

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.

RULING ON EVIDENTIARY HEARING

(Issued June 26, 2020)

JAMES COSTELLO and SEAN MULLANY, Administrative Law Judges:

INTRODUCTION

We hold that no evidentiary hearing is required in connection with the December 6, 2019, petition for a second amendment to the certificate because no party has identified any disputed issue(s) of material and relevant fact.

BACKGROUND

On April 18, 2013, the Public Service Commission (Commission), pursuant to New York Public Service Law (PSL) Article VII, granted a Certificate of Environmental Compatibility and Public Need (Certificate) to Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. (collectively, CHPE or the Applicants). The Certificate authorizes the Applicants, subject to conditions, to construct and operate a High Voltage, Direct Current (HVDC) transmission line extending approximately 330 miles from the New York/Canada border to a converter station in Astoria Queens (the Project).¹

¹ 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, Order Granting Certificate of Environmental Compatibility and Public Need (issued April 18, 2013).

On December 6, 2019, the Applicants filed a petition seeking Commission approval of a second amendment to the Certificate (Amendment 2 Petition).² This petition proposes certain preferred alternative routes for the transmission line (Preferred Alternatives) that differ from the route that was initially certified. The Preferred Alternatives include minor routing changes and the relocation of a converter station.

The Applicants state that the Preferred Alternatives are necessary to, among other things, avoid shallow water engineering challenges, reduce rock removal and wetland impacts, eliminate disruption to downtown Schenectady, forego reliance on an aging railroad bridge, accommodate community concerns, and simplify the design of the Converter Station and the connecting electrical facilities.³ The Applicants state that the proposed changes would result in the addition of approximately 5.8 linear miles (less than 2% increase in the total project length). Except for a proposed routing shift to the Town of Glenville-Village of Scotia, Town of Rotterdam (the "Schenectady Preferred Alternative"), each of the proposed routing modifications was considered as an alternative in the original Article VII proceeding.⁴

In the Amendment 2 Petition, the Applicants emphasize the public need for the Project and its expected benefits. The Applicants point to new programs enacted by the State of New York and by New York City that set ambitious goals aimed at

² On September 30, 2019, the Applicants petitioned for a first amendment to the Certificate, pursuant to PSL §123(2). That petition sought changes to certain conditions and was granted in part by the Commission on March 20, 2020. Case 10-T-0139, Order Granting, in Part, Amendment of Certificate of Environmental Compatibility and Public Need Subject to Conditions (issued March 20, 2020).

³ Amendment 2 Petition, at 9.

⁴ DPS Staff Br., p. 9.

curbing emissions of greenhouse gasses (GHG), including the Climate Leadership and Community Protection Act.⁵ Applicants state that any delay of the approval of the Amendment 2 Petition would jeopardize the successful implementation of the State's GHG programs and jeopardize the ability of the Applicants to timely close on required Project financing, which would delay the in-service date of the Project by one year.⁶

Pursuant to PSL §122(2), in conjunction with its filing of the Amendment 2 Petition, the Applicants served notice on all parties to the original Certificate proceeding and on all potentially newly affected landowners and municipalities.⁷

A procedural conference was convened by the Administrative Law Judges (ALJs) on March 3, 2020, pursuant to a notice issued by the Secretary on February 11, 2020. Representatives for the Applicants, and the parties, including DPS Staff, the Department of Agriculture and Markets (AGM), and the City of New York, participated.

The stated purpose of the Procedural Conference was to determine if an evidentiary hearing would be required or necessary to adequately develop the record. At the procedural conference, the ALJs raised this threshold question, and asked the parties to state their positions. The Applicants reiterated their position, set forth in the Amendment 2 Petition, that nothing in the Applicant's Preferred Alternatives would trigger a hearing requirement under PSL §123(2) because the requested amendments to the certificate would not result in any material change in the environmental impacts of the Project and would not cause any substantial change in the location of the Project.

⁵ Amendment 2 Petition, at 4.

⁶ Amendment 2 Petition, at 8.

⁷ Proofs of Service and Publication, filed December 31, 2019.

At the procedural conference, DPS Staff declined to state any position on whether a hearing is required. DPS Staff took the position that it did not yet have sufficient information to determine whether a hearing would be necessary. DPS Staff requested an opportunity to conduct discovery to gather additional information about the Applicants' proposals.⁸

The ALJs granted DPS Staff's request for discovery and ruled that discovery had to be served on or before March 25, 2020. Thereafter, DPS Staff served several discovery requests on the Applicants on March 25, 2020, and the Applicants provided responses in April.

On March 4, 2020, the Secretary issued a "Notice of Information Forums and Public Statement Hearings" scheduled to take place in Scotia, New York on March 23, 2020. That Notice provided that, although comments will be accepted throughout the pendency of this proceeding, they are requested by April 30, 2020. On March 16, 2020, a Notice Postponing Information Forums and Public Statement Hearings was issued. Pursuant to that Notice, the March 23, 2020, Information Forums and Public Statement Hearings were cancelled, due to the COVID-19 pandemic and the resulting need to avoid potentially large public meetings. That Notice indicated that a notice rescheduling these events would be issued in due course.

On April 29, 2020, the North American Megadam Resistance Alliance (NAMRA) filed a letter requesting that public comments be accepted by the Commission up until a date five weeks after the public information forums and public statement hearings are held. On April 30, 2020, the Applicants filed a letter opposing the requested extension of the public

⁸ At the procedural conference, no other party took a position on whether a hearing is required in this case. No other party raised any other procedural issues, either.

comment period, arguing that NAMRA did not explain how the cancelation of the public statement hearing relates to NAMRA's ability to participate in this proceeding and did not explain how the postponement of the Public Statement Hearings in Scotia, New York, which was intended to focus on the Preferred Alternative passing through Scotia and neighboring municipalities, affected NAMRA's ability to comment on the remaining Preferred Alternatives.

By letter filed May 1, 2020, the Sierra Club Atlantic Chapter requested an extension of the time to submit public comments, until a date that is five weeks after the Commission conducts the rescheduled public information forums and public statement hearings.

Neither NAMRA, nor the Sierra Club Atlantic Chapter, explained why the public comment period, which will extend for the pendency of this proceeding, was insufficient. Nor did they state how the proposed rerouting in the Village of Scotia would have any bearing on their comments.

Thereafter, on May 27, 2020, the Applicants filed a motion for the public statement hearings to be rescheduled expeditiously and held via video-conference. DPS Staff supported this motion. The Applicants reiterated the need for a timely Commission decision on the Amendment 2 Petition and the significant costs and scheduling delays the Applicants will incur without a timely Commission action.

On May 29, 2020, the Examiners issued a ruling truncating the time for parties to respond to the Applicants' motion, citing the time-sensitive nature of the relief sought by the Applicants and the narrow issue raised by the motion. The ALJs directed all parties to respond to the motion by June 2, 2020. No parties opposed the Applicants' motion.

On June 3, 2020, the ALJs issued a ruling denying the Applicants' motion and directing the Applicants and DPS Staff to file legal briefs by June 15, 2020, addressing whether an evidentiary hearing is required in this case by PSL §123(2). The ALJs permitted all parties to brief this question as well.

On June 15, 2020, legal briefs were filed by Applicants, DPS Staff, and the Sierra Club, Atlantic Chapter.⁹ Both the Applicants and DPS Staff argue that no hearing is required. The Sierra Club argues the Commission is obligated to hold an evidentiary hearing. The arguments advanced in the briefs are discussed below, to the extent necessary to explain the reasoning for our decision.

DISCUSSION

Public Service Law § 123(2) states that, [o]n an application for an amendment of a certificate, the commission shall hold a hearing in the same manner as a hearing is held on an application for a certificate if the change in the facility to be authorized would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application." (emphasis supplied)

⁹ On June 15, 2020, the "North American Megadam Resistance Alliance" (NAMA) filed petitions seeking an evidentiary hearing. That submission alleged that the Applicants failed to reveal all environmental impacts and details of the proposed rerouting of the Project. NAMA also asserted, without legal support, that the PSC "must hold" a full evidentiary hearing. The Sierra Club's brief also does not cite any legal authority supporting the position that an evidentiary hearing is required. Because neither NAMA nor the Sierra Club cited any legal authority for their assertions, their submissions do not warrant further discussion or consideration.

The threshold legal questions presented are whether the proposed route modifications would result in "any material increase in any environmental impact" of the facility or whether they would be "a substantial change in the location" of the Project, "other than as provided in the alternates set forth in the application."

Observing that the need for an evidentiary hearing turns on whether there are any disputed issues of material fact,¹⁰ DPS Staff argues neither of the two standards under PSL §123(2) are triggered here. Based on its thorough review of the Certified Project, the Amendment 2 Petition, and the Applicants' responses to DPS Staff's discovery requests, DPS Staff has concluded that the proposed Preferred Alternatives would not result in a material increase in environmental impacts. Instead, as DPS Staff explains, it has determined that each of the Preferred Alternatives proposed will avoid and minimize potential environmental impacts, as well as engineering constraints, from those that would be caused by the Project as currently certified.

DPS Staff further posited that, although the Preferred Alternatives will change the location of a portion of the Project, that change will not be substantial. Here, DPS Staff notes that except for the routing shift along the certificated route on a railroad corridor and streets within the Town of Glenville and City of Schenectady to another railroad corridor traversing the Town of Glenville and the Village of Scotia to the Town of Rotterdam (the "Schenectady Preferred Alternative"), each of the routing changes was considered as an alternative in the original proceeding. Staff further notes that, although the certificated route did not include any facility locations within

¹⁰ DPS Staff Br., pp. 7-8, n. 10 (citing cases).

the Village of Scotia, the proposed route location of the Schenectady Preferred Alternative varies by approximately 3.5 miles at the widest offset from the certificated route.

Staff acknowledges that the proposed relocation of facilities into the Village of Scotia would involve a distance greater than the width of the original study area, but notes that the nature and extent of probable impacts are generally similar to those associated with the certificated route and therefore do not represent a significant increase in environmental impacts.¹¹ Instead, DPS Staff states, the Schenectady Preferred Alternative is designed to reduce environmental impacts as the cable will be installed primarily within previously disturbed railroad rights-of-way. In addition, DPS Staff points out, because horizontal directional drilling will be employed to cross under the Mohawk River, that crossing will impact fewer wetlands compared to the Certified Route.

DPS Staff asserts that, while there is no "bright-line" test for what constitutes a "substantial change in location" under PSL §123(2), where the change is minimal in relation to the certificated project, it is less likely to be deemed "substantial" by the Commission for purposes of PSL

¹¹ In Case 02-T-0036, Application of Neptune Regional Transmission System LLC, the Commission determined that a hearing concerning a proposed certificate amendment was not required because that amendment would not result in any material increase in any environmental impact or a substantial change in the location of the transmission facility. The Commission found the proposed amendment was "beneficial because the change of location of Neptune's connection to the Newbridge Road substation avoids, to the extent possible, interference with other underground facilities," Order Granting Amendment of Certificate of Environmental Compatibility and Public Need (issued June 16, 2005), at 2.

§123(2).¹² In this case, DPS Staff asserts, the change in location of the Schenectady Preferred Alternative is minimal and should not be considered "substantial" when deciding whether a hearing is required.

The Applicants maintain that the route alternatives proposed in the December 6 Petition all share the common goal of avoiding and minimizing changes in location, potential environmental impacts and engineering constraints. They state that the Preferred Alternatives are sited as close as reasonably possible to the certificated route and that the Preferred Alternatives have been designed so that the impact avoidance and minimization measures already incorporated in the design process pursuant to the CECPN will continue to accomplish the goal of assuring that, consistent with PSL §126(1)(c), the Project represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives.

The Applicants state that the December 6 Petition provides a comprehensive review of the proposed route changes and assert that the Preferred Alternatives, individually and in the aggregate, create no material increase in any environmental impact associated with the Project.¹³ The Applicants point out that after two formal opportunities to raise material issues of fact with respect to the route modifications, and the opportunity to file formal briefs on the matter, not a single party has identified any material disputed facts with respect to the Proposed Alternatives.¹⁴ For these reasons, the Applicants reiterate that no hearing, evidentiary or otherwise, is required under PSL § 123(2).

¹² DPS Staff Br., p. 10 & n. 13 (citing cases).

¹³ Applicants' Br., pp. 5-6.

¹⁴ Applicants' Br., p. 1.

CONCLUSION

Based on the reasoning and conclusions of Staff, as well as the Applicants' stated position and rationale, we hold that no hearing is required. The proposed modifications to the certificated Project will not result in any material increase in environmental impacts and the proposed modifications to the previously certificated route of the Project will not result in a substantial change in the location of all or a portion of the Project. For these reasons, we conclude that, no hearing is required in this proceeding.

(SIGNED)

JAMES COSTELLO

(SIGNED)

SEAN MULLANY