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August 29, 2012

Hon. Kevin J. Casutto
Hon. Michelle L. Phillips
Administrative Law Judges
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

Re: 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.

Dear Judges Casutto and Phillips:

In accordance with the schedule established by Your Honors on August 24, 2012, this joint response is submitted on behalf of Entergy Nuclear Marketing, LLC, Entergy Nuclear FitzPatrick, LLC (“ENPM” and “ENFP,” respectively and, together, “Entergy”) and Independent Power Producers of New York, Inc. (“IPPNY”), in opposition to the most recent motion to strike filed in this proceeding by Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. (“Applicants”).¹

INTRODUCTION

Applicants’ Motion takes issue with: (1) Central Hudson Gas & Electric Corporation’s (“CHG&E”) direct quotations from, and accompanying citations to, Applicants’ own publicly-accessible internet webpage, <http://www.chpexpress.com>; (2) IPPNY’s general background reference to the webpage for Governor Andrew Cuomo’s “Energy Highway Initiative,” and IPPNY’s citation to a notice of intent to mothball filed with the New York State Public Service Commission (“Commission”) by the Astoria Generating Company, L.P.

¹ 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, “Applicants’ Motion to Strike Portions of the Initial Post-Hearing Briefs of Central Hudson Gas & Electric Corporation, the Independent Power Producers of New York, Inc. and Entergy Nuclear Power Marketing, LLC and Entergy Nuclear FitzPatrick, LLC” (August 23, 2012) (“Motion”).

(“AGC”)² and (3) Entergy’s: (i) summary of a position it expressed in its filed Initial (and Reply) Statement in Opposition to the Joint Proposal; (ii) citation -- in the context of what has been deemed in this proceeding to be a “legal or policy”³ issue -- of general, undisputed background information on the Endangered Species Act (“ESA”)-listed Atlantic sturgeon, derived from an internet website kept and maintained by the National Oceanographic and Atmospheric Administration (“NOAA”); and (iii) citation to the filed Prepared Testimony of DPS Staff witnesses Leka P. Gjonaj and David V. Wheat in Case 06-T-0650⁴ that is already incorporated into the record,⁵ and that expresses exactly the same principle as -- and therefore reinforces DPS Staff’s long-standing position on -- the caveats contained in paragraph 135 of the Joint Proposal⁶ and in DPS Staff witness Mr. Thomas Paynter’s testimony in this proceeding.⁷

Applicants’ latest attempt to artificially limit the administrative record in this proceeding should be denied because it elevates form over substance in the extreme and is based in part on a distorted reading of Your Honors’ prior rulings in this case. First, Entergy’s discussion in its Initial Post-Hearing Brief of Applicants’ earlier misuse of the “renewable energy” label, and supporting observation concerning the controversy surrounding one of the potential sources of hydropower for Applicant’s project, is not only part of the record already, but it, as well as Entergy’s discussion of endangered species impacts, inform “legal and policy” issues (or mixed issues of law and policy) in this proceeding and do not bear on any disputed factual issue. Consequently, Applicants’ attempt to expand Your Honor’s prior rulings into all-encompassing exclusionary rules to be slavishly applied, across-the-board, including to these legal and policy issues, sweeps far too broadly and must be rejected.

² See Case 05-E-0889, Proceeding on Motion of the Commission to Establish Policies and Procedures Regarding Generation Unit Retirements, “Notice of Intent to Mothball” (December 14, 2011) (“December 2011 Notice”).

³ Id., “Ruling on Issues” (issued May 8, 2012), pp. 3-5; see also, id., “Ruling on Motion” (issued June 7, 2012) (the “June 7 Ruling”), p. 5.

⁴ Case 06-T-0650, Application of New York Regional Interconnect, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII for a High Voltage Direct Current Electric Transmission Line Running Between National Grid’s Edic Substation in the Town of Marcy, and Central Hudson Gas & Electric’s Rock Tavern Substation Located in the Town of New Windsor (“NYRI Proceeding”), “Prepared Testimony of Leka P. Gjonaj and David V. Wheat” (“Gjonaj/Wheat Testimony”), p. 13-14.

⁵ See Case 10-T-0139, supra, Evidentiary Hearing Transcript (“Tr.”), p. 455-456.

⁶ Case 10-T-0139, supra, “Joint Proposal of Settlement” (“JP”), ¶ 135.

⁷ Tr., pp. 171-172; 202-204.

Next, Applicants have not indicated that they dispute the authenticity or accuracy of the information or materials cited by any of the three parties, or that they are prejudiced by consideration of these materials. Nor could they. The validity of the cited materials (e.g., Entergy's Initial and Reply Statements; a NOAA-maintained website; and DPS Staff's pre-filed testimony in an earlier case), and truth of the general, background information imparted thereby, is indisputable.⁸

Finally, the cited portions of the Gjonaj/Wheat Testimony, filed by DPS Staff in the NYRI Proceeding, are not only non-controversial (because the same concept is expressed in the JP, in Mr. Paynter's testimony in this case and in DPS Staff's Initial Post-Hearing Brief)⁹, but Applicants have addressed it directly in their own Initial Post-Hearing Brief.¹⁰ There is thus no prejudice to Applicants by its consideration. If anything, prejudice would accrue to Entergy should the cited materials be stricken from its Initial Brief but allowed to stand in Applicants' brief, which is apparently the incongruous relief that Applicants now seek. Because all sides have now addressed the issue, Your Honors have all the tools that are required to evaluate and determine how much weight (if any) to place on the Gjonaj/Wheat Testimony.

⁸ Indeed, Applicants do not -- and cannot -- seriously contend that: (1) Entergy's filed Initial and Reply Statements did not call into the question the accuracy of the "renewable" label in the context in which it was previously adopted but then erroneously misconstrued repeatedly by the Applicants; or, (2) the general background information on Atlantic sturgeon derived from NOAA's website is inaccurate or unreliable; or (3) that Messrs. Gjonaj and Wheat did not so testify in the NYRI Proceeding. As noted supra, the Applicants themselves referred to the Gjonaj/Wheat Testimony in their Initial Brief. See Case 10-T-0139, supra, "Initial Post Hearing Brief of Champlain Hudson Power Express, Inc. and CHPE Properties, Inc." ("Applicants' Initial Brief") (filed August 22, 2012), pp. 79-82. Absent any dispute over the authenticity or accuracy of the cited information and materials, of which there is none here, the instant motion is nothing other than a transparent attempt to circumvent the parties' rights to present their positions fully and to support those positions with citations to appropriate authority.

⁹ See JP ¶ 135; Tr., pp. 171-172; 202-204; and Case 10-T-0139, supra, "Staff's Initial Brief," pp. 13 and 46, respectively.

¹⁰ Applicants' Initial Brief, pp. 79-82.

DISCUSSION

I. THE MOTION TO STRIKE MUST BE DENIED BECAUSE IT IS NOT SUPPORTED BY LAW, REGULATION OR YOUR HONORS' PRIOR RULINGS IN THIS PROCEEDING.

A. Applicants' Position on the Motion to Strike Distorts the June 7 Ruling.

As purported support for the Motion, Applicants cite the following portion of the June 7 Ruling:

Entergy's broad proposal to cite in its briefs studies, articles, or government reports outside the record improperly seeks to introduce extra-record evidence into the proceeding. We remind the parties that argument in briefs should marshal the record evidence in this proceeding. Briefing citations to evidentiary material outside the record would be improper and will not be considered.¹¹

According to Applicants, the above-quoted passage from the June 7 Ruling represents an absolute directive to the parties "to refrain from citation to factual materials outside the record in this adjudicative proceeding."¹² However, the June 7 Ruling did not -- and, consistent with prevailing Commission practice in administrative hearings -- could not, sweep so broadly as to subsume the materials targeted by the Motion. Nor did the June 7 Ruling establish that parties were barred from incorporating materials by reference or making offers of proof other than during the hearing itself.

(1) Certain of the Cited Materials are Already in the Record.

First, the statement at pp. 17-18 of Entergy's Initial Post-Hearing Brief that "Entergy and other parties correctly noted that the Commission had rejected new large-scale hydro projects -- such as the yet-to-be-constructed and highly controversial Lower Churchill Project and Romaine Project," including the accompanying citation, truthfully and accurately summarizes (nearly verbatim) a position that Entergy had expressed (with the same citation) in its Initial Statement in Opposition to the JP.¹³ As repeated in Entergy's Initial Post-Hearing Brief, it is obviously a recitation of the content of a prior pleading, and not an affirmative assertion of disputed fact. Entergy's Initial Statement opposing the JP in this proceeding,

¹¹ June 7 Ruling, p. 5.

¹² Motion, p. 1.

¹³ Case 10-T-0139, *supra*, "Initial Statement of Entergy Nuclear Power Marketing, LLC in Opposition to Joint Proposal and Article VII Application of Champlain Hudson Power Express, Inc." ("Initial Statement"), p. 24.

moreover, is already part of the record. Thus, citing to it does not qualify as citing to material “outside the record,” and is therefore not within the scope of the above-quoted passage from the June 7 Ruling. In short, it is no different than citing to the JP, which no party can seriously contend would be impermissible.

The same principle holds with respect to the December 2011 Notice and the Gjonaj/Wheat Testimony -- they have already been incorporated into the record. In fact, Your Honors clearly deemed the December 2011 Notice to be part of the record in your ruling issued in this proceeding on August 21, 2012.¹⁴ With respect to the Gjonaj/Wheat Testimony, IPPNY witness Mr. Mark Younger explicitly cited to the same testimony in his pre-filed Direct Testimony.¹⁵ Applicants have filed two motions to strike directed at various aspects of Mr. Younger’s testimony, the second of which sought to strike Mr. Younger’s citation to the Gjonaj/Wheat Testimony.¹⁶ On July 13, 2012, Your Honors denied Applicants’ July 6 motion to strike in its entirety.¹⁷

Subsequently, IPPNY moved Mr. Younger’s direct and rebuttal testimony into the record without any further objection by the Applicants on this point. In addition, the Applicants’ cross-examined Mr. Younger extensively during the hearings without once challenging this part of his testimony. Clearly, Your Honors have already ruled, over Applicants’ objection, that the Gjonaj/Wheat Testimony is incorporated into the record.

(2) The Cited Materials Pertain to Legal and/or Policy Matters, and Thus, Are Not Bound by Strict Evidentiary Principles.

Entergy’s citation to a NOAA website as a source of general, non-controversial background on Atlantic sturgeon, its citation to the Gjonaj/Wheat Testimony, and IPPNY’s citation to the webpage for the “Energy Highway Initiative,” address “legal and policy” issues and so are not “evidentiary materials”¹⁸ in the sense that they are intended to prove a disputed

¹⁴ 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) (the “August 21 Ruling), at p. 4 n. 1 (“As a result [of Applicants’ witness Ms. Julia Frayer’s explicit reference to the same notice in her pre-filed testimony], IPPNY concedes that its request to incorporate by reference or take official notice of the December 2011 AGC notice is unnecessary. **We concur.**”) (emphasis supplied).

¹⁵ Tr., pp. 455-56.

¹⁶ Case 10-T-0139, supra, “Motion of Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. to Strike Certain Additional Portions of the Pre-Filed Testimony of The Independent Power Producers of New York, Inc.” (dated July 6, 2012), p. 3.

¹⁷ Id., “Ruling Denying Motion to Strike” (issued July 13, 2012).

¹⁸ June 7 Ruling, p. 5.

issue of fact. On May 8, 2012, Your Honors identified, in the “Ruling on Issues,” the three disputed factual issues in this proceeding that would be addressed at the evidentiary hearing.¹⁹ The Ruling on Issues then found: “[T]he parties’ other proposed issues are legal issues, policy issues or mixed issues of law and policy that are properly addressed in briefs.”²⁰ Addressing the concern raised at the Procedural Conference by IPPNY and CHG&E, the Ruling on Issues further stated:

Contrary to Central Hudson’s contention during the Procedural Conference, **we are not excluding issues from consideration in the hearing process**, as may occur pursuant to 6 NYCRR Part 624, but instead, **we are distinguishing between contested factual matters requiring adjudication and legal or policy matters, for which no facts are in dispute, and which are appropriately addressed by argument.**²¹

By virtue of the Ruling on Issues, environmental concerns were consigned to the category of “legal issues, policy issues, or mixed issues of law and policy.” Consistent with that determination, Entergy’s citation to undisputed background information on Atlantic sturgeon is intended to demonstrate the relative dearth of information that the Applicants have provided on this front, and thus, the Applicants’ failure to meet their burden of developing a record sufficient for the Commission to determine the “nature of the probable environmental impacts,” particularly on sturgeon, as required by PSL Section 126.1(b), and/or upon which to conclude that environmental impacts (again, on sturgeon) have been sufficiently minimized, as required by PSL Section 126.1(c).

Similarly, Entergy’s marshalling of DPS Staff witnesses’ prior testimony -- testimony that is entirely consistent with both the explicit caveats in paragraph 135 of the JP and with Mr. Paynter’s testimony **in this case**²² -- is meant to show the long-standing nature of DPS

¹⁹ Case 10-T-0139, *supra*, “Ruling on Issues” (dated May 8, 2012). Your Honors held, *inter alia*, “[T]he factual issues that may be addressed in the pre-filed testimony and the evidentiary hearings” are as follows: (i) Deliverability, including the need for and feasibility of the SPS and/or other operational measures; (ii) the “suitability and availability of [the proposed converter station site]”;¹⁹ and (iii) Cost/Benefit Analyses, Facility Costs, revenues and expected benefits. *Id.*, pp. 3-5.

²⁰ *Id.*, pp. 5-6. The Ruling on Issues identified “some examples” of such “legal issues, policy issues or mixed issues of law and policy” -- to wit: (i) whether the Public Service Law’s “need” requirement can be met; (ii) whether the Project would be in the public interest, taking into account its impact on in-state jobs, competition and the expansion and/or improvement of the NYS transmission system; (iii) whether the Project conforms to a long-range plan for expansion of the electric grid; and (iv) whether ratepayers are adequately protected if the Applicants change their business model.

²¹ *Id.*, p. 3 n. 7 (emphasis supplied).

²² See footnote 7, *supra*.

Staff's expressed concerns with using wholesale energy price savings analyses to measure benefits in these proceedings, and thus, to inform the weight (if any) that Your Honors should place on the results of Applicants' (and DPS Staff's) wholesale energy price savings studies. In other words, it is not being proffered as "evidentiary material" to counter the factual findings or conclusions of those studies -- it goes, instead, to the weight Your Honors should place on those findings, even assuming their accuracy. This key distinction is clearly evidenced in Entergy's Initial Post-Hearing Brief, which expresses Entergy's position that "all of these wholesale energy price savings analyses suffer from inherent limitations which render them unreliable as public interest metric. The iteration of these studies that the Commission ultimately elects to use is, thus, irrelevant."²³

With respect to IPPNY's citation to the webpage for the "Energy Highway Initiative," IPPNY's position is that, depending upon how it proceeds and is financed (e.g., whether it is, in fact, indirectly subsidized), the Applicants' proposed Project may harm the economics of, and thus entry by, other potential transmission lines. The citation simply demonstrates that companies other than Applicants have proposed new intra-State transmission lines in New York, and thus, that there are a number of potential alternatives that themselves may be economic and efficient options to meet New York's future energy needs on a true merchant basis. It is not being offered as evidentiary material to counter any position that the Project is more economic than other projects (e.g., to counter Dr. Paynter's so-called production cost analysis).

Reviewing these materials in their proper context thus reveals that their use is consistent with the June 7 Ruling. They are either summaries of matters already in the record (e.g., Entergy's Initial Statement), or background information on matters that Your Honors identified as legal and/or policy issues that were not addressed during the evidentiary hearing and, by extension, are not contained in the evidentiary hearing record.

Indeed, having drawn a distinction between disputed factual issues and issues of law and policy in this proceeding, Your Honors also assured the parties that a full review of the legal and policy issues would occur. An overly strict reading of Your Honors' statement to "the parties that argument in briefs should marshal the record evidence in this proceeding," such as that advanced by Applicants, however, would effectively eliminate those legal and policy matters from meaningful consideration²⁴ -- i.e., would mean that the parties'

²³ Entergy's Initial Post-Hearing Brief, p. 49.

²⁴ Given that Your Honors segregated disputed factual issues from legal and/or policy issues and also ruled that no issues are excluded from consideration, it appears that Your Honors contemplated that legal and policy issues would be supported by authorities and citations extrinsic to the evidence adduced at the evidentiary hearing. Otherwise, parties would necessarily have had to predict, before the hearing, what policy issues might be covered by the proof there and identify any gaps so that they could attempt to advance proof pertaining to those legal and policy issues. Applicants' approach becomes even more absurd as applied to reply briefs. Taking Applicants' position to the next logical step, the parties apparently were required to not only fully anticipate any

“argument(s)”²⁵ on legal and policy issues, explicitly authorized by the Ruling on Issues, could not be supported by any citations to extrinsic secondary authority.²⁶ That clearly cannot have been Your Honors’ intended result.

B. Prior Practice in Commission Proceedings Compels a Rational Interpretation of the June 7 Ruling and Denial of the Motion.

As a preliminary matter, Your Honors are clearly "not bound by the technical rules of evidence" in this proceeding. See PSL Section 20(1).²⁷ Consistent with this settled rule of law, New York administrative agencies, such as the Department of Public Service, need not and routinely do not observe technical rules of evidence, such as those pertaining to hearsay. See, e.g., EJG Corp. v. New York State Liquor Auth., 213 A.D.2d 924 (3d Dep’t 1995) (hearsay evidence properly admitted by agency and sufficient to sustain determination imposing administrative penalty). Thus, records of administrative proceedings are ordinarily and routinely inclusive.

This is particularly the case in proceedings before the PSC. Indeed, it is "customary practice in [PSC] evidentiary proceedings . . . not to exclude statements or testimony, but rather to accord such statements or testimony greater or lesser weight depending on the relevance and persuasiveness."²⁸ Consequently, excluding matters from the record is sparingly applied, and only occurs "when the [material] is manifestly improper, or its

policy issue that would arise both before and during the hearings but also fully anticipate how any other party to this proceeding would address such issue in its respective Initial Post-Hearing Briefs. Only then could each party incorporate by reference at the hearing weeks ago any and all materials it would need to effectively rebut the claims of the other parties.

²⁵ Ruling on Issues, p. 3 n. 7.

²⁶ Since legal and policy issues were excluded from the evidentiary hearing, offers of proof concerning those issues made during the hearing would have lacked a substantive basis for admission. Indeed, Your Honors have already ruled that “[S]uch offers or requests [for admission] are subject to other parties’ objections or may be otherwise subject to exclusion absent a showing that the offered evidence is relevant, material, and supported by an appropriate foundation.” See June 7 Ruling, p. 6. It also bears noting that no party came forward at the hearing with a slew of materials not used in cross-examination and sought their incorporation into the record. Instead, numerous motions in this regard have been made after the hearing concluded.

²⁷ Similarly, Section 306(1) of the New York State Administrative Procedures Act (“SAPA”) states, in pertinent part: “[U]nless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law.” Id.

²⁸ Case 09-E-0428, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Electric Service, “Response of Consolidated Edison” (July 8, 2009), at p. 4 (citing Case 00-E-0612, Proceeding on Motion of the Commission to Investigate the Forced Outage at Consolidated Edison Company of New York, Inc.’s Indian Point No. 2 Nuclear Generating Facility, “Evidentiary Ruling” (issued July 6, 2000), pp. 2-3).

presence in the record would be prejudicial or harmful to the decision-making process. At a minimum, the [material] must be clearly irrelevant."²⁹ In this proceeding, Your Honors have, by “not excluding issues from consideration during the hearing process,” relegated environmental concerns and other issues to the “legal and policy” category. At the same time, Your Honors assured the parties that their issues would be fully considered. In light of these procedural rulings, the matters targeted by the Motion cannot reasonably be considered “clearly irrelevant,” and the Tribunal should err on the side of inclusion.

The rationale behind these rules is clear -- they ensure fulsome consideration, on a complete record, of the important factual, legal and policy issues administrative agencies are routinely called upon to vet. Adopting Applicants’ overly stringent view threatens to divert the focus of this proceeding away from the merits of the matter at hand to a seemingly never-ending series of exclusionary motions (as has actually already become the case). That result should be rejected, particularly when, as on the instant motion, the matters targeted for exclusion are not reasonably in dispute (and/or cannot reasonably be disputed) and the moving party has had (and continues to have) a full opportunity to rebut them.³⁰

C. The Materials Targeted by the Motion Otherwise Qualify for Incorporation by Reference Under the Commission’s Rules.

The fact that all of the materials cited by Entergy and IPPNY and targeted by the Motion would clearly qualify for incorporation by reference dispels any doubt that the Motion impermissibly elevates form over substance. The Commission’s regulations at 16 N.Y.C.R.R. § 85-2.7 state, in pertinent part, that “[a]ny party or staff counsel may move to incorporate by reference information contained in any filing with the commission, or contained in any other public document.”

All of the Entergy and IPPNY materials that the Applicants challenge meet this requirement. Entergy’s Initial Statement, from which the renewable energy statement Applicants now take issue with was derived, was “fil[ed] with the commission,” and thus falls squarely within Rule 85-2-.7, as does the Gjonaj/Wheat Testimony. Similarly, Applicants cannot reasonably dispute that Entergy’s citation to a document found on a publicly-accessible webpage maintained by a federal agency refers to a “public document,” within the

²⁹ Case 02-E-0198, Proceeding on Motion of the Commission as to the Rate, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Electric Service, “Ruling on Motion to Strike” (issued Oct. 11, 2002), at p. 3.

³⁰ Remarkably, while Applicants rushed to take issue with the nonactionable matters discussed, supra, their own Initial Brief is replete with citations to extra-record materials that, under the strict (and unworkable) standard they now advance (if adopted, and it should not be for the reasons stated, supra) must, too, be stricken. See, e.g., Applicants’ Initial Post-Hearing Brief, p. 13 n. 27; p. 18 nn. 40, 41 and 43; p. 19 n. 44; p. 22 (“As the Commission is well aware, the prospects for any such PPA are remote at this time”); p. 25 n. 62; p. 26 n. 66; p. 74, nn. 185-187.

meaning of Rule 85-2.7, and thus would also be allowed under that Rule. Tellingly, the Motion fails to include any reference to, much less application of, these Rules.

CONCLUSION

For the foregoing reasons, the Motion must be denied in its entirety.

Respectfully submitted,

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