

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

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Application of Champlain Hudson Power :  
Express, Inc. for a Certificate of :  
Environmental Compatibility and Public : CASE 10-T-0139  
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. :  
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REPLY BRIEF ON BEHALF OF  
CENTRAL HUDSON GAS & ELECTRIC CORPORATION

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INITIAL BRIEF ON BEHALF OF  
CENTRAL HUDSON GAS & ELECTRIC CORPORATION

To: The Hon. KEVIN J. CASUTTO and  
The Hon. MICHELLE L. PHILLIPS,  
Presiding Administrative Law Judges

I. PRELIMINARY STATEMENT

This brief is submitted on behalf of Central Hudson Gas & Electric Corporation ("Central Hudson") in accordance with the Presiding Administrative Law Judges ("ALJs") Ruling Establishing Schedule and Hearing Procedures, and Ruling on Issues (both rulings were issued on May 8, 2012) and in reply to the briefs of the Department of Public Service Trial Staff ("StaffIB") and the City of New York ("CNYIB"). Other initial briefs are referred to *passim*.

This brief does not reply to the initial post-hearing brief of the Applicants ("AIB") because Applicants did not address Central Hudson's position and concerns in their initial brief and asserted that they are "unaware" of concerns other than those they did address.<sup>1</sup>

II. THE JP DISCRIMINATES IN FAVOR OF THE CITY OF NEW YORK AND AGAINST CENTRAL HUDSON CONCERNING INDEMINIFICATION AGAINST HARM CAUSED BY APPLICANTS' LOCATION DECISIONS, AND THE CONSTRUCTION AND OPERATION OF THE PROPOSED FACILITIES

According to City of New York ("City") (CIB at 26), the JP obligates the Applicants to

obtain a certificate of occupancy from the City prior to commercial operation of the converter station, and comply with the standards and inspection requirements provided by the New York City Electrical Code, the New York City Fire Code, and Title 28 of the New York City Administrative Code, including the New York City Construction Code, during Facility construction and operation.

Among the "standards" of Title 28 of the New York City Administrative Code, in the City Construction Code, is a

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<sup>1</sup> As stated by Applicants (AIB at 109): "Applicants are unaware of any other concerns at this time, but reserve the right to respond in their Reply Brief to any other concerns raised by any party in its Initial Brief." Since Applicants position precludes Central Hudson from responding to Applicants' initial brief or Applicants' position on Central Hudson's previously articulated concerns (See, e.g., Initial Statement On Behalf Of Central Hudson Gas & Electric Corporation In Opposition To Portions Of Joint Proposal And Proposed Certificate Conditions, dated March 16, 2012), Central Hudson objects to, and reserves its rights in the event of, any attempt by Applicants to respond to Central Hudson's initial brief.

requirement that a permit holder indemnify adjacent property owners. The indemnification requirement occurs as a result of the operation of N.Y. Administrative Code, Section 28-105.12.7.1 (Insurance coverage for adjacent properties), which provides

A person who obtains a permit for construction or demolition operations shall, at such person's own expense, procure and maintain for the duration of the operations, insurance of a kind and in an amount specified by rule of the department, to insure any and all adjacent property owners and their lawful occupants fully for all risks of loss, damage to property or injury to or death of persons, arising out of or in connection with the performance of the proposed work. Such person shall submit proof of insurance to the department when applying for a permit for construction or demolition work.<sup>2</sup>

The City Administrative Code requires essentially the indemnification protections to property affected by the proposed facilities in New York City that Central Hudson requested Applicants provide to Central Hudson's pre-existing property and operations that would be similarly affected by the proposed facility. The City would, however, receive an insurance policy and Central Hudson had requested direct contractual

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<sup>2</sup> For the convenience of the Presiding Administrative Law Judges, a copy of the relevant portion of the City Construction Code is set forth in the Appendix.

indemnification, which would be supported by Applicants' financial strength, and not an insurance policy per se.<sup>3</sup>

Applicants refused to agree to Central Hudson's request for indemnification, calling it "unreasonable on its face,"<sup>4</sup> but have agreed in the JP and related documents to provide this same level of indemnification to the City. While Central Hudson did not request that Applicants purchase insurance, as the City's regulations require of Applicants, Central Hudson did request indemnification. Central Hudson and the City are situated similarly to each other in the sense of having pre-existing property and facilities that could be harmed by the construction, installation, location, or operation of Applicants' new facilities. It would be discriminatory to

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<sup>3</sup> Central Hudson does not object in principle to indemnification through an appropriate insurance policy from a well-rated carrier.

<sup>4</sup> See Applicants' Reply Statement (at 20): "Central Hudson' demand that Applicants not only bear all the financial and business risks associated with the Facility, but also be required to indemnify Central Hudson (and presumably everyone else in the State of New York) for all other claims that could conceivably be viewed as having resulted in whole or in part from the construction, operation, maintenance or repair of the Facility is unreasonable on its face...." Notwithstanding Applicants' rhetoric, Applicants have apparently bound themselves to provide indemnification to "everyone" in New York City who would be affected by the construction of the proposed facility. It should also be noted that Central Hudson's request was specifically based upon the standard legal concept of causation (rather than Applicants' alarmist "conceivably be viewed" rhetoric) and would hold Applicants responsible for harm, damage and loss "caused by" Applicants and their decision to locate their facilities in intimate proximity to Central Hudson's pre-existing facilities.

approve the indemnification in favor of the City but deny it to Central Hudson.

The City itself explains the importance of the indemnification provisions:

The City would not have entered the Joint Proposal absent CHPE's agreement to comply with the City's laws, rules and regulations. Such compliance is necessary to safeguard the interests of City residents and businesses and to protect essential City infrastructure during construction, operation and maintenance of the Facility. The Commission should not disturb this critical component of the Joint Proposal, which has not been opposed by any party.

Just as the presence of indemnification is critical to the City and its participation in the JP, the absence of similar treatment for Central Hudson's facilities, operations, and customers is critical to Central Hudson.<sup>5</sup> Just as the City legitimately wants to "safeguard" the pre-existing property and infrastructure within the City, Central Hudson wants to protect its pre-existing facilities and operations to safeguard its customers' interests.

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<sup>5</sup> Ironically, given the City's explicit statement as to the importance of compliance with its own regulations (of which the indemnification obligation is but one), the City (CIB at 43 et seq.) fails to apprehend the similar importance of indemnification to Central Hudson.

The discriminatory treatment in the JP is also shown by the fact that the JP provides more protection for the existing and future aquatic resources than it does to Central Hudson's existing facilities, operations, and customers. Applicants reject the responsibility to indemnify Central Hudson's facilities, operations, and customers against harm, loss or damage Applicants cause, but at the same time Applicants (AIB at 99) point to:

The \$117 million in funding that Applicants have agreed to provide to the Trust [that] will be used exclusively for in-water mitigation studies and projects that have a direct nexus to the construction and operation of the Facility and that are designed to minimize, mitigate, study and/or compensate for the short-term adverse aquatic impacts and any potential long-tem [sic] aquatic impacts and risks to Lake Champlain and the Hudson River resulting from the construction and operation of the Facility.

These provisions and associated funds will exist to provide compensation for, among other things, the impacts of the construction and operation of the proposed facility on Hudson River aquatic resources. No similar fund has been proposed to provide for impacts to legitimately situated pre-existing utility infrastructure on, or below, the bottom of the Hudson River. The limited provisions of certificate conditions 27-29 are not pre-funded as the aquatic protections are.

The importance of Central Hudson's indemnification concerns has been emphasized, even if unintentionally, by the City and by the proposed Hudson River and Lake Champlain Habitat Enhancement, Restoration, and Research/Habitat Improvement Project Trust. There is no justification for Commission approval of JP provisions or certificate conditions that discriminate among similarly situated owners of pre-existing infrastructure.<sup>6</sup>

III. OTHER PARTIES' SUPPORT FOR THE CERTIFICATE CONDITIONS OF CONCERN TO CENTRAL HUDSON DO NOT RECOGNIZE THAT INDEMNIFICATION IS BEING PROVIDED WITHIN NEW YORK CITY BUT NOT TO SIMILARLY SITUATED PERSONS OR PROPERTY OUTSIDE OF NEW YORK CITY

Staff (SIB at 56-57) seeks to support the limited cost reimbursement provisions of proposed Certificate Conditions 27-29.<sup>7</sup> Staff's initial brief did not reach the absence of indemnification within paragraphs 27-29 vis-a-vis the presence of indemnification to the City of New York, or explain why property owners and ratepayers in one area should receive indemnification but similarly situated property owners and ratepayers in another area be denied indemnification.

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<sup>6</sup> The existence of this \$117 million aquatic ecosystem fund is clearly an inducement to the NYSDEC (see, initial brief at 11), and to Riverkeeper and Scenic Hudson (see, joint initial brief at 12-13) to join in the JP.

<sup>7</sup> The NYPAIB takes a position similar in effect to that of Staff.

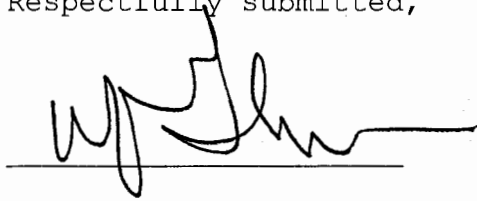
It also appears that the support of NYPA and prior statement of support by VELCO did not recognize the indemnification that is being provided to similarly situated persons and property within New York City, but not them or their property, when they addressed the provisions of concern to Central Hudson. Those parties are free to accept less than Applicants have provided within New York City if they wish to do so. But Central Hudson believes that it is not appropriate for persons and property outside of New York City to receive less favorable treatment than similarly situated persons and property within New York City. Central Hudson's property, operations and customers deserve the same indemnification protections.

#### IV. CONCLUSION

The JP and proposed certificate conditions unfairly discriminate in favor of property and ratepayers in New York City by requiring Applicants to indemnify "any and all adjacent property owners" located within New York City against loss or harm from the proposed facility, but not similarly indemnifying Central Hudson and other similarly situated entities in locations outside of New York City. The indemnification

protections that apply within New York City should be applied everywhere.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. J. Glasser', written over a horizontal line.

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Dated: Poughkeepsie, New York  
September 7, 2012

APPENDIX

Lexis Search N.Y.C. Construction Code

1 of 1 DOCUMENT

Administrative Code of the City of New York

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\*\*\*\* Current through May 2012 \*\*\*\*

*NYC Administrative Code 28-105.12*

New York

Administrative Code of the City of New York

Title 28 New York City Construction Codes

CHAPTER 1 ADMINISTRATION\*2

ARTICLE 105 PERMITS

§ 28-105.12 Conditions of permit.

Permits shall be subject to the following conditions:

**§ 28-105.12.1 Compliance with code.**

Permits shall be deemed to incorporate the provisions that the applicant, the owner, their agents, employees, and contractors shall carry out the permitted work in accordance with the provisions of this code and other applicable laws or rules, whether specified or not, except as variations have been legally permitted or authorized.

**§ 28-105.12.2 Compliance with construction documents.**

All work shall conform to the approved construction documents, and any approved amendments thereto. Changes and revisions during the course of construction shall conform to the amendment requirements of this code.

**§ 28-105.12.3 Adherence to lot diagram.**

All work shall be strictly located in accordance with the lot diagram approved in accordance with this code and no lot or plot shall be changed, increased or diminished in area from that shown on the approved lot diagram, unless and until a revised diagram showing such changes, accompanied by the necessary statement of the owner or applicant, shall have been submitted to and approved by the commissioner.

**§ 28-105.12.4 Compliance with safety requirements.**

All work shall be conducted in accordance with and subject to the safety requirements of this code and other applicable laws or rules, including any order or requirement of the commissioner that the building or structure under construction or alteration be vacated, in whole or in part, during the progress of the work and until the issuance of a certificate of occupancy. Adjoining lots and properties shall be protected in accordance with this code.

**§ 28-105.12.5 Compliance with noise control code required.**

All work shall be performed in compliance with the provisions of the New York city noise control code as set forth in chapter 2 of title 24 of the administrative code. Failure to comply with sections 24-222 and 24-223 of the administrative code shall be a violation of this code.

**§ 28-105.12.6 Deferred submittals.**

Where permits are issued subject to deferred submittal of portions of the design as provided for in section 28-104.2.6, the deferred submittal items shall not be installed until the construction and submittal documents for such portions have been approved by the department and, where applicable, new or amended permits have been issued.

**§ 28-105.12.7 Insurance.**

Where workers compensation, employee disability or liability insurance is required by law or department rule, the applicant for the work permit shall obtain and include proof of such insurance with the work permit application. The permit shall expire by operation of law if the insurance upon which the permit was conditioned lapses, expires or is cancelled, unless the permit holder files proof of alternate insurance before such event.

**§ 28-105.12.7.1 Insurance coverage for adjacent properties.**

A person who obtains a permit for construction or demolition operations shall, at such person's own expense, procure and maintain for the duration of the operations, insurance of a kind and in an amount specified by rule of the department, to insure any and all adjacent property owners and their lawful occupants fully for all risks of loss, damage to property or injury to or death of persons, arising out of or in connection with the performance of the proposed work. Such person shall submit proof of insurance to the department when applying for a permit for construction or demolition work.

**§ 28-105.12.8 Site safety plan.**

Where required by this code or by the department, applications shall include a site safety plan approved in accordance with the New York city building code. All work shall adhere to the site safety plan.

**HISTORICAL NOTE**

Section added L.L. 33/2007 § 11, eff. July 1, 2008.

28-105.12.7.1 added L.L. 8/2008 § 12, eff. July 1, 2008.

**FOOTNOTES**

2[Footnote 2]:           \* Chapter 1 repealed and added L.L. 33/2007  
§ 11, eff. July 1, 2008. Former Chapter 1 added L.L. 99/2005  
never took effect.