

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION



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.

***STAFF'S REPLY
BRIEF***

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STAFF'S REPLY BRIEF

A. Introduction and General Considerations

This reply is submitted by the Staff of the Department of Public Service ("Staff") designated to represent the public interest in this proceeding. It is submitted in support of the Joint Proposal dated February 24, 2012 ("Joint Proposal"). Staff was one of the signatory parties to the Joint Proposal, which was filed with the Secretary to the Public Service Commission ("Commission") on that date. Parties submitted initial and reply statements supporting or opposing the Joint Proposal, an evidentiary hearing was held, and parties submitted briefs. Only four parties submitted briefs opposing the Joint Proposal and the grant of a Certificate of Environmental Compatibility and Public Need ("Certificate") to the Applicants in this adjudicatory proceeding pursuant to Article VII of the Public Service Law.¹ So as not to be unduly repetitious or duplicative here, Staff will presume familiarity with our initial and reply statements and brief in support of the Joint Proposal (filed on March 16 and 30, and August 22, 2012, respectively). Failure on Staff's part to directly address a

¹ Independent Power Producers of New York, Inc. ("IPPNY"), Central Hudson Gas & Electric Corporation ("Central Hudson"), the International Brotherhood of Electrical Workers - Local 97 ("IBEW"), and Entergy Nuclear Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC ("Entergy").

point made by a party is not meant to imply that Staff agrees with the position.²

The evidence in this proceeding³ is comprised of the testimony of witnesses who testified on behalf of the Applicants, IPPNY, and Staff, along with exhibits sponsored by the Applicants, IPPNY, Entergy, and Staff. Regarding many of the statutory findings, the Joint Proposal opponents have not offered any evidence that disputes that offered by the signatory parties and made part of the record (including those on environmental impact, undergrounding, conformance to applicable state and local legal requirements, and most aspects of public need). Although the Joint Proposal opponents originally alleged factual disputes requiring an evidentiary hearing on the issues of (i) energy and capacity deliverability and (ii) the suitability and availability of the Luyster Creek site, they wholly failed to present any contradictory evidence on these issues.⁴ In fact, the only party presenting a witness to testify

² IBEW purports to make two arguments in support of its position that the Commission should reject the Joint Proposal: (i) there is insufficient evidence to support adoption of the Joint Proposal and granting of a Certificate and (ii) the Project will not provide sufficient benefits. (IBEW Brief, pp. 8-15). IBEW's argument concerning insufficient evidence restates concerns raised by Entergy and IPPNY regarding the economics of the Facility. Staff's Brief addresses IPPNY's and Entergy's arguments directly, and IBEW's recitation of them will not be addressed separately. To the extent IBEW's second argument, that the Project will provide sufficient benefits to warrant certification, is not based on redacted testimony, it is addressed generally in section J. Public Interest, Convenience and Necessity.

³ The evidence presented modifies the Joint Proposal in a few instances - changes that were either agreed to, or not opposed by, the signatory parties.

⁴ See Ruling on Issues (issued May 8, 2012). The ruling, pursuant to 16 NYCRR §§4.4[a] and 4.5[f]) and consistent with SAPA §301(4), identified the factual issues that may be addressed in the pre-filed testimony and the evidentiary

in opposition to the grant of a Certificate to the Applicants was IPPNY, an organization of incumbent competitors who have a vested interest in minimizing the competition.⁵ In contrast, those favoring the grant of a Certificate to the Applicants represent a broad spectrum of views regarding economy, efficiency, public safety, the preservation of environmental values and the conservation of natural resources.⁶

The facts established by the evidence - the vast majority of which are undisputed - overwhelmingly support the findings and determinations required to be made by the Commission in rendering its decision on the record pursuant to Public Service Law (PSL) §126(1) to grant a Certificate to authorize the construction, operation and maintenance of the Facility. After our review of opponents' briefs, Staff holds even more firmly to the position we espoused in our statements in support of the Joint Proposal. Specifically, the record is more than sufficient for the Commission to make the required findings pursuant to PSL §126(1) and Staff requests the Commission grant the Applicant a Certificate to construct, operate and maintain the Facility.

hearings as: 1. Deliverability, 2. the Proposed Luyster Creek Converter Station Site and, 3. Cost/Benefit Analyses/Facility Costs. No party filed an interlocutory appeal to the Commission contesting the Ruling on Issues. This ruling was preceded by several in 2011 and the February 22, 2012 ruling in which the ALJs explained that parties would have the opportunity to describe disputed factual issues in their statements opposing the Joint Proposal.

⁵ See Initial Brief of Independent Power Producers of New York, Inc. in Opposition to Joint Proposal and Article VII Application of Champlain Hudson Power Express, Inc., ("IPPNY Brief").

⁶ See PSL §5(2).

1. "The Scope and Standard of Review"

a. Scope of Review

Entergy and IPPNY rest the majority of their arguments opposing the grant of a Certificate to the Applicants on the assumption that New York ratepayers will bear the financial risks of building the Facility just as if it were cost-based, without a shred of evidence for this bald assumption. In fact, Proposed Certificate Condition 15.b., discussed below, assures that the Facility will be developed, constructed and operated as a merchant facility, and will not expose captive New York ratepayers to financial risks. Moreover, as noted in Staff's Initial Brief,⁷ the Applicants have committed to obtain contractual commitments for 75% throughput from financially responsible shippers; and HydroQuebec has already indicated its willingness to consider financial support to the Facility, in its response to the Governor's Energy Highway Request for Information.⁸

IPPNY tries to make its arguments relevant by claiming that the Facility is not a "truly merchant" project, which it defines as "one that earns all of its revenues exclusively from the competitive market where existing and new suppliers compete on a level playing field."⁹ Entergy argues further that any contract with HydroQuebec would disqualify it as not "purely merchant."¹⁰ However, Staff explained in detail that the economics of the Facility are linked to the economics of new hydroelectric resources, such as those under development by HydroQuebec. As a result, HydroQuebec may have a strong

⁷ Staff's Initial Brief ("Staff Brief"), p. 17.

⁸ Hearing Exhibit 213.

⁹ IPPNY Brief at p. 50 (emphasis added).

¹⁰ Initial Post-Hearing Brief of Entergy Nuclear Power Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC. ("Entergy Brief"), pp. 10-14.

economic incentive to contract with the Facility, in order to mitigate its own development risks. (Tr. 180-183). Such contractual commitments are a normal part of efficient competitive markets, and should not be impugned. In any event, they do not shift risks onto captive New York ratepayers, and therefore do not justify opponents' demands for cost-of-service analyses.

b. Standard of Review

Entergy and IPPNY rest the majority of their arguments opposing the grant of a Certificate to the Applicants on a theory that in Article VII proceedings, different "standards of review"¹¹ are applicable depending on particular facts concerning the Facility. Specifically, they argue that a less stringent standard of review applies for "purely merchant" projects, and a more stringent standard - dictating use of a cost-benefit metric derived from the NYISO's CARIS process - applies to everyone else.¹² They use this artificial bifurcation to argue that the Facility is not needed, economic nor in the public interest. The theory is entirely unsupported by any statute, case law, Commission precedent, or the record in this proceeding.

The Public Service Law applies equally to all Article VII applications and PSL §126(1) requires that the Commission make the same findings and determinations concerning every major transmission facility prior to granting a certificate. In making the required findings and its determination of

¹¹ The term "standard of review" is normally used to describe the "criterion by which an appellate court exercising appellate jurisdiction measures the constitutionality of a statute or the propriety of an order, finding, or judgment entered by a lower court." Black's Law Dictionary 1535 (Deluxe 9th ed. 2009). Entergy's use of the term is confusing but assumed to mean the record evidence the Commission must consider in performing the balancing and weighing required by PSL §126.

¹² Entergy Brief, p. 11; IPPNY Brief, p. 8.

environmental compatibility and public need the Commission must consider and balance the totality of all of the relevant factors appearing in the record as a whole.¹³ It is true that in rendering its decision in Article VII proceedings, the Commission may consider and balance different facts and circumstances; however, that is dictated by the particular facts and circumstances of each case. The Joint Proposal opponents are attempting to impose an overly narrow "standard of review" that dictates the weight of particular types of evidence receive. The theory should be rejected. The import granted any particular evidence or factor in the Commission's determination of need and public interest, convenience and necessity is within the Commission discretion and expertise¹⁴ and depends on the particular circumstances of the proceeding.

Entergy and IPPNY's novel theory of a bifurcated and fixed "standard of review" should be dismissed. Further, as explained in more detail below, the vast majority of Entergy and IPPNY's arguments against the grant of a Certificate in this proceeding are based on this figment, and they too must fail.

B. Basis of the Need

Both Entergy and IPPNY argue that the Facility is not needed by attacking a number of individual factors the Joint Proposal proffers as supporting a finding that the Facility is needed pursuant to PSL §126(1). Even if their arguments had merit (which, as explained below, they do not) a failure of individual factors (or even a few factors) to support a finding

¹³ See CNG Transmission Corp. v New York State Public Service Com., 185 AD2d 671, 671 (4th Dept., 1992) (listing a various factors supporting a Commission finding of need) and Delaney v. Public Service Commission, 123 A.D.2d 861, 862 (2d Dept., 1986) (explaining the weighing and balancing required by PSL §126[1]).

¹⁴ See CNG Transmission Corp., supra, at 671.

of need does not require the conclusion that need cannot be found. As explained above, making the finding of need requires the Commission to consider the totality of all of the relevant factors appearing in the record as a whole, not individual factors in a piece-meal fashion.

Here, the required finding of need is supported by the Facility's ability to (i) deliver 1,000 MW of electricity from the Canadian border to CNY; (ii) increase fuel diversity and the use of renewable energy resources; (iii) reduce greenhouse gas emissions; and, (iv) enhance system reliability significantly by providing a major new electric energy supply to the most electrically constrained location of the state, the City of New York (CNY). In addition, the proposed Facility is expected to promote competition and provide economic energy benefits for electric customers throughout CNY and the rest of the state. Moreover, the bases of the need for the Facility are consistent with prior findings of the Commission related to reliability,¹⁵ economics,¹⁶ wholesale competition,¹⁷ and public policy.¹⁸

1. Public Policy

Both IPPNY and Entergy argue that the Facility will contravene public policy. However, their arguments are based on

¹⁵ Case 10-T-0080, Niagara Mohawk Power Corporation d/b/a National Grid, Order Granting Certificate of Environmental Compatibility and Public Need (issued February 24, 2011); 06-T-0710, Consolidated Edison Company of New York, Inc., Order Granting Certificate of Environmental Compatibility and Public Need (issued August 23, 2010).

¹⁶ Case 70126, Power Authority of the State of New York, Op. No. 85-2, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued January 30, 1985).

¹⁷ Matter of CNG Transmission Corporation v. New York State Public Service Commission, et al., 185 A.D.2d 671 (4th Dept., 1992).

¹⁸ Case 07-T-0140, Noble Wethersfield Windpark, LLC, Order Adopting the Terms of a Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need (issued December 21, 2007).

a self-serving and incomplete view of the public policy alleged to be violated and the unsupported conclusion that the Facility will inappropriately induce and require a rate-payer funded subsidy.

IPPNY argues that the Facility "would be inconsistent with the State's public policy goal of developing in-State energy infrastructure to improve the State's energy independence and fuel diversity."¹⁹ In support of its argument, IPPNY cites the 2009 New York State Energy Plan ("Energy Plan")²⁰ and Governor Cuomo's 2012 State of the State address.²¹ IPPNY's laser-like focus on the Facility's potential impact on in-state resources, ignores a number of other public policies that the Facility will clearly advance.²² Further, its conclusion that the Facility will contravene public policy concerning in-state infrastructure is simply wrong. As demonstrated by the Project Description attached to the Joint Proposal, the Facility is entirely within New York,²³ and therefore would be an addition to New York's energy infrastructure - in conformance with the public policy of developing in-state infrastructure. Second, IPPNY makes a point of mentioning that Governor Cuomo "expressly encouraged the development of an "energy highway" to provide the State's surplus of inexpensive fossil and renewable generation in western and upstate New York with a means to reach load

¹⁹ IPPNY Brief, p. 10.

²⁰ Available at:
http://www.nysenergyplan.com/final/New_York_State_Energy_Plan_VolumeI.pdf.

²¹ Available at:
<http://www.governor.ny.gov/assets/documents/Building-a-New-New-York-Book.pdf>.

²² See Staff Brief, pp. 8-9 for a complete description of the policies supported by the Facility.

²³ See Entergy Brief, pp. 47-48, wherein Entergy describes the location of the Facility as being in the State of New York.

centers in the Downstate region.”²⁴ IPPNY fails to mention that the Governor also states his support for “an energy expressway down from Quebec.”²⁵ Indeed, if the policy documents relied on by IPPNY are viewed in their entirety, they clearly support, and in some cases envision, infrastructure development similar to the Facility as proposed.

Both Entergy and IPPNY also misstate the Commission’s policy on renewable power, by claiming that the power to be delivered by the Facility will not help New York meet its goals of increasing the amount of renewable power consumed in the State.²⁶ As explained in Staff’s Brief, hydropower is a technology that the Commission generally recognizes as renewable²⁷ and neither Joint Proposal opponent explains why such power should be considered differently here. Moreover, the Joint Proposal opponents appear to confuse eligibility for incentives under the Renewal Portfolio Standard (“RPS”) with the Commission’s stated policy of increasing the proportion of renewable energy consumed in New York State. The incentive structure in the RPS was adopted as a means for advancing the State’s objective of increasing use of renewable energy sources.²⁸ Because, the record demonstrates that the vast majority, if not all, of the power that would be transmitted by the Facility is renewable and will not contribute to greenhouse gas emissions, the Facility clearly advances important public policies.²⁹

²⁴ IPPNY Brief, pp. 10-11.

²⁵ Available at:
<http://www.governor.ny.gov/assets/documents/Building-a-New-New-York-Book.pdf>, p. 12.

²⁶ IPPNY Brief, p. 13 and Entergy Brief, p. 15.

²⁷ Staff’s Brief, pp. 34-35.

²⁸ Case 03-E-0188, Renewable Portfolio Standard (RPS), Order Regarding Retail Renewable Portfolio Standard, (issued September 24, 2004), p. 2.

²⁹ See Hydro-Québec, Annual Report 2010, p. 3 (2011). Available at:

Entergy makes a number of assertions that the Facility is contrary to public policy without identifying specific public policy provisions with which it is concerned. First, Entergy claims that the Applicant's are not "'purely merchant' competitors."³⁰ As explained above, the "purely merchant" term is irrelevant to the findings required by PSL §126. Moreover, Entergy makes no effort to describe how failure to be a "purely merchant competitor" is against New York State public policy. Next, Entergy states that the Facility is contrary to public policy because it does not provide transmission access to existing upstate generators and would stymie development of new generation. Again, Entergy makes no reference to what policy it claims the Facility would be violated. Finally, Entergy asserts that the Facility will erode competition and perhaps impact reliability. Arguably, these assertions, if true, could be considered contrary to public policy. However, Entergy's stated concerns are entirely based on the false premise that the Facility will not be a "merchant" facility, as that term is widely used and defined,³¹ and can only appropriately be analyzed according to the NYISO's CARIS cost-benefit ratio method. As described above, the premise is false and certainly not based on

http://www.hydroquebec.com/publications/en/annual_report/pdf/rapport-annuel-2010.pdf. (referenced in the Joint Proposal, p. 54, n. 9.).

³⁰ Entergy Brief, p. 14.

³¹ See Champlain Hudson Power Express. Inc., "Order Authorizing Proposal and Granting Waivers," 132 FERC 11611 (Jul. 1, 2010) ("Champlain meets the definition of a merchant transmission owner because it assumes all market risk associated with its Project and has no captive customers It is sufficient that Champlain has agreed to bear the risk that the Champlain Project will succeed or fail based on whether a market exists for its services and the fact that Champlain has no ability to pass on any costs to captive ratepayers."), p. 7.

the evidentiary record in this proceeding or Commission precedent.

Finally, the record simply does not support Entergy's assertion that prices will increase in Upstate New York. This argument is based on a hypothetical scenario which IPPNY presented during cross-examination, in which HydroQuebec is assumed to add additional hydroelectric resources and simply sells these at the New York border, without making any transmission upgrades. (Tr. 212-213). As Staff Witness Paynter made clear in his response to this hypothetical, the impact of the Facility would be to have a smaller price reduction at the border compared to the case where HydroQuebec simply sells its additional output at the border without any transmission upgrades. IPPNY refers to this as causing prices at the border to "increase," but that is only in comparison to the depressed prices in their hypothetical. Compared to current market prices, the overall impact of the additional hydroelectric resources delivered by the Facility is to reduce prices across New York State, including Upstate, as shown in the direct testimony of Applicant's witness Frayer (Tr. 277).

2. Reliability

Entergy and IPPNY dispute that the Facility will contribute to and enhance system reliability. However, as explained in Staff's Brief, the Facility will enhance system reliability by increasing delivery capability into CNY, a load pocket, where electricity peak demand exceeds the existing transmission import capability. By increasing the import capability, the Facility provides increased reliability and reduces the dependence on local generation.³² Neither Entergy, nor IPPNY attempts to dispute this general concept. Rather,

³² Staff Brief, p. 9.

both of them rely solely on the fact that, the NYISO's 2010 Reliability Needs Assessment ("RNA") did not find a reliability need for additional capacity in NYC through at least 2020. However, as explained by Witness Paynter, "the function of the RNA is to identify potential shortages of capacity or other reliability needs that might require a regulated investment ("Regulated Backstop Solution," or RBS) in the event there is insufficient merchant investment. . . . Thus the entry of merchant projects in advance of a "reliability need" is not only consistent with, but is in fact an integral part of the NYISO's market-based planning process. " (Tr. 195). Moreover, the Commission has previously found a need for a facility when the NYISO process did not find its own need.³³

IPPNY and Entergy also argue that the contingencies mentioned in the Joint Proposal are too remote to justify the Facility in terms of reliability needs.³⁴ First, contingencies are by definition uncertain.³⁵ However, prudence requires that they be adequately considered.³⁶ Moreover, uncertainty concerning probability of an occurrence does not necessarily equate to it being improbable or unlikely. IPPNY argues that consideration of the possibility of higher load forecasts is

³³ 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 (issued November 12, 2009), pp. 12-13.

³⁴ Entergy Brief, pp. 16-17 and IPPNY Brief, pp. 13-15.

³⁵ See Black's Law Dictionary 362 (Deluxe 9th ed. 2009).

³⁶ See NYISO 2010 Reliability Needs Assessment - Executive Summary, September 2010, p. i (stating "[t]he NYISO will continue to monitor these developments and will conduct appropriate reliability studies as necessary).

unreasonable because significant funds are being spent on conservation programs such as the Commission's Energy Efficiency Portfolio Standard. However, allocating funds does not ensure actual load reduction results.³⁷ Similarly, in IPPNY's view, the retirement of Indian Point facility is speculative and unlikely to occur. However, events have occurred, perhaps even since IPPNY formulated its argument in opposition, that would indicate the relicensing of Indian Point is as uncertain as its retirement.³⁸

In sum, the Facility is needed on a reliability basis. The Joint Proposal Opponents' arguments to the contrary rely entirely on assumptions, conjecture or the opponents' skewed and incomplete understanding of public policy.

3. Fuel Diversity Needs

Under this heading in its brief, Entergy states that (i) the Applicants do not currently have a supply contract, (ii) Applicant's have no authority or jurisdiction to compel the delivery of hydroelectric or wind power to the HVDC system, and (iii) that Applicant's "promptly ceased invoking" the label "renewable" after Entergy noted that the Commission had rejected new large hydro projects as eligible for financial incentives.³⁹ Interestingly, Entergy makes no effort to explain how such statements, even if true,⁴⁰ refute the fact that the Facility

³⁷ See Case 07-M-0548 et al., Energy Efficiency Portfolio Standard (EEPS), Order Approving Utility (Energy Savings) Target Adjustments (issued February 17, 2012).

³⁸ See Nuclear Regulatory Commission, Docket No. 52-016-COL, et al., Memorandum and Order, CLI-12-16 (issued August 7, 2012) (suspending the relicensing of Indian Point Nuclear Generating Units 2 and 3), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/orders/2012/2012-16cli.pdf>.

³⁹ Entergy Brief, pp. 17-18.

⁴⁰ Entergy's statement (i) and (ii) appear to be true as of the writing of this brief. Staff holds no position on (iii) as

will increase fuel diversity by decreasing CNY's reliance on natural-gas-fired generation by delivering almost exclusively (at least 94%) wind and hydro-power to CNY.⁴¹ If wind and hydro generators are essentially the only sources of power available in the HQ control area, a supply contract or "jurisdiction to compel" is irrelevant to what type of power will be supplied from the area.

4. Black Start

Entergy argues that the Facility does not advance the State's interests in the availability of black start providers. It is true that Applicants are under no obligation to provide black start service. The Joint Proposal only requires the Applicant to inquire of the NYISO concerning what it would take - technically and financially - to provide such service. Viewed separately, without the context provided by the entire evidentiary record, an approach repeatedly supported by Entergy, black start service would not be a sufficient basis for need, upon which alone a certificate should be granted. However, as the record amply demonstrates and explained in Staff's Brief, the bases of the need for the Facility are multi-faceted and the potential to provide black start service is simply an "adder" - increasing the value of the Facility to the interconnected electric system.

5. Impact on Competition

Both IPPNY and Entergy argue that granting the Facility a Certificate will have negative impacts on competition by signaling the market that the State is willing to subsidize certain competitors and artificially suppressing prices. As explained above in section A.1, both arguments are based

the record in this proceeding does not prove or disprove the statement.

⁴¹ See JP ¶125.

explicitly on contingencies for which the record contains no support. Entergy states the public interest "may" be harmed "if the Project is allowed to proceed on a non-merchant basis - for example, because it is subsidized through some mechanism, including the TDI/HQ structure described in the EHI RFI submissions."⁴² As discussed in Section A.1 above, there is nothing inappropriate about a potential contract between HydroQuebec and TDI. Indeed, there is nothing in the record to support the idea that the Facility will impact the competitive market in anyway other than to increase competition.

Moreover, granting the Article VII Certificate simply permits the Facility; as a merchant, the developer must obtain financing. Staff witness Paynter explained on Rebuttal (Tr. 166-167) that HydroQuebec ("HQ") has a clear financial interest in developing additional transmission from Quebec to CNY, in order to get a high market price for its hydroelectric sales. Indeed, Exh. 213 (Hydro-Quebec Response to The New York Energy Highway Request for Information, May 30, 2012), HQ has expressed an interest in helping to finance both the Facility and expansions of New York State's existing AC transmission system. (Exh. 213, Hydro-Quebec Response to The New York Energy Highway Request for Information, May 30, 2012). HQ will naturally weigh the costs and benefits of the Facility vs. alternative transmission investments in New York or elsewhere, in deciding which projects to finance. (Tr. 189-190; see also TDI Witness Jessome at Tr. 68-69). Thus, granting an Article VII Certificate merely allows the Facility to enter the competition for financing.

⁴² Entergy Brief, p. 19.

C. Cost Issues

Both Entergy and IPPNY raise a number of issues concerning the estimated cost of the Facility. As explained in Staff's brief, the evidence regarding cost support the granting of a Certificate to Applicants. The estimated cost of the HVDC Transmission system will be incurred at the risk of Applicants and their investors. Staff believes the estimate for the Astoria-Rainey cable is reasonable and the proposed certificate conditions provide protections against unreasonable cost overages.

1. Record evidence

Entergy claims that the record evidence is not reliable for determining "any of the project costs."⁴³ The claim is based on speculation.⁴⁴ More importantly, Entergy makes no effort to provide actual evidence indicating that either the cost figures in the record are inaccurate or that the smaller Facility components (4.5 acres of land, four breaker ring bus, etc.) represent significant costs. With no record evidence to the contrary, Staff continues to believe the cost figures in the record are reasonable and sufficient to make the required findings under PSL §126.

2. The Project is Economic

Both Entergy and IPPNY claim that the Facility is not economic based solely on the analysis performed by Witness Younger. In his rebuttal testimony, Witness Paynter explains that the Younger analysis is a "short term profitability analysis, rather than the long-term economic analysis [he] performed." (Tr. 170). He further explains that his analysis

⁴³ Entergy Brief, p. 21.

⁴⁴ See Entergy Brief, p. 21 (claiming certain route modifications, if they occur "could impact project costs"); p. 22 (claiming ACOE's permit, "may have substantial cost impacts").

"addresses the question of whether such investments are economically efficient from a societal perspective." Moreover, the results of the analysis demonstrate, even after accounting for criticisms leveled by Witness Younger, that the Facility will produce long-term economic benefits.

Staff believes that a more appropriate analysis of this Facility is one that measures its economic impact on the society as a whole because it more accurately reflects the Facility's impact on the public interest (the underlying concern of Article VII proceedings) rather than whether the Facility will provide profits to the Applicants and/or their investors. Entergy and IPPNY continue to focus exclusively on the more limited impacts of profitability under the justification that if the Facility is not profitable it will require a subsidy which in turn will have broader economic impacts. As explained above, their narrow economic view is based on an untenable theory about purely merchant standards of review. More importantly, it addresses short-term profitability of an investor owned facility, which in Staff's view is less relevant to the public interest than the analysis performed by Witness Paynter, which presents a societal view.

3. Contracts and Open Season

Entergy argues that "all of Applicant's representation concerning the Project's intent to transmit 'renewable,' or 'carbon free' power, or for that matter, power of any particular characteristic, or at any price remain mere speculation."⁴⁵ First, the claim ignores the record evidence that the Facility intends to connect to a control area that contains at least 94% wind and hydro-generation facilities. A 94% probability that the Facility, when operational, will transmit wind and hydro-generation is more than "mere speculation." More importantly,

⁴⁵ Entergy Brief, p. 27.

Entergy attempt o discredit the Facility by highlighting a current lack of shipping contracts is irrelevant - and Entergy makes no effort to argue otherwise.⁴⁶

D. Probable Environmental Impacts

The Application, testimony and exhibits in the evidentiary record describing the nature of the probable environmental impacts of the Facility were briefly summarized in Staff's initial and reply statements and brief in support of the grant to Applicants of a Certificate; they are discussed below to the extent warranted, given that not a scintilla of contrary evidence is contained in the record.⁴⁷ The environmental impacts associated with the Facility will be avoided, minimized or mitigated, provided that the Best Management Practices ("BMPs") and Guidelines for the preparation of the Environmental Management and Construction Plan ("EM&CP Guidelines") agreed to by the Signatory Parties are adhered to in the preparation of the Environmental Management and Construction Plan ("EM&CP") and provided that the Proposed Certificate Conditions agreed to by the Signatory Parties, the EM&CP and the terms and conditions of the order(s) approving the EM&CP are strictly complied with during facility construction, operation, and maintenance.

1. Underwater Environmental Impacts

The record adequately describes the adverse underwater environmental impacts including impacts to aquatic physical

⁴⁶ Id.

⁴⁷ In its brief, p. 45, Entergy appears to claim that removing the HVDC Transmission Line would be preferable from an environmental viewpoint to abandoning it in place. It is obvious, however, that removal would cause greater adverse environmental impact and that no incremental environmental impact would be caused by abandoning the HVDC Transmission Line at the end of its useful life.

features, sediments, benthic resources, aquatic plants and animals, and water quality.

a. Cable burial depth

Entergy claimed in its brief that the record describes cable burial depth requirements that are wholly inconsistent with the determinations of the United States Army Corps of Engineers ("USACE") and are otherwise inconsistent with Commission precedent.⁴⁸ Entergy argued that in-water burial depth requirements in the Joint Proposal, including the provision permitting Certificate Holders to surface-lay the cable under some circumstances, are inconsistent with the Commission's prior rulings in similar merchant transmission cases.

Entergy incorrectly stated that determinations regarding the proposed Facility have been established by the USACE. No such determinations have been made since a USACE permit has not yet been issued for this Facility. The Commission has been consistent in establishing in-water burial depths that set reasonable installation requirements in New York water bodies associated with various cases, including where federal authorization by the USACE was also required. As in previous cases, the Commission should establish appropriate certificate conditions based on the evidentiary record,⁴⁹ not based on misleading arguments. Staff maintains that the proposed conditions on the subject of burial depth contained in Appendix C to the Joint Proposal are appropriate for this Facility.

b. Impact on Endangered Species

The Hudson River contains significant fish and related resources including designated significant habitats and

⁴⁸ Entergy Brief, pp. 28-31.

⁴⁹ Hearing Exhibits 118 and 121.

threatened and endangered species like the Shortnose sturgeon and Atlantic sturgeon. Entergy contended that the record is inadequate as to the potential impacts of Facility construction on these species.⁵⁰ In particular, Entergy raised a concern regarding the potential electromagnetic field ("EMF") impacts on sturgeon.⁵¹

The route in the Hudson River reflects considerable effort by the Signatory Parties to the Joint Proposal to avoid seventeen Significant Coastal Fish and Wildlife Habitats within the vicinity of the proposed Facility. Although twelve of these significant habitat areas have been totally avoided, the proposed route is close to five areas and the Applicants will develop a final facility design during the EM&CP phase of the project that minimizes adverse impacts to these resources. Moreover, the record evidence belies the concern expressed by Entergy regarding potential impacts to Shortnose and Atlantic sturgeon,⁵² including EMF impacts.⁵³

Several compliance monitoring study scopes have also been incorporated into the Joint Proposal to ensure that aquatic environmental impacts are minimized during cable installation and operation. These include Scopes of Study for Benthic and Sediment Monitoring; Bathymetry, Sediment, Temperature and Magnetic Field; and Atlantic Sturgeon Pre-installation and Post-Energizing Hydrophone Studies. Specific construction windows have also been set forth (in proposed Certificate Condition 93) to avoid adversely impacting spawning fish in the major waterbodies.

⁵⁰ Entergy Brief, pp. 31-36.

⁵¹ Entergy Brief, pp. 39-44.

⁵² Hearing Exhibit 121.

⁵³ Hearing Exhibits 24, 92, 100 and 121.

2. Overland Environmental Impacts

a. Astoria Converter Station Site

Entergy stated that the proposed converter station site is contaminated and will require potentially extensive remediation before it can be productively utilized.⁵⁴ Analysis of the Astoria Converter Station site, however, shows that this claim is false or irrelevant.

While not proffering any evidence on the subject, Entergy (in cross-examination) indicated its view that the Luyster Creek site may not be suitable for use as the site of the Converter Station. Entergy also suggested that Applicants may be required to incur significant costs to remediate the Luyster Creek site prior to construction of the converter station. Moreover, Entergy expressed a concern that the materials that Consolidated Edison Company of New York, Inc. ("Con Edison") had provided to Applicants in discovery may be out of date.⁵⁵

The issues raised by Entergy regarding the environmental conditions of the proposed converter station site have been thoroughly addressed in the record. As indicated in Hearing Exhibit 108, although the parcel lies within a larger property currently being investigated under the Resource Conservation and Recovery Act ("RCRA") Corrective Action Program of the Department of Environmental Conservation ("DEC"), the agency that oversees site remediation planning and implementation, the proposed converter station location is more than 3,000 feet from the location of the former manufactured gas plant and former sintering plant, the primary sources of contamination at the site. Hearing Exhibit 108 also explains that, although the site is being investigated for contamination

⁵⁴ Entergy Brief, pp. 37-39.

⁵⁵ Tr. 129-135, 139-141, and 143-146.

from other sources (such as fuel oil spills), only low levels of contaminants associated with former uses of the property have been identified in the area around the proposed converter station site. These issues raised by Entergy are further addressed in the testimony of two witnesses—Applicant witness Murphy and Staff witness Davis. Mr. Davis provided testimony regarding recent correspondence with DEC remediation staff specialists. Mr. Davis testified that DEC has identified the need for improvement and replacement of a 30-inch diameter stormwater drainage culvert that crosses the south-central portion of the Luyster Creek parcel, and installation of a new outfall structure for that replacement drainage system at the Luyster Creek waterfront. Responding by email of June 22, 2012 to an inquiry by Staff, Doug Macneal of DEC's Remediation Bureau stated that – the actual outfall is buried now, and the new one will be located south of the mound south of the proposed converter station location. As described, the location would be several hundred feet away from the proposed converter station site (Tr. 50, l. 3-18). Staff testimony had identified the mound as –a small rise at the southern end of the site where an area of debris dumping appears to have occurred historically (Tr. 26, l. 13-16). Staff further identified the fact that DEC had –pending remediation plans at adjoining parcel(s). (Tr. 37, l. 19-21). Based on its discussions with DEC remediation experts, Staff is convinced that any contamination conditions or remediation requirements at the converter station site are not significant issues in terms of suitability of the site for development of the proposed converter station.

Dr. Murphy also identified the fill mound, and stated on cross-examination by Entergy that the fill mound does not appear as if it would be within the footprint of the proposed converter station (Tr. 150, l. 10-12). Dr. Murphy concluded his testimony regarding site contamination at the Converter Station

site with the statement – the preponderance of the evidence is that there is not significant contamination at the site. (Tr. 153, l. 24-154 and l. 2).

Record evidence also demonstrates that, in the event evidence of environmental contamination is found at the proposed Astoria Converter Station site, appropriate measures will be implemented to ensure compliance with all applicable regulations and standards. In response to Staff's discovery requests,⁵⁶ Applicants describe methods for handling contaminated soils and remedial procedures. These measures include visual, olfactory, and photo ionization detector soil screening and assessment performed by a qualified environmental professional, monitoring of contaminated soil excavation and stockpiling by a qualified environmental professional, sampling of contaminated soil stockpiles for waste characterization, use of liners, covers and soil erosion and sediment controls to minimize the potential spread of contaminated soils, transport and disposal of contaminated soils in accordance with applicable regulations and standards, fugitive dust monitoring and dust control measures, and health and safety training for all personnel who may be exposed to hazardous substances or health hazards on-site. Since the proposed converter station site development is part of the HVDC Transmission System, a merchant project, any costs required for environmental clean-up or remediation of the proposed Astoria Converter Station site would be the responsibility of the project developers. With the preponderance of the evidence indicating that there is no significant contamination at the converter station site, and the appropriate measures in place to measure, monitor, control, contain and dispose of any contaminants that are discovered as a result of final design and construction of the Facility, the

⁵⁶ Hearing Exhibit 63, responses to DPS-40 and DPS-49.

efforts by Entergy to portray the site as a pending pit of disastrous proportion are plainly phony.

E. Minimum Adverse Environmental Impact

Entergy alleges that the evidentiary record suffers from information gaps that preclude a finding that the Facility represents the minimum adverse impact, given the state of available technology, the nature and economics of the various alternatives and other pertinent considerations.⁵⁷ However, the Facility, as proposed to be located, configured and operated in the evidentiary record, represents the minimum adverse environmental impact considering the state of available technology and the nature and economics of the various alternatives and other pertinent considerations. The Facility as proposed to be located, configured and operated is preferable, on balance considering all factors, to any of the alternatives considered.

1. Alternative Technologies
2. Alternative Routes
3. Alternative Locations for Converter Station
4. Alternative Methods to Fulfill Energy Requirements

The Facility is expected to deliver electricity produced by wind and hydroelectric generation in Canada, displacing other, typically gas-fired, generation in and around CNY. Entergy argued that the Applicants failed to give meaningful consideration to any alternatives other than their proposal.⁵⁸ Neither Entergy nor any other party opposing the grant of a Certificate, however, attempted to present evidence on some other alternative and the Applicants were not required to present evidence on alternatives they deemed unreasonable.⁵⁹

⁵⁷ Entergy Brief, pp. 45-47.

⁵⁸ Entergy Brief, p. 46.

⁵⁹ Tyminski v. Public Service Commission, 38 N.Y.2d 156 (1975).

Nevertheless, the record does contain a comparison of a generation alternative with the Applicants' proposed Facility, not only with respect to cost but also considering other matters.⁶⁰ Generation alternatives may have smaller overall areas of construction disturbance than the proposed Facility; however, the air quality benefits the project affords due to its interconnection to renewable energy sources would not be achieved by fossil-fueled generation. Siting of approximately 1,000 MW of renewable generation in or near the CNY market in the project timeframe is an unrealistic expectation due to costs, siting, and technology issues, and many of the benefits of the project would not be realized. To site and construct a nuclear generating facility in the project area would be an expensive, lengthy and contentious endeavor, and would not result in a project being constructed in the timeframe contemplated by the project schedule.

As explained in paragraphs 23 and 107-118 of the Joint Proposal (as updated by Hearing Exhibits 202 and 203),⁶¹ Staff performed an analysis comparing the cost of 1,000 MW of Canadian hydroelectric power delivered to CNY via the Facility to the cost of building and operating 1,000 MW of combined cycle gas-fired turbine ("CCGT") generation of similar capacity located in CNY. Staff provided this long-term production cost comparison solely as an estimate of one important component of societal benefits - total production costs - to assist the Commission in deciding whether the Facility proposed in this case can be expected to yield net societal benefits.

Staff estimated the long-term production cost savings of the Facility as the cost of the Facility plus the cost of the hydropower (dams), less the cost of the combined cycle plant and

⁶⁰ Joint Proposal, paragraphs 119 through 121.

⁶¹ See also Tr. 198-199.

the present value of the plant's fuel and other operating and maintenance costs. Over a 35-year period, the savings (net present value) ranged from \$0.4 billion to \$2.6 billion (in 2015 dollars). Thus, for both environmental and economic reasons, the Commission can find that the proposed Facility represents the minimum adverse environmental impact given the considerations required to be weighed.

F. Undergrounding Considerations

G. Conformance to Long-Range Plans for Expanding the Electric Grid

1. Central Hudson's Claims

Central Hudson claims that the Commission cannot make the required statutory finding under Article VII that the Facility "conforms to a long-range plan for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems, which will serve the interests of electric system economy and reliability."⁶² Central Hudson argues that the Facility would not "materially assist in curing the limitations of the existing grid," or "improve[] deliverability of otherwise bottled upstate generation [by] bypass[ing] the grid."⁶³ Further, Central Hudson contends that the Facility would not be consistent with the required statutory finding unless "the NYISO determines that a reliability need exists and that Applicants' proposed Facility will be a 'solution' to such reliability need."⁶⁴

Central Hudson attempts to establish an overly narrow and burdensome standard for meeting the required statutory finding related to long-range plans for expansion of the electric grid. There is simply no requirement under PSL Article

⁶² PSL §126(1)(d).

⁶³ Central Hudson Brief, pp. 9, 12.

⁶⁴ Central Hudson Brief, pp. 9-10.

VII that an applicant demonstrate that it is a "solution" to a "reliability need" established by the NYISO, and nor should the Commission establish any such requirement as the sole means of compliance. Such an approach would inappropriately restrict the Commission's decision-making authority and preclude consideration of a range of transmission projects that may be consistent with long-range plans other than the NYISO's Comprehensive Reliability Plan.

While the need to maintain reliability may be one way to demonstrate consistency with a long-range plan, there are various other potential bases for addressing long-range plans. For example, a project may be identified as needed for economic considerations, such as relieving congestion, pursuant to the NYISO's Congestion Assessment and Resource Integration Study. Similarly, a project may be pursued for public policy purposes pursuant to the NYISO's planning process being developed to comply with FERC's Order No. 1000. Although it is expected that such projects would still need to obtain an Article VII Certificate, Central Hudson's suggested approach would preclude the Commission from granting such a certificate and would render these NYISO processes meaningless.

Moreover, as established in Staff's Brief, the Facility is consistent with long-range plans identified in the most recent State Energy Plan, which establishes as a policy objectives that the state of New York will support increased use of renewable energy and energy systems that enable the state to significantly reduce greenhouse gas emissions.⁶⁵ The New York

⁶⁵ See Energy Infrastructure Issue Brief, New York State Energy Plan 2009 (December 2009), p. 9, available at <http://www.nysenergyplan.com/2009stateenergyplan.html>.

State Energy Plan further states that an increase in renewable energy will require additional transmission in New York.⁶⁶

Contrary to Central Hudson's claims, the Facility would expand the State's electrical grid and assist in relieving congestion on the State's existing HVAC electrical grid. The Facility would add an additional tie to Quebec, providing the State with greater access to Quebec's hydroelectric power. Energy imports over the Facility would not consume capacity on New York's existing HVAC transmission system, and by increasing supply downstream of the congested interfaces, the Facility would reduce congestion on New York's HVAC transmission interfaces.

The Facility is also consistent with CNY's long-range plans established in PlaNYC, in which CNY recognizes that providing residents with increased access to renewable energy supplies will simultaneously reduce electricity prices, local air pollution, and greenhouse gas emissions in the NYC.⁶⁷ The ability of the Facility to advance these important public policy objectives of the State and CNY should be explicitly recognized by the Commission in issuing a Certificate. For all of these reasons, Central Hudson's arguments are incorrect and its suggested standard is inappropriate, and accordingly, should be rejected.

2. Entergy's Claims

Entergy points out that the Facility will not have "on-ramps" to allow New York-based generation to access the line.⁶⁸ It also states, erroneously, the Facility will not relieve existing constraints or benefit New York consumers.

⁶⁶ *Id.* at 1.

⁶⁷ See PlaNYC (2007), pp. 112-117, available at: <http://www.nyc.gov/html/planyc2030/html/theplan/the-plan.shtml>.

⁶⁸ Entergy Brief, p. 47.

Further it claims, again, that the Facility will inevitably result in a subsidy, the burden of which can only be carried by New York consumers. Finally, it concludes that these "impacts" are inconsistent with the State's long range plans.

As discussed above, the Facility is consistent with a number of long range plans. Even if Entergy's claims are taken at face value, they do not preclude or even detract from the conclusion that the Facility conforms with a number of long-range plans. It is true that the Facility will not involve "on-ramps" but long -range plans to increase transmission capacity into CNY are not limited to providing access to existing up-state generation. They also include connecting CNY with the abundance of power in the Quebec area, as proposed by the Joint Proposal.⁶⁹ Moreover, undisputed record evidence indicates that the Facility will positively impact constraints on the system (Tr. 589-590) as well as produce consumer benefits. (Tr. 256).

H. System Reliability Impact

I. Conformance with State and Local Laws and Regulations

J. Public Interest, Convenience and Necessity

The Commission can determine that the Facility is in the public interest, convenience and necessity. Construction of the Facility would produce a variety of benefits including: long-term production cost savings; short-term reductions in wholesale market prices throughout the state, but primarily in CNY, Long Island and the lower Hudson Valley; reductions in air pollutant emissions in those areas that continue into the future; and, increased reliability of the Bulk Power System in CNY.

⁶⁹ See Governor Cuomo's 2012 State of the State address, available at Available at: <http://www.governor.ny.gov/assets/documents/Building-a-New-New-York-Book.pdf>.

1. Wholesale Energy Price Savings

IPPNY and Entergy contend that short-term reductions in wholesale energy prices should not be considered in determining whether the Facility meets the public interest, convenience and necessity finding.⁷⁰ They claim that these benefits should be dismissed alternatively arguing: that the wholesale price reductions do not represent benefits to society and should be disregarded as benefits to the public interest; that such benefits would be experienced only for a limited time; and, that the studies performed by Staff and the Applicants are flawed. The opponents' assertions must be rejected; consideration of short-term benefits is appropriate in determining whether to issue a Certificate.

Lowered wholesale energy prices result in lower prices to consumers and are appropriately considered in determining whether the Facility is in the public interest. IPPNY and Entergy urge that instead of considering the results of the wholesale energy price savings analyses, the Commission should look *exclusively* at production cost savings; they state that since production cost savings analyses are conducted to determine which generation method is most beneficial to society, so acts as a better indicator of whether the Facility is in the public interest.⁷¹ Opponents' claim that the Commission should consider either one analysis or the other, but not both, is preposterous. The Commission considers a variety of factors when considering each of the findings it is required to make to grant a Certificate. As discussed in Staff's Brief, rather than competing theories, these two analyses focus on different areas and are both relevant and appropriate. The results of both analyses are properly considered in determining whether the

⁷⁰ Entergy Brief, pp. 49-54; IPPNY Brief, pp.30-34.

⁷¹ Entergy Brief, p. 49; IPPNY, pp. 31, 33.

Facility meets the public interest, convenience and necessity finding. Although Dr. Paynter stated his preference for the production cost study to determine overall long-term economic benefits to society of the Facility, (Tr. 172) Staff conducted a wholesale energy price savings analysis because it believes short-term price impacts to consumers are also relevant in determining whether a proposal is in the public interest.

Benefits to consumers, albeit short-term benefits, should be a factor considered in determining whether to issue a Certificate. As previously described, the Facility will produce short-term benefits in the form of reduced wholesale prices. These reductions translate into savings for consumers; lowered prices would be concentrated in CNY, Long Island, and the lower Hudson Valley. IPPNY and Entergy claim that these savings ought not be considered because the savings may be experienced for a short amount of time.⁷² Staff does not deny that these benefits are not permanent; in fact, Staff has repeatedly indicated that the study it performed focuses on short-term benefits. Staff has acknowledged that new entry reduces prices and over time, that the market responds to the depressed prices and eventually adjust itself. While Staff cannot predict how long it will take the market to adjust itself, the study indicates that new entry of the proposed Facility will result in significant benefits to consumers.

Staff's wholesale energy price savings analysis should not be discarded due to alleged flaws. The results of Staff's updated wholesale energy price savings analysis resulted in significant savings to consumers both in CNY and in New York State. IPPNY recommended several downward adjustments that would reduce those benefits. Staff disagrees with the total adjustment amount that IPPNY recommends. Nevertheless, even if,

⁷² IPPNY Brief, pp. 31, 33.

for arguments sake, the adjustments proposed by IPPNY were accepted and the estimated benefits reduced, wholesale energy market benefits would persist; benefits to consumers would still be experienced by the addition of the Facility. IPPNY and Entergy's insistence that wholesale market price savings should be ignored in determining whether the proposed Facility is in the public interest must be rejected; benefits to consumers based on reduced energy prices are material to determining whether the Facility is in the public interest.

IPPNY further claims that the Facility will cause Upstate wholesale prices to increase: "In short, all else equal, building the [Facility] will mean that Upstate customers pay more for Canadian power." (IB at 11) In fact, however, the impact of the additional hydroelectric resources delivered by the Facility is to reduce prices across New York State, including Upstate. (Tr. 277) IPPNY's claim was based on a hypothetical scenario which IPPNY presented during cross-examination, in which HydroQuebec (HQ) is assumed to add additional hydroelectric resources and sell it all at the New York border, without making any transmission upgrades to ensure a good price for its power. Staff witness Paynter had already explained in testimony why such a scenario was unlikely. (Tr. 174-175) On cross, Dr. Paynter responded to IPPNY's hypothetical scenario as follows: "In general, if HQ commits to build projects and simply sells the additional output at the border, then that would tend to depress the border price. Alternatively, if HQ were to finance transmission upgrades that allowed it to receive to avoid some of the congestion and reach higher price markets, then basically you would not see the price reduction, or at least as much price reduction at the border. (Tr. 212) As Dr. Paynter made clear in his response to this hypothetical, the impact of the Facility would be to have a smaller price reduction at the border compared to the case where

HQ simply sells its additional output at the border without any transmission upgrades. IPPNY refers to this as causing prices at the border to "increase," but that is only in comparison to the depressed prices in their hypothetical. Compared to current prices, the overall impact of the additional hydroelectric resources delivered by the Facility would be to reduce prices across New York State, including Upstate.

IPPNY simply assumes its hypothetical, that HQ will sell additional hydroelectric resources to New York regardless of the price it receives. IPPNY then concludes that, if the Commission were to deny certificating the Facility, Upstate New York would benefit from lower prices at the New York border. However, absent the Facility, such added imports would not only depress Upstate prices, but would also exacerbate congestion on New York's existing transmission system and increase bottling of Upstate generation. (Staff Reply Statement in Support, p. 15) This would promote the very discouragement of new Upstate renewable resources, retirement of existing Upstate resources, and concomitant loss of Upstate jobs and tax revenues, that IPPNY bemoans in its IB (at 11). As Dr. Paynter emphasized in Rebuttal testimony, such market responses will tend to offset any initial price impacts: "Over time, markets respond to the depressed prices, e.g. through additional load or reductions in supply, until prices return to long-run equilibrium levels that reflect the cost of new entry." (Tr. 172) And as TDI witness Jessome observed, if transmission upgrades in New York were blocked, HQ would have a strong incentive to finance transmission to alternative markets for its exports, either to New England, Ontario, or Atlantic Canada. (Tr. 69) Thus rejecting certification of the Facility in hopes of bottling HQ's energy in Upstate New York does not represent a viable strategy for New York State.

2. Production Cost Savings

As discussed above in C.2., and in Staff's brief, the proposed Facility would produce long-term economic benefits. In its brief, Staff addressed the allegations that IPPNY and Entergy make that its production cost savings analysis is flawed.

3. Employment Effects

4. Environmental Benefits

5. Reliability Benefits

As stated in Section B.2. and in Staff's Brief, Staff has demonstrated that the Facility will enhance system reliability; IPPNY's allegation that the Facility will not provide benefits should be discarded.

6. Economic Benefits

As described above, and in Staff's Brief, economic benefits of the Facility include short-term wholesale price savings and long-term production cost savings. In addition, other benefits of the Facility would include both short and long-term benefits to local municipalities through purchase of goods and services and tax payments.

As described above, IPPNY alleges that the short-term wholesale energy market benefits should be rejected. It also claims the analysis that Staff performed is erroneous. Again, as described above and in its Brief, Staff's updated analyses estimate significant energy price savings. As acknowledged in its Brief, Staff agrees that arguments could be made that for some adjustments IPPNY suggests, but the adjustment amounts suggested by IPPNY are overstated and unreasonable.

7. Merchant Facility

IPPNY and Entergy's position on whether project will be developed, constructed and operated on a merchant basis is based on acceptance of its economic analyses and claimed result

that the project is uneconomic and that the only way the project can be developed and operated profitably over the long term is through some form of out-of-market subsidy.⁷³ IPPNY and Entergy argue that the proposed Facility isn't a "truly" or "purely" merchant facility. Opponents have fabricated a self-serving definition of a purely or truly merchant facility apparently with the goal of limiting competition and restricting how generators shipping energy over the Applicant's Facility can sell their energy.

IPPNY and Entergy claim that the Facility needs an out-of-market subsidy to be profitably operated.⁷⁴ Since proposed Certificate Condition 15.b. restricts Applicants from recovering costs through cost-of-service rates or entry into a contract with a State authority or agency, municipality or investor-owned utility, the idea of the Applicants obtaining an "out-of-market subsidy" is not viable. IPPNY argues that Applicants could *indirectly* receive such an out-of-market subsidy, or contract, by virtue of its agreement with generators shipping energy over the Facility, and that such action should render Applicants' project non-merchant.

IPPNY alleges that a "truly" or "purely" merchant project is "one that earns all of its revenues exclusively from the competitive market where existing and new suppliers compete on a level playing field."⁷⁵ It asserts that a project is only truly merchant if "its investors alone would be responsible for recovering its construction and operating costs from market based revenues."⁷⁶ IPPNY's argument is therefore, if Applicants receive money from generators using its Facility and those generators don't limit their transactions to the marketplace,

⁷³ IPPNY at 50; Entergy at 3.

⁷⁴ IPPNY 50.

⁷⁵ Id.

⁷⁶ Id.

the Facility shouldn't be considered merchant because existing generators would be disadvantaged by their inability to participate. IPPNY however, suggests that if those generators enter into out-of-market contracts, the effect will be harm to New York consumers and the deregulated electricity market.⁷⁷

IPPNY argues that if generators shipping energy over CHPE's facility are permitted to enter into contracts, a procurement process would not be generally open to all market participants which it asserts is discriminatory, and it would result in above-market prices.⁷⁸ Here, IPPNY has not explained why such a process would hurt consumers or the marketplace, but rather laments that its member-generators may not be able to participate and may be at a competitive disadvantage. IPPNY further complains that HQ, and presumably any other shippers over the Facility, would have "extra-market" revenues and therefore would not be required to bid its actual costs of electricity and transmission and would effectively reduce wholesale market clearing prices for existing generators.⁷⁹ While IPPNY claims to be concerned with impacts to consumers and the marketplace, the situation it describes is not harmful, but rather beneficial to consumers and an intended consequence of competition. Opponents are simply trying to protect the livelihood of existing generators and urge that *they*, not consumers, be insulated from the affects of a new generator entering the marketplace.

The arguments IPPNY presents are clearly made in the interest of self-preservation and should be rejected. Staff rejects IPPNY's economic analysis, its narrow interpretation of "merchant", and consequently, its allegations that the Facility

⁷⁷ Id.

⁷⁸ IPPNY 52.

⁷⁹ IPPNY p.53.

is not merchant. If IPPNY's theory were accepted, it would effectively limit consumer choice by skewing the playing field to limit how competitor-generators shipping energy over the Applicant's Facility may participate in the marketplace.

8. Other Considerations

a. Competitive Generation

K. Proposed Findings

As discussed above, opponents' allegations that the record does not support the issuance of a Certificate are unfounded; the arguments presented largely represent an attempt to keep a direct competitor out of the market. As described above and in Staff's Initial Statement in Support, the record in this case is sufficient for the Commission to make all of the required findings pursuant to PSL §126, and Staff recommends that the Applicants be issued a Certificate for the construction, operation and maintenance of the Facility.

L. Proposed Certificate Conditions

1. Certificate Condition 15: Ratepayer Protection

Proposed Certificate Condition 15.b.⁸⁰ was designed to ensure that captive ratepayers were not asked to pay for the Facility. As described in the condition, the HVDC Transmission System is proposed as a merchant facility, meaning that it would be developed, financed, constructed and operated with no reliance on cost-of-service rates and none of its costs will be put into utility rate base. Likewise, all costs associated with the use of the Astoria-Rainey Cable to deliver electric energy and capacity over the HVDC Transmission System, will be recovered on a merchant basis with no reliance on cost-of-service rates and will not be included in utility rate base. If the Applicants change their business model and attempt to recover costs through cost-based rates, the Certificate would be

⁸⁰ Evidentiary Hearing Exhibit 150.

deemed invalid. Proposed Certificate Condition 15.b. is an appropriate condition to impose on the Applicants that would ensure protection of captive ratepayers.

As discussed above, IPPNY insists that the Commission should adopt a new definition of a merchant project claiming that a truly merchant project is "one that earns all of its revenues exclusively from the competitive market where existing and new suppliers compete on a level playing field (emphasis added)."⁸¹ IPPNY alleges that proposed Certificate Condition 15.b. is inadequate to ensure that the Facility will be a *truly* merchant facility. As previously discussed, the "truly" or "purely" merchant definition used by project opponents and the standard of review opponents urge be applied must be rejected. Proposed Certificate Condition 15.b. ensures that the Facility is developed, constructed and operated as a merchant facility, does not expose captive ratepayers to any risks.

According to Entergy, proposed Certificate Condition 15.b. is insufficient; and it claims that, unless more restrictive conditions are placed on the Applicants, the result would be "substantial investment risk being shifted away from the Project's investors and instead being shouldered by New York consumers in some capacity..."⁸² Entergy proposes four additional conditions it claims will "insulate New York consumers from subsequently funding the Project's substantial above-market costs..."⁸³ however Entergy has wholly failed at explaining why consumers are at risk and how its proposed conditions minimize that risk. Consumers must be distinguished from captive ratepayers. Captive ratepayers pay cost-of-service rates from the utility serving their area and have no ability switch

⁸¹ IPPNY Brief, p. 50.

⁸² Entergy Brief, p. 57.

⁸³ Entergy Brief, p. 58.

utility service providers. Consumers may choose to purchase energy from different sources and at different prices based on their interests and needs. While Entergy claims that consumers may be on the hook to pay higher-than-market prices, this argument fails because it assumes a contract arrangement; if a consumer enters into a contract, it has determined that the agreed-upon arrangement is satisfactory. Entergy's allegation that consumers are at risk is unsupported must be rejected along with its proposed certificate conditions.

2. Reasonableness of Certificate Conditions

Central Hudson raises various objections to certain proposed Certificate Conditions. In general, DPS Staff maintains that these objections are either misplaced because Central Hudson misinterprets the proposed conditions, or should be appropriately addressed during the review of the applicant's proposed EM&CP(s) post-certification. To the extent Staff does not address a specific argument raised by Central Hudson, it should not be interpreted as agreement with such argument.

a. Central Hudson's Legal Remedies Are Not Affected

Central Hudson objects to proposed Certificate Conditions 27 through 29, and requests confirmation that if the Facility is certified those conditions do not relieve the Applicant from potential liability under common law or statutory law. Central Hudson is concerned that construction of the Facility in proximity to its existing utility infrastructure may result in damage to such infrastructure, and that these proposed Certificate Conditions could be interpreted as limiting the Applicants' responsibility and Central Hudson's rights of recovery.

It is axiomatic that a Certificate granted pursuant to PSL Article VII only places obligations and limitations upon the Certificate Holder. Proposed Certificate Condition 8 would solely require the Certificate Holder to agree to comply with

the conditions contained within any such Certificate, or to seek rehearing, within 30 days of the grant of the Certificate. To the extent the proposed Certificate Conditions contain provisions for the Certificate Holders to reimburse certain costs, and for the Commission to consider disputes as to that responsibility under the Certificate, Staff views such reimbursements as separate and distinct from any common law or statutory law causes of action that Central Hudson May have. Therefore, Central Hudson's concerns are misplaced, and no clarifications are necessary.⁸⁴

b. Central Hudson's Access to Repair and Maintain its Infrastructure Will be Maintained

Central Hudson also objects to Proposed Certificate Condition 162. This condition would require, in part, Certificate Holders to demonstrate that "owners or operators of...Submerged [Co-located Infrastructure (CI)] would have access to repair and/or maintain its Submerged CI," and that "there will be no material interference with the ability of the owner and/or operator of any CI crossed by, or in proximity to, the Facility, to repair, operate, or maintain such CI as a result of the construction, operation, or maintenance of the Facility."⁸⁵ Central Hudson claims that these provision may be interpreted to "authorize impacts to Central Hudson's pre-existing infrastructure."⁸⁶

⁸⁴ For similar reasons, Central Hudson's request that Certificate Holders "hold Central Hudson harmless against risk or loss" is unnecessary and should be rejected. Central Hudson Brief, p. 23. Recommended Certificate Condition 15 b. and c. ensures, to the extent possible, that Facility costs are not shifted to ratepayers.

⁸⁵ Proposed Certificate Conditions 162(e)(iii) and 162(f), contained in Hearing Exhibit 127.

⁸⁶ Central Hudson Brief, p. 19.

Contrary to Central Hudson's concerns, Proposed Certificate Condition 162 is merely designed to detail the information that "shall [be] include[d] in the EM&CP." As provided for therein, Central Hudson and other infrastructure owners will be consulted early and often through the facility design process. Central Hudson will have the additional ability to review locations, procedures, standards and related details as the final design is proposed in an EM&CP. Central Hudson has successfully used this process in the past to plan, mitigate, and construct transmission facilities in close proximity to the property of others. Given the plain language that indicates Proposed Certificate Condition 162 is a reporting requirement, and that interested parties will have an opportunity to raise concerns during the consultation and EM&CP review phases, Central Hudson's objection to this condition should be rejected.

c. The Proposed Certificate Condition For Acquisition of Property Rights Is Appropriate
Central Hudson claims that proposed Certificate

Condition 5, relating to property acquisition, is too broad in two respects. First, Central Hudson argues that the portion of the condition requiring the Applicants to "acquire and maintain the continuing rights to enter onto and use certain additional lands" is overly broad and that "there is no demonstration that such land rights are universally necessary."⁸⁷ Second, the utility claims that the portion of the certificate condition requiring "terms prohibiting the owners of such land from taking any action that would interfere with such repair and maintenance activities" is inappropriate. Central Hudson claims that the certificate condition is inappropriate because it will limit its

⁸⁷ Central Hudson Brief, p. 24.

“unfettered right to repair its pre-existing infrastructure that is devoted to the public service and serving customers.”⁸⁸

Central Hudson’s concerns highlight its apparent misunderstanding of the import of the certificate condition of which it complains. Read as a whole, Certificate Condition 5 is appropriate and will not interfere with Central Hudson’s ability to maintain its existing infrastructure. First, the requirement to obtain the right to enter and use certain lands is limited to “certain additional lands immediately adjacent to the Facility ROW needed for repair and maintenance purposes.”⁸⁹ The requirement is not universal as Central Hudson posits. Rather, it is limited to those property rights that the Certificate Holders will need in order to maintain and repair their Facility in the future. The requirement that the property rights be sufficient to avoid interference with the Certificate Holders’ ability to maintain and repair their Facility, is also meant to ensure that Certificate Holders will not be excluded from performing necessary maintenance and repair of the Facility by underlying landowners. Nothing in the certificate condition would prevent Central Hudson from repairing its own infrastructure.

Moreover, as noted above, the Proposed Certificate Conditions regarding co-located infrastructure provide the specific protections that Central Hudson states it needs (i.e., the right to repair its pre-existing facilities). Certificate Conditions 27 through 29 relate to co-located infrastructure and would apply to the infrastructure Central Hudson appears concerned about. Specifically, Certificate Condition 27 states “[t]he Certificate Holders shall engineer, construct, and

⁸⁸ Central Hudson Brief, p. 25.

⁸⁹ Proposed Certificate Condition 5 (emphasis added), contained in Hearing Exhibit 127.

install the Facility so as to make it fully compatible with the continued operation and maintenance of Co-located Infrastructure.” In addition, the conditions place a number of specific obligations on the Certificate Holders concerning notice, reimbursement for certain costs, and study and design requirements that will provide additional protections to existing infrastructure and its owners. Requiring the Certificate Holders to maintain the rights to access property they will need to maintain and repair their Facility and protection of existing infrastructure are not mutually exclusive. Central Hudson’s argument to the contrary is without merit and should be rejected.

M. EM&CP Guidelines

N. Water Quality Certification

O. Conclusion

The record in this proceeding enables the Commission to: (1) make the findings required in connection with the construction and operation of an electric transmission line, as set forth in PSL §126(1)(a), (b), (c), (d)(1) and(2), (f) and (g); (2) impose appropriate certificate conditions; and, (3) issue the pertinent WQC. For the foregoing reasons, the arguments presented by those opposing the grant of a Certificate to the Applicants should be rejected.

Respectfully submitted,

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