁵ 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 Motions To Incorporate Or Take Notice Of NYISO Draft Reliability Report, slip op. at 4 (Issued August 17, 2012).

⁶ 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 Motions to Incorporate by Reference or Take Notice Filed by DEC, Jointly With Applicants And Staff; and, Separately, By IPPNY and Entergy, slip op. at 3 (Issued August 21, 2012).

B. The Commission Should Not Take Official Notice Of EIA’s Early Release Overview

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.” IPPNY does not specifically contend that judicial notice could be taken of the gas price forecasts contained in EIA’s Early Release Overview. This is hardly surprising, as judicial notice is generally limited to facts within common knowledge.⁷

Nor can IPPNY claim that the subject of EIA’s Early Release Overview – future prices for natural gas – is a matter within the Commission’s specialized knowledge. While the Commission clearly has specialized knowledge regarding the use forecasts of future prices for natural gas in the exercise of its broad regulatory powers under the Public Service Law in proceedings where such forecasts have been properly introduced into evidence, the Commission does not have the specialized knowledge of market conditions affecting the future prices of natural gas or the manner in which forecasts of natural gas prices are or should be prepared that would be required to bring the making of such forecasts within the scope of the Commission’s “specialized knowledge.” This is particularly true where, as here, the forecast presented is only a preliminary report providing a “first look” at part of a broader forecast to be released at some unspecified date in the future, where the agency releasing that forecast has expressly stated that its forecast should not be used in isolation but should be reviewed in the full context of its yet-to-be released final report, and where the agency preparing that forecast has made clear that it has modified its fundamental forecasting methodology in ways that cannot be fully understood and

⁷ See, e.g., *Rohlf v. Weil*, 271 N.Y. 444, 448 (1936)(“Courts take judicial notice of the fact within common knowledge that work performed on scaffoldings on the outside of buildings abutting on highways is attended with danger to those using the sidewalk and that reasonable measures, such as barriers or warning notices, to prevent such danger must be employed.”).

evaluated based on the abbreviated preliminary report currently available. Accordingly, the Commission should reject IPPNY's request that it take official notice of this preliminary report.

CONCLUSION

WHEREFORE, for the above-stated reasons, Applicants Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. respectfully request that IPPNY's Motion to incorporate by Reference or Take Official Notice of EIA's Early Release Overview be denied and that the Commission disregard all contentions made by IPPNY on the basis of that extra-record material.

Respectfully submitted,

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