BEFORE THE
PUBLIC SERVICE COMMISSION
STATE OF NEW YORK

Application of Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the Public Service Law for the Construction, Operation and Maintenance of a High-Voltage Direct Current Circuit from the Canadian Border to New York City.	)	Case No. 10-T-0139

OPPOSITION OF CHAMPLAIN HUDSON POWER EXPRESS, INC. AND CHPE PROPERTIES, INC. TO REHEARING REQUEST OF ENTERGY NUCLEAR POWER MARKETING, LLC AND ENTERGY NUCLEAR FITZPATRICK, LLC

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Dated: July 3, 2013

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Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. (collectively, the "Certificate Holders") submit this Opposition to the Petition of Entergy Nuclear Power Marketing, LLC and Entergy Nuclear FitzPatrick, LLC (collectively, "Entergy") for Rehearing (Entergy's "Rehearing Request") of NYPSC April 18, 2013 Order Granting Certificate of Environmental Compatibility and Public Need (the "Certificate Order") pursuant to Rule 3.7(c) of the Commission's Procedural Rules, 16 N.Y.C.R.R. § 3.7(c) (2012), and the Commission's Notice of Schedule Regarding Petition for Rehearing dated June 18, 2013.

INTRODUCTION AND SUMMARY OF POSITION

In the Certificate Order, the Commission found that Certificate Holders 1,000 MW High Voltage Direct Current transmission line from Canada to Astoria, Queens, New York (the "Facility") was needed. Specifically, the Commission found that the need for the Facility was established by uncontested evidence that:

> - the Project will offer additional transmission capacity into the New York City load pocket;
>
> - by providing a link to abundant hydropower resources, the Project will significantly reduce harmful emissions and will enhance fuel diversity; and,
>
> - due to these and other characteristics, [the Project] will help achieve public policy objectives expressed in the 2009 State Energy Plan and New York City's PlaNYC, among other documents expressing State policy.[1]

The Commission also found that the environmental impacts of the Facility were minor due to the fact that its transmission cables would be constructed under water and underground and had been mitigated by certificate conditions governing the Facility's construction and operation,[2] and that captive utility ratepayers would not bear the risk of the Facility's costs, which would instead be recovered entirely from shippers using the Facility to deliver electricity to New York City.[3] Based on these findings, the Commission concluded that the Facility would serve the public interest, convenience and necessity as required by section 126(1) of the Public Service Law ("PSL") and issued a certificate of environmental compatibility and public need (the "Certificate") authorizing

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[1] Certificate Order, slip op. at 22.

[2] *Id*., slip op. at 98.

[3] *Id*., slip op. at 83.

Certificate Holders to construct and operate the Facility. Entergy seeks rehearing of the Commission's decision to issue the Certificate on several grounds, each of which is without merit for the reasons set forth below.

ANALYSIS

I. THE COMMISSION CORRECTLY FOUND THAT THE FACILITY WILL BE DEVELOPED ON A MERCHANT BASIS

The central thrust of Entergy's initial argument on rehearing is that the Commission erred in classifying the Facility as a merchant project because "if the [Facility] qualifies as merchant, it escapes the more stringent Commission scrutiny that attends regulated transmission projects."[4] Significantly, however, Entergy makes no effort whatsoever to specify precisely what "more stringent" scrutiny it believes the Commission is required to apply to regulated transmission projects or how that level of scrutiny would differ from the detailed administrative review of the projected financial viability of the Facility that Entergy claims the Commission was required undertake before it issued a Certificate for the construction of the Facility on a merchant basis. As part of this claim, Entergy also contends that the Commission erred in failing to place the burden of proof with respect to forecasting the economic performance of the Facility on the Certificate Holders.

Contrary to Entergy's claims, the Commission properly found that Certificate Holders have demonstrated that the Facility will be developed on a merchant basis because it cannot be developed without passing a "market test" of its financial viability.

[4] Entergy Rehearing Request at 6.

The Commission also properly rejected Mr. Younger's distorted forecasts of the costs and revenues of the Facility for the reasons noted below.

A. The Commission Properly Found That The Facility Will Be Developed On A Merchant Basis

In granting the Certificate, the Commission succinctly explained what it meant to be a merchant project, holding that:

> [A] project is non-merchant if its investors are seeking cost recovery through regulated cost-of-service rates and merchant when they are seeking to recover their costs through wholesale power transactions.[5]

The Commission also explained that because Certificate Holders have agreed that, with one limited exception,[6] the financing for the Facility would be provided by investors without reliance on cost-of-service rates, captive ratepayers have nothing to lose and much to gain by granting the Facility the opportunity to go forward:

> [B]y granting the Facility a a certificate, we are providing its investors with the option to move forward with

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[5] Certificate Order, slip op. at 83.

[6] In the Certificate Order, the Commission rejected the claims of IPPNY and Entergy that Certificate Holders' limited reservation of the right to impose cost-based rates on free riders on the Astoria-Rainey HVAC cable precludes a finding that the Facility is being developed on a merchant basis. Specifically, the Commission ruled that:

> Entergy makes no attempt to explain how provisions that prevent free ridership on the HVAC Astoria-Rainey Cable by virtue of cost-based FERC rates and that avoid constraining the existing capacity of Astoria Energy II can have any possible adverse consequences for the public interest; nor does it explain how ratepayer subsidy of the Astoria-Rainey cable is possible, given that the costs of the cable will be subject to regulatory scrutiny by us (via the filing provision of Condition 15) and also by FERC.

Certificate Order at 83. Contrary to Entergy's claim in footnote 12 of its Rehearing Request, the Commission did not "gloss over" the fact that Certificate Holders retained these limited rights with respect to free riders on the HVAC Astoria-Rainey Cable. Rather, as explained in the excerpt from the Certificate Order provided above, the Commission found that this reservation of rights was limited in scope and subject to review by both the Commission and FERC and, consequently, cannot result in any meaningful ratepayer subsidy of the Facility as a whole.

> construction of the Facility if circumstances such as a revised gas price forecast lead its investors to believe that it will be an economic project. As we explain below, the Project is in the public interest because its non-monetary benefits outweigh its environmental harm. This weighing of the Project's non-monetary aspects holds irrespective of any conclusion we make on the economics of the Project. If the economics are positive and the Project is built, then society will be better off for it, because of the important non-monetary benefits. If the economics become worse and the Project never gets underway, then no harm will come of our decision to grant the Facility a certificate.[7]

The Commission's decision to rely on competition and market mechanisms rather than on administrative litigation to assess the financial viability of the Facility is also entirely consistent with numerous Commission orders granting lightened regulation to wholesale merchant generators. In these orders the Commission has consistently ruled that competition and market mechanisms will protect captive retail customers from any poor investment decisions made by such entities and, hence, that there is no need for the Commission to conduct the detailed administrative review of such decisions that Entergy demands in this case. For example, in *Carr Street Generating Station, L.P.*, the Commission ruled that:

> These provisions were intended principally to prevent financial manipulation or unwise financial decisions that could adversely impact rates paid by customers of monopoly service providers. So long as there is an effectively competitive wholesale generation market, the public interest does not require that we investigate the financial manipulation or poor financial management of wholesale generators. We do not regulate the wholesale rates these providers charge, and the market will prevent

[7] Certificate Order, slip op. at 41.

> them from charging higher electric rates even if their costs rise due to their poor management.[8]

The Commission has made similar rulings in granting lightened regulation to numerous other wholesale merchant generators. Entergy has failed to provide any justification whatsoever for its contention that the Commission should abandon in this case its long-standing reliance on competition and market mechanisms to guide investment decisions in competitive wholesale power markets, while continuing to allow Entergy and other merchant generators to make similar financial decisions without the strict scrutiny that Entergy seeks to impose on Certificate Holders in this case.

Entergy's failure in this regard is hardly surprising. The only purpose that could possibly be served by subjecting Certificate Holders to the "more stringent scrutiny" demanded by Entergy would be to enable Entergy and other incumbent generators to erect an artificial barrier to new entry into the wholesale energy markets they serve. As the Commission recognized in another portion of the Certificate Order, any such unnecessary barrier to entry would constitute a clear and present danger to the proper operation of the competitive wholesale power markets that the Commission has consistently supported for many years:

> The single most important characteristic of a competitive market is ease of entry by new suppliers. One potential entry barrier is the siting process itself and the requirement that a potential new entrant, such as the Facility, obtain a certificate. One way to truly harm competitive markets is to

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[8] Case 98-E-1670, *Carr Street Generating Station, L.P. – Petition for an Original Certificate of Public Convenience and Necessity and For a Declaratory Ruling On Regulatory Regime*, Order Providing For Lightened Regulation, slip op. at 9 (Issued and Effective April 23, 1999).

> deny potential suppliers the certificates they need without having a strong basis for doing so.[9]

Accordingly, the Commission acted properly to promote competition in wholesale markets when it ruled that because Certificate Holders and their financial backers are required to assume responsibility for the Facility's future economic viability, there is no need for the Commission to undertake the administrative review of the wisdom of investment in the Facility demanded by Entergy.

B. The Commission Properly Discounted Mr. Younger's Forecasts Of The Financial Viability Of The Facility

In addition to basing its finding of a need for the Facility on the non-economic factors discussed above and on Certificate Holders' undertaking to develop the Facility on a merchant basis without reliance on cost-based rates, the Commission also rejected the analyses of the economics of the Facility put forth by Mr. Younger. For the reasons set out below, Entergy's Rehearing Request fails to demonstrate any error of law or fact in the Commission's rejection of Mr. Younger's testimony in these areas.

1. The Commission Properly Rejected Mr. Younger's Forecasts Of The Facility's Production Cost Savings

The Commission received conflicting testimony from a number of experts, including Mr. Younger, DPS Staff economist Dr. Thomas Paynter and Ms. Julia Frayer of London Economics concerning the production cost savings likely to result from construction and operation of the Facility. The Commission began its review of this

[9] Certificate Order, slip op. at 50.

conflicting testimony by observing that all projections of the future economics of the Facility were inherently uncertain:

> First, it must be emphasized that no one can make any definitive statements about the future economics of the Facility. One can only talk about the future in terms of forecasts that are made at this point in time and the likelihood that the economics of the Facility may actually turn out to be better than forecasted or worse than forecasted. We must therefore recognize the role that uncertainty plays in the investment decisions of potential developers.[10]

After carefully reviewing each of these experts' conflicting testimony concerning the production costs likely to result from the Facility, the Commission concluded: (1) that all of these forecasts were based in large part on expectations concerning the future price of natural gas; and (2) that the uncertainty inherent in all such forecasts made it impossible for the Commission to conclusively say that any of these forecasts was correct:

> Based on the information available to us, we find the production cost savings estimates to be inconclusive, as the results of such an analysis depend very heavily on, among other things, the trajectory of actual gas prices. As was clear from the record and is well understood within this Commission's experience, gas price forecasts can change dramatically in a very short time.[11]

In its Rehearing Request, Entergy makes no effort to come to grips with this determination and instead merely reiterates its previously-rejected claims concerning the alleged merits of the forecasts of the Facility's economic performance offered by Mr. Younger. Because Entergy completely fails to address the fundamental basis of the

[10] Certificate Order, slip op. at 38

[11] *Id*., slip op. at 41.

Commission's findings with respect to the need for the Facility, and because the Commission's rejection of Mr. Younger's opinion testimony is reasonable and supported by substantial evidence in the record in this proceeding, Entergy's Rehearing Request must be rejected.

2. The Commission Properly Rejected Mr. Younger's Forecasts Of The Facility's Cash Flow

The Certificate Order also rejected Mr. Younger's cash flow projections for the Facility based on the Commission's finding that those projections relied on historic bus prices that failed to account for future changes in market conditions:

> IPPNY's revenue/cash flow analysis cannot be relied upon because it keyed on historical bus prices instead of forecasted bus prices. Historical bus prices fail to capture key future factors such as gas price forecasts, and, as Staff points out, the historical bus prices used by IPPNY were artificially depressed by the recent recession.[12]

Entergy's only response to this finding is to argue: (1) that it represented an "implicit" finding that if Mr. Younger had used forecasted bus prices, his analysis would have shown the Facility to be economic; and (2) that there was no evidence in the record to support such a finding.[13]

Entergy's claims in this regard completely misconstrue the Commission's primary finding in this portion of the Certificate Order, which was simply that forecasts of the financial viability of any commercial enterprise may vary widely and the only forecasts that truly matter in this case are those of the Facility's financial backers. Thus, contrary

[12] *Id*., slip op. at 41-42.

[13] Entergy Rehearing Request at 9.

to Entergy's claims, the Commission made no "implicit" findings whatsoever concerning what Mr. Younger's projections might have shown if he had used forecasted rather than bus prices. Rather, as previously explained, the Commission found that because Certificate Holders have agreed to finance the project on a merchant basis, captive retail consumers are fully protected by competition and market mechanisms from bearing any of the risks of this decision. Accordingly, the Commission correctly concluded that there was no need to address Entergy's concerns with respect to the wisdom of such financial decisions in this proceeding.

II. THE COMMISSION IS NOT REQUIRED TO RULE ON THE ECONOMICS OF A MERCHANT FACILITY

Entergy begins this portion of its Rehearing Request by admitting that the requirements that the Commission must determine the basis of the need for the facility[14] and that the facility will serve the public interest, convenience and necessity[15] are "somewhat interrelated."[16] Entergy then goes on to boldly complain that "[t]he utter marginalization of the Project's economics [in the Certificate Order] is unprecedented in Article VII jurisprudence" and that the Commission has "collapsed [these two allegedly separate tests] into a single, low standard."[17] The result of this, according to Entergy, is that the Commission has essentially "neutered" Article VII and "impermissibly limited its

[14] N.Y. Pub. Serv. L § 126(1)(a).

[15] N.Y. Pub. Serv. L. § 126(1)(d)(2).

[16] Entergy Rehearing Request at 16-17.

[17] *Id*. at 18.

scope to environmental concerns."[18] Entergy further contends that Commission's reliance on its previous orders in the *Bayonne*[19] and *HTP*[20] cases to support the conclusions reached in the Certificate Order is misplaced.[21]

Certificate Holders would note at the outset that these claims provide no basis for overturning the Certificate Order so long as that order is supported by substantial evidence and is not arbitrary, capricious or beyond the Commission's authority under the PSL.[22] In this portion of its Rehearing Request, Entergy does not appear to be challenging the evidentiary basis for the Commission's actions. Nor has Entergy identified any specific provision of the PSL that it claims would expressly require the Commission to make an administrative determination of the financial viability of any

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[18] *Id*.

[19] 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 and Effective November 12, 2009) ("*Bayonne*").

[20] Case 08-T-0034, *Application of Hudson Transmission Partners, LLC for a Certificate of Environmental Compatibility and Public Need for a 345 kV Submarine/Underground Electric Transmission Link Between Manhattan and New Jersey*, Order Granting Certificate Of Environmental Compatibility And Public Need (Issued and Effective September 15, 2010) ("*HTP*").

[21] In the preamble to section II of its Rehearing Request, Entergy also contends in passing that because Certificate Holders have no contracts at this time for use of the Facility by Hydro-Québec or any other shipper, there is no "tangible proof" that the Facility can deliver the non-monetary benefits found by the Commission or "even a single MW of hydropower." Because the Commission affirmed the findings in the Recommended Decision in this case with respect to these non-monetary benefits, and because Entergy failed to preserve this claim in its Brief on Exceptions, Entergy's claims in this regard are barred by section 4.10(d)(2) of the Commission's Procedural Rules, 16 N.Y.C.R.R. § 4.10(d)(2) (2012).

Moreover, Entergy directly contradicts this contention later in its Rehearing Request, where it correctly points out that the response of Hydro-Québec Production ("HQP") to Governor Andrew Cuomo's "Energy Highway Initiative" Request for Information clearly establishes that HQP is committed to using the Facility to ship at least 750 MW of hydroelectric power to markets in New York City. *See* Entergy Rehearing Request at 11; Hearing Exhibit 213.

[22] *See* N.Y. Pub. Serv. L. § 128(2).

major transmission facility to which it proposes to grant an Article VII certificate.[23] Accordingly, Certificate Holders understand Entergy's claim to be that the Commission acted arbitrarily and capriciously by departing from what Entergy appears to claim to be previous Commission precedents without explaining its reasons for so doing.[24] For the reasons noted below, any such claim is once again so completely out of touch with reality as to be objectively baseless.

A. The Commission And The Siting Board Have Granted Numerous Certificates Of Environmental Compatibility And Public Need Entirely On The Basis Of Non-Economic Benefits

Contrary to Entergy's claims, the Commission has granted numerous Article VII certificates without undertaking the kind of analysis of project economics that Entergy demands in this case. For example, in its Opinion No. 91-3, the Commission issued an Article VII certificate for the construction of the Empire State Pipeline (the "Empire Pipeline") without giving any consideration to the economics of that proposed major transmission facility. Instead, the Commission found that the increased competition that the Empire Pipeline would provide was desirable and sufficient in and of itself to justify approval of that facility:

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[23] Entergy's claim in the heading of section II on page 16 of its Rehearing Request that the Commission "exceeded its statutory authority" by lowering the bar for obtaining an Article VII certificate is not supported by any references to any specific statutory provisions that could conceivably support a claim that the Commission is precluded from relying on competition and market mechanisms and must instead rely only on administrative litigation to determine whether any proposed project should be regarded as a merchant facility. Instead, as noted above, the contentions Entergy advances in this portion of its Rehearing Request are better characterized as claiming that the Commission's decision to rely on competition and market mechanisms rather than administrative litigation to determine the financial viability of the Facility somehow constitutes an arbitrary, capricious, and unexplained departure from what it erroneously claims to be prior Commission precedent.

[24] *See* N.Y. Pub. Serv. L. § 128(2)(e).

> As Judge Moynihan pointed out, the term "need" is not defined in Article VII. Therefore, it is within Commission discretion to determine whether need for the Empire pipeline has been demonstrated. In determining need for the line, we must consider the role the line would play in promoting the overall energy policies of the state, which include encouraging competition.
>
> In this case increased demand for some additional pipeline capacity in western New York has been demonstrated by the [State Energy Office] study. More significantly, we agree with Judge Moynihan's finding that the Empire line is needed in part because Empire will introduce competition into the gas transportation market. Although one cannot predict exactly what effect competition will have on prices, New Yorkers clearly will benefit from the additional gas transportation option provided by Empire. *In the wake of movement toward deregulation of the gas industry, competition itself is desirable and justifies a finding of need.*[25]

The *Empire Pipeline* case is directly on point, as it also involved efforts by existing suppliers – like Entergy – to protect their markets from competition by a new entrant – such as the Facility.[26] Thus, the Facility is similar to the Empire Pipeline, in that it too will benefit consumers by providing increased competition in the markets it serves.[27]

The Commission has also issued Article VII certificates to many other major transmission facilities without conducting any review whatsoever of project economics. For example, in Case 99-T-0977, the Commission found that the public interest,

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[25] Case 88-T-132, *Application of Empire State Pipeline for a Certificate of Environmental Compatibility and Public Need authorizing the construction of a natural gas pipeline pursuant to Article VII of the Public Service Law*, Opinion And Order Granting Certificate Of Environmental Compatibility And Public Need, Opinion No. 91- (Issued and Effective March 1, 1991) (emphasis supplied) ("Opinion No. 91-3").

[26] *See* Opinion No. 91- 3 ("Dismissing CNG's argument as merely an effort to preserve its captive market, staff contends also that alternative gas transportation service provides New Yorkers the benefit of being able to choose with whom they contract for gas.").

[27] *See* Certificate Order, slip op. at 54 ("[B]y allowing a new entrant into the New York City market, approval of the Project would advance our policy favoring competition.").

convenience and necessity justified issuance of an Article VII certificate for the construction of a natural gas pipeline proposed by Nornew Energy Supply, Inc. ("NES") because that facility was needed to deliver natural gas to the Jamestown Board of Public Utilities ("JBPU"):

> The facility proposed by Nornew will serve the public convenience and necessity because it will enable JBPU's generating facility to receive gas in a timely manner.[28]

Similarly, in Case 10-T-0350, the Commission found that a gathering pipeline proposed by Laser Pipeline (the "Laser Line") was needed "to transport natural gas from certain Marcellus shale formation gas wells in Pennsylvania, nine recently drilled Alta gas wells and nine proposed Alta gas wells, to Certificate Holders' proposed Dunbar Compressor Station Facility located in the Town of Windsor, and connect to the existing Millennium Pipeline in New York State."[29] The Facility is similar to the NES pipeline and the Laser Line, in that it will permit consumers in New York City and surrounding areas to receive clean, low-cost electric power from Hydro-Québec in a timely manner.

Similarly, in Case 03-T-0515, the Commission issued an Article VII certificate for the construction of a new 230 kV overhead electric transmission line that would connect the Flat Rock Wind Farm to the New York State Transmission System. Once

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[28] Case 99-T-0977, *Application of Nornew Energy Supply, Inc. for a Certificate of Environmental Compatibility and Public Need for the Construction of a natural gas pipeline, of approximately 7.39 miles of 8 inch steel pipeline, to be located in the Towns of Ellicott and Gerry, and the City of Jamestown, Chautauqua County*, Order Granting Certificate Of Environmental Compatibility And Public Need, slip op. at 8 (Issued and Effective January 13, 2000).

[29] Case 10-T-0350 – *Application of DMP New York, Inc. and Laser Northeast Gathering Company, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII to Construct a 16 Inch Natural Gas Gathering Pipeline to the Existing Millennium Pipeline in the Town of Windsor, Broome County Approximately 51,857 feet of Steel Coated Pipeline and a Gas Compressor Station*, Order Granting Certificate Of Environmental Compatibility And Public Need, slip op. at 3-4 (Issued and Effective February 22, 2011).

again, the Commission conducted no review whatsoever of the economics of that new transmission facility in its order issuing that certificate. The Commission found instead that this new transmission line was needed because it would deliver power from the Flat Rock Wind Farm into the New York State Transmission System and was consistent with both the transmission planning requirements of the New York Independent System Operator, Inc. ("NYISO") and with the New York State Energy Plan:

> The transmission facility proposed by the applicant is needed to connect the Flat Rock Wind Power generation facility to the State's electric system. The facility is consistent with the New York State Independent System Operator's transmission planning for the New York State bulk power system, and with the 2002 New York State Energy Plan, which sets forth the State's energy policies and long-range planning objectives and strategies.[30]

The Facility is similar to the transmission line approved in the *Flat Rock* case, in that it is needed to directly connect the Astoria Annex in New York City to the bulk power system operated by Hydro-Québec TransÉnergie in Canada and has been found to be consistent with both the transmission planning requirements of the NYISO and with the latest New York State Energy Plan.[31] However, the long-term impact of the Facility on the human environment will be substantially less than that of the overhead transmission line at issue

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[30] Case 03-T-0515, *Application of Flat Rock Wind Power, LLC for a Certificate of Environmental Compatibility and Public Need for the construction of an Approximately 10.3 Mile Long 230 Kilovolt Electric Transmission Line in the Towns of Martinsburg and Watson, Lewis County*, Opinion And Order Adopting Joint Proposal And Granting Certificate Of Environmental Compatibility And Public Need, Sip Op. at 20 (Issued and Effective April 12, 2004).

[31] Certificate Order, slip op. at 73 n.127, 98.

in the *Flat Rock* case, due to the fact that the Facility's cables will be installed entirely underground or under water.[32]

Moreover, the New York State Board on Electric Generation Siting and the Environment (the "Siting Board") has also granted certificates of environmental compatibility and public need under former Article X for the construction of a number of merchant generating facilities. The "need" and "public interest" findings required for the issuance of such certificates X were substantially identical to the similar requirements under Article VII. The Siting Board routinely found such merchant generating facilities to be needed without undertaking the kind of detailed administrative inquiry into project economics that Entergy demands in this proceeding. For example, in granting an Article X certificate to KeySpan Ravenswood, Inc. for the construction of a 250 MW generating facility in Astoria, Queens, New York, the Siting Board found that this proposed new facility was needed solely because of the reductions in air emissions that new clean gas-fired generating facility would produce:

> For the reasons set forth in this Opinion and the examiners' Recommended Decision, the proposed facility, if constructed and operated in accordance with all the Certificate conditions set forth in Appendix B of this Opinion and the terms of permits issued by other agencies, will be in the public interest, considering the environmental impacts of the proposed facility and the reasonable alternatives examined [PSL §168(2)(e)].[33]

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[32] *Id*. at 98.

[33] Case 99-F-1625, *Application by KeySpan Energy for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 250 Megawatt, Cogeneration, Combustion Turbine Electric Generating Facility to be Developed at the Existing Ravenswood Generating Station in Long Island City, Borough of Queens,* Opinion And Order Granting Certificate Of Environmental Compatibility And Public Need, slip op. at 27 (Issued and Effective: September 7, 2001) (parenthetical in original).

The Siting Board granted similar certificates to a number of other merchant generating facilities on substantially identical grounds.[34] The Facility is similar to these merchant generating facilities in that, if constructed and operated in accordance with all of the terms set forth in its Certificate, the Facility will provide substantial uncontested environmental benefits to consumers in New York City and surrounding areas.

Thus, to the extent that Entergy is claiming that the Certificate Order represents an unexplained departure from prior Commission precedent, that claim cannot be reconciled with the reality of the Commission decisions cited above. In fact, these cases make clear that if Entergy's claim that the Commission must review the economic viability of the business plans of lightly regulated entities were adopted by the Commission in this case, that action would constitute an unexplained departure from these precedents.

B. The Certificate Order Is Entirely Consistent With The Commission's Decisions In *Bayonne* And *HTP*

As the foregoing analysis makes clear, Entergy's claim that the Commission's "utter marginalization" of the Facility's economics in the Certificate Order is "unprecedented in Article VII jurisprudence"[35] is completely out of touch with the reality of both the Commission's decisions under Article VII and the Siting Board's decisions

[34] *See, e.g., Case 00-F-0566, Application of Brookhaven Energy Limited Partnership for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 580 Megawatt Electric Generating Facility in the Town of Brookhaven, Suffolk County*, Opinion And Order Granting Certificate Of Environmental Compatibility And Public Need, slip op. at 84 (Issued and Effective: August 14, 2002) ("For the reasons set forth in this decision and the examiners' Recommended Decision, the construction and operation of the Project, if constructed and operated in accordance with all Certificate terms set forth in this decision and the terms of permits issued by other agencies is in the public interest, considering the environmental impacts of the facility and reasonable alternatives. [PSL §168(2)(e)]") (parenthetical in original).

[35] Entergy Rehearing Request at 17.

under the substantially identical provisions of former Article X. It should therefore come as no surprise that Entergy's analysis of the Commission's decisions in *Bayonne* and *HTP* is equally out of touch with reality.

1. The Certificate Order is entirely consistent with the Commission's decision in the *Bayonne* case.

Entergy's claim that the Commission applied a "production cost savings analysis" to the merchant transmission facility at issue in the *Bayonne* case is simply not true. In fact, the words "production cost" do not appear anywhere in that order. Instead, the Commission's order in Bayonne makes clear that the Commission awarded a certificate to *Bayonne* for reasons that are virtually identical to its reasons for awarding the Certificate in this proceeding. Specifically, the Commission ruled in *Bayonne* that the Bayonne Energy Center ("BEC") project met the Article VII need standard based on a number of factors, including: (1) system reliability benefits; (2) wholesale energy price benefits for consumers and New York State; and (3) achievement of public policy goals including environmental benefits. With respect to reliability, the Commission ruled that:

> [T]he BEC project will provide an additional source of supply in the event that other expected generation and transmission projects are not completed as projected, generation retires or is unavailable as a result of relicensing disapproval, emissions control requirements such as compliance with the Clean Air Act National Ambient Air Quality Standards or the effects of possible changes in state and federal climate change/greenhouse gas emission regulation and legislation, or for any other reason. The BEC project will provide significant capacity and energy benefits. Although the BEC generating facility is located in New Jersey, it is electrically interconnected directly with Con Edison's system at its Gowanus Substation in Brooklyn. Therefore, the NYISO will consider the BEC project to be in-city generation and it will be counted

> toward the New York City 80% Locational Capacity Requirement.[36]

With respect to the impact of the Bayonne facility on wholesale energy prices, the Commission found that:

> BEC will provide economic benefits for New York City consumers as a result of the addition of in-city generation. The facility is expected to displace older, less efficient generation, leading to reduced energy prices. If the resource is counted in the installed capacity market, there could be capacity price benefits as well. The addition of the BEC facility promotes competitive wholesale markets and helps reduce the market power of incumbent generators. The BEC facility is a merchant project. No ratepayer funding is being sought. Therefore, any and all favorable impacts − reliability, economic or environmental − benefit New York without imposing additional risk on electric ratepayers.[37]

With respect to environmental benefits, the Commission found that:

> From an environmental perspective, the addition of the BEC Project will provide the option of meeting the City's electricity needs with a cleaner generation mix than presently available. Adding new generation at a rate greater than the rate of electric demand growth will likely result in the displacement of older, inefficient generation, especially on High Energy Demand Days. The draft State Energy Plan emphasizes in-state generation, but also generally supports improving the efficiency of generation and reducing emissions through new, cleaner technologies, without restricting that goal to generation located in New York State. BEC's operation should result in a decline from the present annual NO_x emissions in New York City by 12% (349 tons); SO_2 emissions by 25% (104 tons), and CO_2 emissions by 5% (407,000 tons).[38]

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[36] Bayonne Order, slip op. at 13.

[37] *Id*.

[38] *Id*. at 13-14.

Entergy's claim that the Commission's decision in *Bayonne* was somehow based on an analysis of the "production cost savings" anticipated to flow from that facility is therefore completely untrue.

Moreover, the uncontested evidence in the record in this proceeding clearly demonstrates that, like BEC, the Facility: (1) will provide an additional source of energy supply into the New York City load pocket;[39] (2) will displace older, less efficient generation, leading to reduced energy prices and, if counted in the installed capacity market could produce capacity benefits as well;[40] and (3) will result in substantial reductions in emissions of SO_x, NO_x and CO_2 in New York City and surrounding areas.[41] Thus, contrary to Entergy's claims, the Commission would have impermissibly departed from the precedent set in its decision in *Bayonne* if it had failed to grant an Article VII certificate to Certificate Holders in this proceeding.

2. The *HTP* case did not involve a merchant transmission facility.

Entergy's claims with respect to the *HTP* decision are also flawed, but for very different reasons. To begin with, the facts in *HTP* make clear that its facility was not developed on a merchant basis without reliance on cost-based rates or contracts with utilities operating under cost-based rates, as Certificate Holders have agreed to do. Instead, Commission expressly found that the HTP project would be supported by a contract awarded to it by the New York Power Authority ("NYPA"):

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[39] Certificate Order at 3.

[40] *Id.* at 30-31.

[41] *Id.* at 23.

> When asked about the project's financial arrangements, [HTP's CEO] stated that HTP, as a development company, has spent millions of dollars to develop the project. Ultimately, HTP intends to have a contract with NYPA that will permit it to finance the HTP project in the capital markets that provide debt and equity financing.[42]

As a result, the *HTP* case cannot possibly stand for the proposition that merchant transmission projects must be required to pass a "production cost" test, since that case did not involve a merchant transmission facility.

Rather, when the Commission's decisions in *HTP* and *Bayonne* are compared, they are proof of the validity of Entergy's claim that the Commission has subjected regulated transmission projects to "more stringent scrutiny" than merchant projects.[43] Unfortunately for Entergy, however, these cases also make clear that this "more stringent scrutiny" involves nothing more and nothing less than subjecting regulated transmission projects to the administrative review of their production cost savings that Entergy demands be applied to Certificate Holders' merchant facility in this proceeding.[44] Entergy's demand that the Commission also apply this "production cost" test to Certificate Holders' merchant facility must therefore be rejected as conflicting with the Commission's established precedents in this area, under which only regulated transmission projects are subjected to a production cost test.

Moreover, the Commission made clear in the *HTP* decision that notwithstanding the contractual support that HTP received from NYPA, its finding of a need for that non-

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[42] HTP Order, slip op. at 63 (footnotes omitted).

[43] Entergy Rehearing Request at 6.

[44] This makes perfect sense, as regulated transmission facilities are developed on a cost-of-service basis and therefore are not subject to the "market test" of their financial viability applicable to all merchant facilities.

merchant project was based on an examination of a number of factors other than the production cost savings that Entergy falsely claims are at the heart of the Article VII need determination in this case. Specifically, the Commission ruled in the *HTP* case that:

> For our purposes pursuant to PSL Article VII, need is determined by examining numerous factors, including system reliability benefits, economic benefits for customers and the State, and the achievement of public policy goals.

With respect to the system reliability benefits of the HTP project, the Commission found that:

> [W]e find that the facility is needed to provide a useful, bulk transmission connection to the PJM region — a regional interconnection that will improve electric system reliability and promote network security. The bulk transmission system that enters New York City from all directions is constrained, such that currently 80% of the generation to meet peak New York City energy requirements must be located within the City to serve its load reliably. Beyond any reasonable doubt, the HTP facility can be used productively to alleviate the existing constraints on the transmission system serving New York City.[45]

With respect to the HTP project's economic benefits, the Commission ruled that:

> We find that New York City consumers can expect to obtain savings as a result of the operation of the HTP facility by importing lower cost power from PJM. In addition, the electric energy available from this facility can lower the in-City market clearing prices during the unconstrained hours during which competitive market forces establish the price for such facilities in the New York City energy market and this benefit inures to customers. Staff has estimated that these benefits could be

[45] *Id*., slip op. at 42 (footnote omitted).

> as much as $1.763 billion. Also, the economic risks of this project will not be borne by public utility ratepayers.[46]

The Commission followed this discussion with a statement that the HTP project "sufficiently passes" what it described as the "production cost test" based on Staff's testimony that the HTP project's would produce a net production cost savings of $174 million over the course of its 40-year useful life.[47] In a subsequent passage, the Commission rejected the lower estimates of HTP's production cost savings proffered by IPPNY as not "dispositive."[48] Thus, contrary to Entergy's claims, the issue of production cost savings played little or no role in the Commission's decision to certify the HTP project, notwithstanding NYPA's direct contractual involvement with that project.

On the issue of public policy goals, the Commission ruled that:

> [W]e are aware of NYPA's statutory duty and public responsibility to provide sufficient and adequate electricity for the governmental customers in its charge. NYPA must plan for their requirements and it is responsible for providing safe and reliable service to the City of New York, the MTA and the Port Authority, among others. The record reflects the results of NYPA's energy planning process culminating in the selection of the HTP facility.[49]

Thus, while the Commission's grounds for issuing an Article VII certificate for the construction of HTP's regulated transmission facility differed in detail from its grounds

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[46] *Id*., slip op. at 44-45.

[47] *Id.*

[48] *Id*. at 45.

[49] *Id*., slip op. at 46.

for issuing the Certificate in this proceeding, the Commission's decision in the *HTP* case is entirely consistent with its decision to issue the Certificate in this proceeding.

III. THE FACILITY WILL NOT HARM COMPETITION IN WHOLESALE ELECTRIC POWER MARKETS

Entergy advances two very different claims in this section of its Rehearing Request. First, Entergy claims that the Facility will harm competitive markets because it will constitute subsidized uneconomic entry. Second, Entergy claims that the Facility will harm consumers in upstate New York by diverting low-cost Canadian hydroelectric power to New York City that would otherwise be sold to consumers in upstate New York. Both these claims are wholly without merit for the reasons noted below.

A. Entergy's Claim That The Facility Will Constitute Subsidized Uneconomic Entry Is Wholly Without Merit

At the hearing in this proceeding, IPPNY and Entergy both contended that the Commission should refuse to issue an Article VII Certificate for the Facility in order to protect incumbent generators serving the New York City market from what they perceived to be the threat of subsidized uneconomic entry. In the Certificate Order, the Commission rejected this claim on several grounds. To begin with, the Commission recognized that blocking entry into otherwise competitive wholesale power markets at the request of incumbent suppliers such as IPPNY and Entergy poses a threat to competitive markets that dwarfs the threat to such markets posed by subsidized uneconomic entry:

> The single most important characteristic of a competitive market is ease of entry by new suppliers. One potential entry barrier is the siting process itself and the requirement that a potential new entrant, such as the Facility, obtain a certificate. One way to truly harm competitive markets is to

> deny potential suppliers the certificates they need without having a strong basis for doing so.
>
> Opponents in this case ask us to deny the Facility a certificate because of the alleged possibility that the Facility will become part of a buyer market power scheme to artificially drive down New York City wholesale electric prices. Buyer market power problems tend to be rare and therefore do not need entry-blocking actions that cause more harm than good.[50]

The Commission then went on to explain that Entergy's concerns about uneconomic entry were premature, since the Commission's continuing jurisdiction over Con Edison provided it with ample authority to ensure that Con Edison would not enter into any such anticompetitive agreements:

> Moreover, even if we were concerned about buyer market power in this case, we need not act now, at the siting stage of the process, to prevent hypothetical exercise of future buyer market power, since we can act later. Specifically, the single largest buyer of market-based electricity in New York City, Con Edison, would have to pass muster with us in the form of a prudence review, were it to later enter into a contract with a shipper such as HQ. Were Con Edison to pay above-market prices in such a contract, we have the authority to find the overpayments to be imprudent. This regulatory power enables us to protect the market from buyer overpayments by Con Edison.[51]

The Commission also found that incumbent generators were fully protected from any threat of uneconomic entry by the installed capacity mitigation measures in the NYISO's Open Access Transmission Tariff ("OATT").[52] The effectiveness of these

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[50] Certificate Order, slip op. at 50.

[51] *Id*., slip op. at 50-51.

[52] *Id*., slip op. at 51 ("Furthermore, as the Applicants have noted, the NYISO has buyer market power mitigation measures in place, approved by FERC, and fully tested, whose sole purpose is to protect markets

NYISO mitigation measures is clearly established in the record in this proceeding by two sworn statements filed with the Federal Energy Regulatory Commission ("FERC") by Mr. Younger himself. Specifically, Mr. Younger informed the FERC in those sworn statements that the mitigation measures proposed by NYISO to address the threat of uneconomic entry were "generally sound in principle," that those measures "will provide a reasonable framework over the long run to deter further uneconomic entry,"[53] and that those tariff provisions "meet [FERC's] directive to provide a level of compensation that will attract and retain needed infrastructure and thus promote long-term reliability while neither over-compensating nor under-compensating generators."[54]

In addition, the Commission found in the Certificate Order that the Facility would promote competition by reducing the concentration of ownership of electricity supply in New York City. This finding too is supported by substantial evidence in the record in this case in the form of Mr. Younger's testimony before the Siting Board in Case 01-F-1276 concerning the benefits of the 1,000 MW TransGas cogeneration facility:

> The addition of the TransGas facility makes a significant contribution towards moving the NYC market towards being unconcentrated. The Facility, therefore, will promote competition in a significant way.[55]

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from buyer market power. Therefore, if the future entry of the Facility were to occur in the form of an alleged instance of buyer market power, the FERC-approved mitigation measures will be available to prevent damage to the market.").

[53] Hearing Exhibit 159 at 2, 4-5.

[54] Hearing Exhibit 160 at 2.

[55] Hearing Exhibit 164 at 13, lines 11-14.

Weighing all this evidence, the Commission reasonably concluded that the cause of promoting competition in New York's wholesale markets would be better served by granting the Certificate than by withholding it:

> In summary, the goal to have markets in New York that are more competitive rather than less competitive is well served by granting the Facility a certificate that is a prerequisite to entering the market. It would be folly to raise entry barriers by barring the entry of this new competitor, especially at the siting stage, out of a concern that doing so is needed to prevent the speculative potential for future buyer market power.[56]

Entergy's claims that this analysis constitutes an "oversimplification" that "fails to give meaningful consideration to the risks to competitive wholesale markets" posed by certificate of the Facility[57] can only be described as completely out of touch with reality. Entergy's insistence that the Commission must address the issue of uneconomic entry in this Article VII siting proceeding completely ignores the Commission's findings of: (1) the serious threat to competition posed by Entergy's proposal: (2) the existence of mitigation measures in the NYISO OATT which Mr. Younger himself has found to be wholly adequate to protect wholesale power markets from the threat of uneconomic entry; and (3) the benefits to competition which Mr. Younger has confirmed will result from the addition of a new 1,000 MW source of supply in highly concentrated wholesale markets in New York City and surrounding areas. Accordingly, Entergy has failed to show any error of law or fact in the Commission's determination in the Certificate Order

[56] Certificate Order, slip op. at 52.

[57] Entergy Rehearing Request at 22.

that the goal of promoting competition in wholesale power markets was best served by issuance of the Certificate.

B. Entergy's Claim That The Facility Will Have Negative Price Impacts On Upstate Consumers Is Wholly Without Merit

In the Certificate Order, the Commission rejected claims by Entergy and IPPNY that the Facility would harm consumers in upstate New York. In rejecting this claim, the Commission relied on Dr. Paynter's testimony that when large supplies enter a market, they naturally tend to depress prices[58] and on the contentions advanced by DPS Staff in its Brief on Exceptions in response to IPPNY's and Entergy's earlier claims about the impacts of the Facility on the price of electricity in upstate New York. The Commission summarized DPS Staff's response to these claims as follows:

> Staff says that Dr. Paynter, in fact, determined that the Project would reduce prices across New York State, including Upstate. Staff adds that IPPNY's claim is based, not on Staff's testimony, but on a hypothetical, presented on cross-examination, which assumes that HQ would invest in 1,000 MW of additional hydroelectric supply and sell this at the New York border, without any transmission upgrades in New York. Referring to its Reply Brief (p. 11), Staff states that the "increase" in border prices is only in comparison to the depressed prices in the hypothetical and that compared to current market prices, the impact of the additional hydroelectric resources delivered by the Facility is to reduce prices statewide, including at the Canadian border.[59]

In its Rehearing Request, Entergy complains that the Commission rejected Dr. Paynter's testimony in response to a hypothetical question posed by counsel for IPPNY

[58] Certificate Order, slip op. at 46

[59] *Id*.

on the ground that this hypothetical was "premised on the assumption that all things would remain equal."[60] Entergy goes on to contend that DPS Staff had used a similar assumption in preparing its estimates of the wholesale energy price savings that would be provided by the Facility and that this is a common analytical convention used to compare different scenarios and that the Commission cannot ignore the "potentially negative impacts" of the Facility on upstate electricity prices simply because Dr. Paynter's response to this hypothetical question was based on "a hypothetical set of assumptions."[61]

These claims fail to demonstrate that the Commission committed any error of fact or error of law in the Certificate Order for several reasons. First and foremost, Entergy's claim that the Commission's ruling on this issue somehow turns on a rejection of an assumption that "all other circumstances would remain constant" cannot be reconciled with the plain language of the Certificate Order finding, based on testimony offered by DPS Staff, that the Facility "would reduce prices across New York State, including Upstate."[62] Entergy's failure to come to grips with this important Commission finding requires rejection of its claims concerning the impacts of the Facility on electricity prices in upstate New York.

Second, Entergy's claim that the hypothetical question posed to Dr. Paynter by IPPNY's counsel reasonably assumed that all other circumstances would remain constant was also expressly rejected by the Commission in the Certificate Order. Specifically, the Commission found that IPPNY's hypothetical question assumed "that HQ would invest

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[60] Entergy Rehearing Request at 24.

[61] *Id*.

[62] Certificate Order at 46.

in 1,000 MW of additional hydroelectric supply and sell this at the New York border, without any transmission upgrades in New York," notwithstanding the substantial reduction in prices that IPPNY and Entergy claim would result from that strategy.[63] This is far from a simple assumption that all other circumstances will remain constant as Entergy asserts.

This factual claim must be supported by substantial evidence of HQ's intention to make such potentially uneconomic investments if Dr. Paynter's response to IPPNY's hypothetical question is to be given any weight whatsoever in this proceeding. In *Hambsch v. New York City Transit Authority*,[64] the New York Court of Appeals recognized that expert opinion testimony is not entitled to any probative weight unless the opinion given is based on facts in the record or known to the witness:

> It is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness." In *People v. Sugden* (35 NY2d 453), we recognized two limited exceptions to this rule and held that an expert may rely on out-of-court material if "it is of a kind accepted in the profession as reliable in forming a professional opinion" or if it "comes from a witness subject to full cross-examination on the trial."[65]

As a result, courts in New York State have consistently refused to give probative weight to responses to hypothetical questions where the facts assumed in the hypothetical are not supported by the record or by the witness's own knowledge. For example, in *O'Shea v.*

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[63] *Id*.

[64] 63 N.Y.2d 723 (1984).

[65] 63 N.Y.2d at 725-26 (citation in original).

Sarro[66] the Appellate Division held that the Supreme Court committed error when it allowed the defendant's expert to answer hypothetical questions based on facts not in the record or known to that expert:

> In formulating his opinion that the damage to plaintiff's spinal accessory nerve resulted from causes other than defendant's negligence in performing the surgery, Dr. Cohen relied, to a large extent, upon the erroneous assumptions in the hypothetical questions propounded by defense counsel that examinations by three physicians at Downstate revealed that plaintiff was able to use her trapezius muscle approximately 11 months after the operation. Therefore, the opinion of the only expert witness called by the defense was not properly accepted for consideration by the jury, as it was grounded in speculation rather than an adequate factual basis on the record.[67]

Because Entergy has failed to provide any record support for the assumption that HQ will make the investments required to bring 1,000 MW of hydroelectric power to the New York border in the absence of any transmission upgrades in New York State, the Commission acted correctly when it rejected Entergy's claims based on that hypothetical question.

This is particularly true in light of the record evidence clearly demonstrating that it would be unreasonable to assume that HQ would invest in an additional 1,000 MW of new hydroelectric capacity to sell at the New York border without any transmission upgrades in New York. Certificate Holders' President and Chief Executive Officer, Mr. Donald Jessome, directly addressed this issue when he testified that if the Commission were to refuse to issue a certificate for the Facility, HQ could be expected to make the

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[66] 106 A.D.2d 435 (1984).

[67] 106 A.D.2d at 438.

investments in transmission required to develop other markets for its hydroelectric power:

> [T]he question [is] whether the low-cost, low-carbon electricity that will be produced by these new generating facilities will flow over the Facility to consumers in New York, or whether the owners of these generating resources will develop alternative markets for their energy production in other locations. Because of the advanced stage of the Facility when compared to alternative methods of bringing these electricity supplies to market, as well as the support that the Facility has received from state agencies including the Department of Public Service and the Department of Environmental Conservation, as well as leading enviromental groups such as Scenic Hudson, Riverkeeper and the New York Council of Trout Unlimited, the Facility is uniquely positioned to secure a long-term commitment to deliver electricity from these sources to consumers in New York State. If the Commission hesitates or imposes unreasonable conditions on the Facility, this opportunity may be lost and these electricity supplies may instead flow to consumers in New England, Ontario or Atlantic Canada.[68]

Accordingly, Entergy's claims concerning the potential impacts of the Facility on electricity prices in upstate New York are not supported by any evidence on the record in this proceeding and therefore fail to reveal any error of law or fact in the Commission's decision to grant the Certificate in this proceeding.

IV. THE FACILITY REPRESENTS THE MINIMUM ADVERSE ENVIRONMENTAL IMPACT ON SHORTNOSE AND ATLANTIC STURGEON AND CONFORMS TO APPLICABLE LAWS AND REGULATIONS

In assessing Entergy's claims concerning the alleged impacts of the Facility on Federally-protected sturgeon, it is important to keep in mind that Entergy waived its right

[68] Tr. at 68, line 15 to 69, line 7.

to present evidence on these environmental impacts when it failed to identify them as a contested issues of material fact to be addressed in the hearing in this proceeding.[69] In their Ruling on Motion issued June 7, 2012, the ALJs rejected Entergy's belated request to modify the list of issues set for hearing in this proceeding to include these claims. In rejecting Entergy's motion, the ALJs stated that:

> Applicants and Riverkeeper are correct that Entergy did not identify the issues it is now raising as proposed contested issues of material fact, nor did it state that it would sponsor testimony on such issues, in its March 16, 2012 Statement in Opposition. However, even if Entergy had timely raised such allegations, we would have deemed them to be issues of law or policy for which adjudication is not required. This is because Entergy essentially is asserting that the record fails to adequately address potentially adverse environmental and EMF impacts to endangered sturgeon. In our view, challenging whether the record in this proceeding is legally sufficient to support a finding that the Facility represents the minimum adverse environmental impact is a legal question that may be addressed by any party in briefs.[70]

Because the Commission ruled in the Certificate Order that the Facility does in fact represent the minimum adverse environmental impact, considering the state of available technology and the nature and economics of various alternatives, and other pertinent considerations as required by PSL § 126(1)(c),[71] Entergy is now limited to claiming that this Commission finding is not supported by substantial evidence on the record in this

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[69] *See* Initial Statement of Entergy Nuclear Power Marketing, LLC in Opposition to Joint Proposal and Article VIII Application of Champlain Hudson Power Express, Inc. (filed March 16, 2012).

[70] Ruling on Issues, slip op. at 5 (issued June 7, 2012).

[71] Certificate Order, slip op. at 99 ("We find that the nature of the probable environmental impacts have been identified, and further, that the facility 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, including but not limited to, the effect on agricultural lands, wetlands, parklands, and river corridors.").

proceeding. For the reasons noted below, Entergy's claims in this regard are without merit.

A. Entergy's Claims That The Commission Failed To Adequately Assess The Impacts Of The Facility On The Habitat Of Federally-Protected Sturgeon Are Without Merit

In its Brief on Exceptions, Entergy claimed that the ALJs had failed to adequately assess the impacts of the Facility on the habitat of sturgeon protected under the Federal Endangered Species Act. Entergy's reliance upon federal law is misplaced, since PSL § 126(1) does not include this authority as part of its standards. The Commission accordingly evaluated these claims under state law.[72]

In particular, Entergy expressed concern that Certificate Holders' proposal to place concrete mats over the Facility's cables on the Hudson River bottom where conditions did not permit those cables to be buried would result in the loss of 6.41 miles of sturgeon habitat.

In rejecting this claim in the Certificate Order, the Commission made several important findings. First, the Commission noted that Entergy's claims regarding the extent of the concrete mats that the Facility would require were overstated and that Entergy had failed to provide any evidence or legal authority whatsoever to support their claims that such mats would have any adverse impacts on sturgeon:

> The record shows that Entergy has overstated the extent of concrete matting by at least 25%. Moreover, Entergy has failed to present any evidence or legal authority to support its claim that the Applicants' installation of concrete mats

[72] New York State Environmental Conservation Law § 11-0535 ("State ESA").

> will result in the adverse modification of sturgeon habitat amounting to a state ESA "take."[73]

Second, the Commission noted that the route of the Facility had been carefully designed in concert with the New York State Department of Environmental Conservation ("NYDEC") and the New York State Department of State ("NYSDOS") to avoid environmentally sensitive fish habitat to the maximum extent possible:

> The Facility has been routed to avoid, to the maximum extent practicable, environmentally sensitive DOS Significant Habitats and DEC Exclusion Areas. The Significant Habitats and Exclusion Areas were designated specifically because they contain sensitive habitat, including sensitive state ESA sturgeon habitat, relative to other areas of the Hudson River. By avoiding areas recognized as sensitive aquatic habitat areas, including sensitive habitat areas for sturgeon, Applicants will avoid potential adverse impacts to sturgeon.[74]

The Commission recognized that the parties developed the route over months of collaborative discussions based on "an extensive analysis of river bottom bathymetry, fisheries data, acoustic fish tracking, annual Hudson River surveys of fish distribution, adult and juvenile sturgeon monitoring, submerged aquatic vegetation maps, tidal wetland maps and existing SCFWHs.[75] NYSDEC, a party to these discussions and a signatory to the Joint Proposal, is the agency primarily responsible for assessing sturgeon habitat and effects on the essential behavior of sturgeon. Thus, the few locations where

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[73] Certificate Order at 58; *see also* Hearing Exhibit 2 at 4 (Location of Facilities (Exhibit 2 to the Application)) (describing the original routing); Hearing Exhibit 92 at 3 (Letter to New York State Department of State dated February 18, 2011)

[74] *Id*. at 58-59.

[75] Certificate Order at 58, 62; Hearing Exhibit 102 (Description of Protected Areas within Hudson River); Hearing Exhibit 127: Revised Certificate Condition ¶ 156(b)(1).

concrete mats are required will be mostly if not entirely outside of these sensitive habitat areas.

Third, the Commission found that the record showed that the disruption to the benthic community resulting from construction of the Facility would be minor and short lived:

> [F]or the limited areas of the river bed where concrete mats will be installed, the benthic community is anticipated to redevelop. Therefore, we conclude that permanent habitat loss is not anticipated to occur and that any permanent habitat loss that may occur due to the limited use of concrete mats on the Hudson River segment of the facility has been minimized.[76]

The Commission's finding is further supported by substantial evidence in the record that approximately 17% of the matting would be installed over existing hard substrate that is similar to the surface of the concrete matting.[77] On the basis of these findings, the Commission concluded that "the proposed limited installation of concrete mats would not degrade state ESA sturgeon habitat or harm sturgeon."[78]

In its Rehearing Request, Entergy completely ignores the Commission's finding that no permanent loss of sturgeon habitat will occur as a result of the construction of the Facility. Instead, Entergy argues only: (1) that routing around significant habitat areas will not prevent damage to habitat outside of such areas; (2) that the Commission "quibbles over meaningless factual distinctions" when it found that Entergy overstated

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[76] *Id*. at 61; *see also* Hearing Exhibit 121 at 206 (Revised Environmental Impacts Assessment).

[77] Certificate Order at 56, 59; *See* Hearing Exhibit 121 at 193 ("The mats will have an insignificant effect on near bottom hydrodynamics, which may be similar to the conditions found in rocky bottom areas.").

[78] *Id*. at 60.

the amount of matting required; (3) that the Commission cannot rely on "post-certification" requirements in the Environmental Management and Construction Plan ("EM&CP") process to address its concerns with respect to sturgeon habitat; and (4) that the Army Corps of Engineers ("ACOE") has prohibited Certificate Holders from using concrete mats.[79]

None of these claims can withstand scrutiny. Entergy's claim that routing the Facility around sensitive habitat areas is not sufficient, in and of itself, to avoid harm to sturgeon must be rejected for several reasons. To begin with, routing the Facility around sensitive habitat areas is an important factor in minimizing the possible adverse impacts to sturgeon habitat. As the Commission made clear in the Certificate Order, the Certificate Holders worked in collaboration with numerous parties, including NYSDEC, NYSDOS, DPS Staff, Riverkeeper, Scenic Hudson, and Trout Unlimited, to develop a route that avoids, to the maximum extent possible, sensitive aquatic habitat based upon the best available information.[80] The Exclusion Areas that the Certificate Holders will avoid go above and beyond legally protected habitats to include other areas that NYSDEC considers to be areas of high quality habitat.[81] NYSDEC identifies the State ESA as its authority for the development of the Exclusion Areas and notes that "[r]outing of the Project outside of the Exclusion Areas, to the maximum extent possible, will help avoid a taking of endangered or threatened species."[82]

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[79] Entergy Rehearing Request at 26-27.

[80] Certificate Order at 61-62.

[81] Hearing Exhibit 102.

[82] *Id*.

Moreover, Entergy has failed to identify any reason why construction of the Facility outside of such sensitive habitat areas would harm sturgeon habitat other than by the installation of concrete mats. As previously noted, the record in this case makes clear that such mats will be limited in scope and will not result in any permanent loss of habitat.

Entergy's dismissal of the Commission's finding that the concrete matting required by the Facility would be limited to less than 4.45 miles as a "quibble" must also be rejected, since the Commission's finding in that regard is supported by competent evidence and demonstrates that the amount of matting required by the Facility is limited in scope. The Commission's discussion of the issue in the Certificate Order properly corrected Entergy's mischaracterization of the amount of matting required by the Facility, which was "overstated . . . by at least 25%."[83] Moreover, in "small sections of the riverbed where concrete mats will be installed," the Commission found that "the benthic community is anticipated to redevelop on or around the concrete mats."[84]

Entergy's claim that the Commission may not rely on the EM&CP process to address the issue of sturgeon habitat must be dismissed out of hand in light of the Commission's express statement in the Certificate Order that it did not rely on the EM&CP process for that purpose.[85]

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[83] Certificate Order at 58; Hearing Exhibit 2 at 4; Hearing Exhibit 92 at 3.

[84] Certificate Order at 60; Hearing Exhibit 121 at 206; *See* Hearing Exhibit 121 at 193 ("The mats will have an insignificant effect on near bottom hydrodynamics, which may be similar to the conditions found in rocky bottom areas.").

[85] *See* Certificate Order, slip op at 65("[W]e find that the Project has avoided or minimized potential environmental impacts in satisfaction of PSL §126, without reference to any further avoidance or minimization that may be achieved from the EM&CP Plan.").

Entergy's claim that a letter from the ACOE issued during preliminary discussions should be regarded as dispositive evidence of an agency decision to prohibit the placement of concrete matting must also be rejected.[86] Initially, it should be noted that the ACOE's letter is completely unrelated to potential impacts to sturgeon and makes no such decision. Moreover, Entergy originally used the ACOE letter to protest the burial depth of the cables. As such, Entergy's most recent claims in this regard are a further gross mischaracterization of the status of a pending federal process related to construction in the navigation channel. The ACOE has not yet made a final determination regarding the placement of the cables, and when it does, the Certificate Holders will be bound by the determination pursuant to Revised Certificate Conditions 9 and 11, which require the Certificate Holders to obtain all necessary permits and consents.

B. Entergy's Claims That The Commission Failed To Adequately Assess The Impacts Of The Magnetic Fields Produced By The Facility On Federally-Protected Sturgeon Are Without Merit

Entergy's speculative argument about the magnitude of the magnetic field created by the buried cables and the supposed inadequacy in the record examining its potential effects is merely a repetition of the arguments that were presented to and rejected by the Commission.[87] In its unsuccessful effort to counter the substantial evidence in the record to the contrary, Entergy makes vague references to studies outside the record supposedly supporting its claim that the Certificate Holders have not adequately described the

[86] Entergy Rehearing Request at 26.

[87] Entergy Rehearing Request at 28-30; Certificate Order at 67-70.

"nature of the environmental impact" or minimized adverse environmental impacts to sturgeon.[88] As previously noted, however, such references to materials outside the record in this proceeding are improper and must not be countenanced.[89]

After examining the substantial analysis, testimony and other record evidence, the Commission's conclusion was clear: "Entergy's principal argument, that state ESA sturgeon will respond to the magnetic field that the Facility is anticipated to induce, is contradicted and rebutted by expert record evidence."[90] The Commission stated that the magnetic field produced by the Facility would be "de minimus or non-existent," based on the burial depth and configuration of the cables.[91] In addition to the Environmental Impacts Assessment ("EIA"), the record contains multiple models of expected magnetic and heat fields at varying depths, showing that impacts, if any, will be minimal and will not affect sturgeon.[92] As recognized in the Certificate Order, the Certificate Holders have minimized the effects of the cables by agreeing to "install the cables to the maximum depth achievable that would allow each pole of the bi-pole to be buried in a single trench using a jet-plow"[93] outside of the Federal navigation channels, to a planned depth of six

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[88] Entergy Rehearing Request at 29.

[89] *See* N.Y. St. Admin. Proc. L. § 302(3) ("Findings of fact shall be based exclusively on the evidence and on matters officially noticed.").

[90] Certificate Order at 67.

[91] Certificate Order at 68.

[92] Hearing Exhibit 24 at 10-16, 36-37 (Appendix B: Requests for Additional Information (Appendix B to the Supplement)); Hearing Exhibit 64 (NYSDEC-1 through NYSDEC-6); Hearing Exhibit 87 (Applicant's Letter to New York State Department of State regarding Updated Alternatives Analysis (January 18, 2011); Hearing Exhibit 92, Hearing Exhibit 100 (Certificate Holders' Letter to the New York State Department of State, dated March 18, 2011).

[93] Hearing Exhibit 127; Revised Certificate Conditions ¶ 95(a)(ii).

(6) feet.[94] Within the navigation channel, the cables will be buried at least (15) feet below the U.S. Army Corps of Engineer's authorized navigation channel depth.[95] Any magnetic field generated by the cable would originate at the centerline and lessen as the distance horizontally and vertically from the centerline increases, in proportion to the cable burial depth.[96] As a result, the Commission found that the zone of influence from the cables is small[97] and that "migrating fish could potentially travel the full length of the Hudson without encountering the zone of influence."[98]

The Commission also properly rejected Entergy's argument, repeated from its Brief on Exceptions, that potential effects on sturgeon have not been adequately studied and documented in the record: "We find that the record supports a finding that the magnetic field induced by the Facility will have a minimal impact, if any, on migratory species, including ESA sturgeon, in the Hudson River."[99] As a record basis for this finding, the Commission cited the Applicant's EIA, which considered the impact of magnetic field on migration, spawning, feeding and development of aquatic species, including those limited areas hosting concrete matting.[100]

The Commission's conclusion that the "nature of the environmental impact" has been assessed and minimized is also well-supported in the record by the uncontroverted

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[94] Hearing Exhibit 100 at 1-3.

[95] Hearing Exhibit 127; Revised Certificate Conditions ¶ 95(a)(ii).

[96] Hearing Exhibit 100 at 1

[97] Hearing Exhibit 121.

[98] Certificate Order at 68-69.

[99] *Id*. at 69.

[100] *Id.* at 68-69; Hearing Exhibit 24 at 10-16, 36-37; Hearing Exhibit 64; Hearing Exhibit 87; Hearing Exhibit 92; Hearing Exhibit 100.

statements of Dr. William H. Bailey of Exponent Inc. regarding potential impacts on aquatic species from magnetic fields. Commenting on the potential magnetic field impact on eggs and larvae, Dr. Bailey indicated that "[the] data suggests that much greater magnetic fields are required than the proposed cable will produce, in order to create deleterious effects on eggs and larvae" and that "as a percentage of the overall spawning numbers, the area of potential effect is small and extremely weak."[101] Moreover, Dr. Bailey concluded that "research studies on a variety of fish and other marine species have not reported adverse effects of exposure to magnetic fields."[102] As Dr. Bailey noted, the research is clear that no single environmental stimulus such as current flow, light, smell, taste, magnetic field, temperature, salinity or other factor dominates migratory behavior; marine organisms have the means to coordinate and make use of multiple cues and resolve discrepancies.[103]

The Commission stated that both Dr. Bailey's statements and the EIA demonstrate that the Facility will have no significant impact.[104] Nonetheless, the Certificate Holders have committed to conducting additional prophylactic investigations in the form of a study of sturgeon migration patterns before and after the Facility is energized.[105]

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[101] Hearing Exhibit 64 at 59.

[102] *Id*. at 57.

[103] *Id*.

[104] Certificate Order at 69.

[105] JP, Appendix C, ¶ 163; Attachment 4 (Atlantic Sturgeon Pre-Installation and Post-Energizing Hydrophone Scope of Study).

The Certificate Order rejected the same arguments Entergy currently offers, based on substantial evidence in the record that the Certificate Holders have studied the nature of potential impacts on sturgeon and demonstrated that the Facility will have a minimum adverse environmental impact in conformance with the State ESA. Accordingly, as Entergy has not offered any grounds that the Commission committed an error of law or fact, Entergy's Rehearing Request should be dismissed.

V. THE REQUIREMENT IN THE REVISED CERTIFICATE CONDITIONS TO COMPLY WITH THE FINAL DETERMINATION OF CABLE BURIAL IN THE NAVIGATION CHANNEL SET BY THE ARMY CORPS OF ENGINEERS IS CONSISTENT WITH THE REQUIREMENTS OF PSL § 126.1

In its Rehearing Request, Entergy repeats its argument that the Certificate Holders have not minimized adverse environmental impacts, and bases that argument upon a single piece of correspondence from the ACOE.[106] Entergy refers to the ACOE's letter as the "agency's objections" to the burial of approximately nine (9) miles of cable longitudinally in the navigation channel.[107] As noted above, this particular correspondence was made in the course of preliminary discussions during an ongoing federal process that is completely independent and outside of the Article VII process.

The Certificate Order correctly recognized the error of Entergy's attempts to substitute Entergy's own judgment (or preference) on the outcome of a pending federal process, particularly where the Revised Certificate Conditions require compliance with

[106] Entergy Rehearing Request at 30-33.

[107] Hearing Exhibit 216, Attachment D (Updated ACOE Application) (stating, in pertinent part, that "[t]he Corps of Engineers does not permit permanent structures within the length of the right of way, including side slopes, of a Federal navigation channel (perpendicular crossings are permitted)" and also stating that burial must be "fifteen (15) feet below the authorized depths when crossing a federally maintained navigation channel.").

the outcome of that process. As the Certificate Order stated: "It is simply premature to guess the outcome of [the ACOE's] review."[108] Entergy's Rehearing Request impliedly concedes the Commission's point as a basis in the Certificate Order for rejecting Entergy's arguments, namely that the ACOE's letter was not a final determination of cable burial requirements for the Facility.[109] The Commission also based its decision, in part, on the ACOE's prior precedent for cable burial established in the Bayonne proceeding in which the ACOE allowed burial at shallower depths.[110]

The Certificate Order also recognized that the issuance of the Certificate for the Facility does not disregard or forego compliance with the ACOE's eventual final determination. Indeed, as the Commission recognized, the project cannot proceed without ACOE approval. Revised Certificate Condition 9 requires the Applicant to obtain all necessary permits and consents before commencing site preparation or construction. Compliance with the ACOE is also an express condition of Revised Certificate Condition 11, which states that, prior to construction, the Certificate Holders

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[108] Certificate Order at 71.

[109] Entergy Rehearing Request at 32-33.

[110] In fact, in the recent Bayonne Energy Center proceeding (one of the three cases which Entergy puts forth as precedent-setting), the ACOE issued a permit authorizing Bayonne to install its cables across or along the following federal navigation channels: Kill Van Kull Navigation Channel, Pierhead Navigation Channel, Port Jersey Navigation Channel, Anchorage Navigation Channel, Buttermilk Navigation Channel, Red Hook Navigation Channel, and Gowanus Creek Navigation Channel. In 2011, the ACOE authorized a burial depth for Bayonne of "at least eight (8) feet below the Federal Navigation Channels' Congressionally authorized depth." Bayonne Energy Center, LLC ACOE Permit, NAN-2008-01564-M3, July 7, 2011; Case 08-T-1245, *Application of Bayonne Energy Center, LLC for a Certificate of 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 Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need, With Conditions, and Clean Water Act § 401 Water Quality Certification (Issued and Effective Nov. 12, 2009).

must obtain permits pursuant to Section 404 of the Federal Clean Water Act and Section 10 of the Federal Rivers and Harbors Act from the ACOE.[111]

Entergy fails to explain how the outcome of the ACOE permitting process could undermine the Commission's determination that the environmental impacts of the Facility have been minimized. Not only has the ACOE approved cable burial within the federal navigation channel in prior proceedings, but compliance with its final determination is required for the commencement of construction of the Applicant's Facility. Entergy has offered no grounds in its Rehearing Request for establishing an error of fact or law in the Certificate Order, and in fact, has conceded that the ACOE's letter is neither a final determination or an absolute standard. Accordingly, Entergy's Rehearing Request should be rejected by the Commission.

CONCLUSION

WHEREFORE, for the above-stated reasons, Certificate Holders Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. respectfully request that the Commission issue a single integrated order:

1. rejecting the Petition of Entergy Nuclear Power Marketing, LLC and Entergy Nuclear FitzPatrick, LLC for Rehearing of NYPSC April 18, 2013 Order Granting Certificate of Environmental Compatibility and Public Need for the reasons stated in Certificate Holders' Response in Opposition to Entergy's Brief Seeking Acceptance of Its Late-Filed Rehearing Request date June 4, 2013; and

[111] Clean Water Act, 33 U.S.C. § 1344; Rivers and Harbors Act of 1899, 33 U.S.C. § 401 et. seq.

2. also rejecting Entergy's Petition for Rehearing in this proceeding for each of the reasons stated herein.

Respectfully submitted,

/s/ George M. Pond

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Dated: July 3, 2013