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January 31, 2013

Via Electronic Mail

Hon. Jeffrey Cohen
Acting Secretary to the Commission
New York State Public Service Commission
Agency Building 3
Albany, NY 12223-1350

Re: Case 10-T-0139 Application of Champlain Hudson Power Express, Inc.
Letter in lieu of Brief Opposing Exceptions on Behalf of
Vermont Electric Power Company

Dear Acting Secretary Cohen:

On behalf of Vermont Electric Power Company (VELCO) we submit this letter in lieu of a brief opposing exceptions to address arguments concerning proposed Certificate Conditions 27 and 29 made on behalf of Central Hudson Gas & Electric Corporation (CHG&E) in Points II and III of its Brief on Exceptions (BoE). CHG&E's arguments are premised on a misunderstanding of those conditions. If CHG&E's misinterpretation of Certificate Conditions 27 and 29 were to prevail, VELCO's interests as the owner of existing, "co-located" infrastructure could be harmed. We urge the Commission to explicitly adopt the Recommended Decision's discussion at pages 122-128 and reject CHG&E's exceptions.

CHG&E argues that Certificate Condition 27 shifts from the Applicants to owners of existing utility infrastructure the risk that construction, operation or maintenance of the proposed transmission line may damage existing utility-owned infrastructure. (CHG&E BoE at 8). CHG&E also argues that Certificate Condition 29 prevents owners of existing infrastructure damaged by the Applicants "from pursuing [their] remedies in court" and imposes unreasonably burdensome requirements and limitations on owners seeking reimbursement for costs they incur due to Applicants' construction activities. (*Id.* at 5.) CHG&E makes these arguments notwithstanding its acknowledgement that "the RD and the Commission lack the authority to restrict Central Hudson's access to the courts." (*Id.* at 5.) CHG&E also suggests that signatories to the Joint Proposal have waived their rights to pursue other remedies and have agreed that the requirements of Condition 29 are prerequisites to pursuing other avenues available for seeking cost reimbursement. (*Id.* at 3.) None of these arguments has merit and all should be rejected.

Conditions 27, 28 and 29 were accepted by the Applicants as part of the “price” of obtaining an agreement by certain parties to the Joint Proposal not to contest the grant of the license Applicants are required to secure pursuant to Public Service Law Article VII in order to build and operate the Applicants’ proposed major electric transmission facility. Though these conditions address matters that are also governed by other laws – both statutory and common law – they do not limit, restrict, replace, or modify such other laws. To the extent Conditions 27, 28 and 29 create rights and impose liabilities, they can only be interpreted as creating rights and liabilities that are in addition to those created by such other laws.

Condition 27 sets a basic standard governing, as a function of their Article VII Certificate, the Applicants’ work in connection with co-located infrastructure: Applicants have committed to ensure that their project will be fully compatible with existing co-located infrastructure. The Applicants’ commitment to this standard is a product of the Article VII Certificate and enforceable by the Commission solely through the Commission’s Article VII authority. To the extent that other laws impose a higher standard on Applicants (or, inversely, grant owners of co-located infrastructure rights to demand a higher level of performance), Condition 27 may not be read to dilute such a higher standard. Subparagraphs (a) through (h) of Condition 28 impose specific obligations on Applicants to consult infrastructure owners prior to finalizing designs and beginning construction. Condition 29 imposes on Applicants certain cost reimbursement and indemnification obligations, and prescribes a process by which other infrastructure owners (whether Joint Proposal signatories or not) may secure cost reimbursement from the Applicants. If an owner of co-located infrastructure wishes to benefit from the cost reimbursement process created by Condition 29, it must follow the procedures laid out in subparagraph (c). However, like Condition 27, the reimbursement obligations imposed by Condition 29 do not supplant obligations imposed on Applicants by virtue of other laws.

Nothing in the Joint Proposal, including Condition 29, purports to limit infrastructure owners from seeking cost reimbursement through other available avenues, or to require infrastructure owners seeking indemnification to employ the Condition 29 procedures. If the law provides other avenues to obtain cost reimbursement, nothing in Conditions 27 through 29 does, or could, restrict the use of such other avenues. Nor does anything in the Joint Proposal even suggest that signatories have waived any rights they have under other laws. Waivers of existing rights must be clear and unambiguous and nothing in the Joint Proposal rises to that level. CHG&E’s suggestion that, by prescribing such a cost-reimbursement process, the Article VII Certificate imposes an exhaustion-of-remedies obligation on other infrastructure owners, whether signatories or not, is untenable. An Article VII Certificate granted to Applicants is a license authorizing the Applicants to undertake certain activities. An Article VII Certificate is not a rule “of general applicability” governing non-Applicants, including those who are signatories to a Joint Proposal. (*See* State Administrative Procedures Act, § 102 [distinguishing “rules” from “licenses”]).

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For the reasons expressed herein, VELCO urges the Commission to reject the arguments of CHG&E discussed above, and to explicitly adopt the Recommended Decision's discussion at pages 122-128.

Respectfully submitted,

John W. Dax

A large, stylized handwritten signature in black ink, appearing to read 'John W. Dax', is written over the typed name and extends upwards into the 'Respectfully submitted,' text.

JWD:lm

cc: Actives Parties