

**SERVICE COMMISSION
STATE OF NEW YORK**

Application of Champlain Hudson Power)
Express, 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)
Canadian Border to New York City)

Case No. 10-T-0139

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
BRIEF ON EXCEPTIONS**

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I. INTRODUCTION

The State of New York Public Service Commission (PSC) Administrative Law Judges (ALJs) Casutto and Phillips issued a Notice for Filing Exceptions and a Recommended Decision on the Application of Champlain Hudson Power Express, Inc. (Applicant) on December 27, 2012 for the Champlain Hudson Power Express 1000 MW Transmission Project (Project). The New York State Department of Environmental Conservation (NYSDEC) submits this brief on exceptions pursuant to PSC's aforementioned notice. While NYSDEC concurs with the eloquent Recommended Decision drafted by the ALJs, this statement serves to clarify certain statements made therein pertaining to consistency with the New York State Constitution and NYSDEC's jurisdiction over Forest Preserve lands and recommends that the Commission may accept the ALJs' conclusion on that topic without taking into account their dicta.

II. DISCUSSION

The Recommended Decision issued by the ALJs examines issues pertaining to consistency with the New York State Constitution on pages 112-116. Specifically, the Recommended Decision states, “[a]ssuming the Commission decides to grant the requested Article VII certificate, Applicants will have to acquire any necessary land rights through other applicable means. As a result, Department of Public Service staff is correct that this proceeding is not the appropriate venue for litigating land rights.” (Page 113) NYSDEC agrees with the ALJs that an Article VII proceeding is not the appropriate forum for determining Office of General Services' (OGS) authority to grant leases or other property rights to lands submerged under Lake Champlain.¹

¹ OGS will be the agency charged with determining whether Applicants will be granted authority to install cables on the bottom of Lake Champlain.

NYSDEC further wishes to clarify the jurisdictional roles of NYSDEC and the Adirondack Park Agency (APA) with respect to Forest Preserve lands.² NYSDEC has “care, custody and control” of Forest Preserve lands pursuant to New York Environmental Conservation Law (ECL) § 3-0301(1) (d) and 9-0105(1) and is therefore the day-to-day manager of all such lands. Importantly, the Adirondack Park State Land Master Plan provides on page 12: the Adirondack Park Agency (APA) is responsible for long-range planning and the establishment of basic policy for state lands in the Park, in consultation with the NYSDEC. Via the master plan, the APA has the authority to establish general guidelines and criteria for the management of state lands, subject to the approval of the Governor. On the other hand, the NYSDEC and other State agencies with respect to the lands under their respective jurisdictions, have responsibility for the administration and management of these lands in compliance with the guidelines and criteria laid down by the master plan.

Finally, NYSDEC also notes that the Recommended Decision’s discussion regarding Association for the Protection of the Adirondacks v. Macdonald, 228 A.D. 73 (3rd Dep’t 1930), aff’d 253 N.Y. 234 (1930), includes an overly broad reading of the case, which held that construction of an Olympic bob sleigh run was not an appropriate use of Forest Preserve land, but that an immaterial number of trees can be cut on Forest Preserve land for purposes consistent with the Forest Preserve. In their reading of McDonald, the ALJs opine, at page 115, about their interpretation of a more broad public use exception to the “forever wild” provision of Article XIV of the New York State Constitution. Without a more nuanced expression of the history of cases pertaining to Article XIV’s “forever wild” clause, the ALJs’ review could lead to a conclusion that does not comport with that history. NYSDEC

² Page 116 of the Recommended Decision fails to state that NYSDEC is also a signatory party responsible for safeguarding the Adirondack Park.

believes that a complete analysis of this issue is beyond the scope of this proceeding and also refers the PSC to the Macdonald companion case, Balsam Lake Anglers Club v. Department of Environmental Conservation, 199 A.D. 2d 852 (3rd Dep't,1993), for its full meaning and intent.

In addition, the ALJs' review of opinions regarding whether lands under the waters of Lake Champlain are within the forest preserve is too limited in scope for the Commission to consider or rely on in reaching a decision on this particular topic. Consequently, NYSDEC recommends that the Commission accept the ALJs' conclusions without taking into account their dicta.

CONCLUSION

NYSDEC agrees with and supports the ALJ's Recommended Decision with the exception of the overly broad statements made relative to Forest Preserve lands. This Article VII proceeding is not the appropriate forum for determining Office of General Services' (OGS) authority to grant leases or other property rights to lands submerged under Lake Champlain. Further, a thorough analysis of the New York Constitution's Article XIV "forever wild" clause is beyond the scope of this proceeding and is far too complex to be summarized in an overly broad manner.

Respectfully Submitted,

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