

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 10-T-0139 - Application of Champlain Hudson Power Express, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City.

RULING ON MOTION TO STRIKE BRIEFS ON EXCEPTION

(Issued January 30, 2013)

As set forth in the December 27, 2012 Notice for Filing Exceptions, briefs on exceptions in the above referenced proceeding were due by 4:00 p.m. on January 17, 2013. Entergy Nuclear Power Marketing, LLC and Entergy Nuclear FitzPatrick, LLC (jointly, Entergy) filed a brief on exceptions on January 17, 2013 at 4:06 p.m. The N.Y.S. Business Council (Business Council) filed its brief on January 17 at 4:17 p.m.

On January 18, 2013, Champlain Hudson Power Express, Inc. (CHPEI) and CHPE Properties, Inc. (CHPE; together, the Applicants), filed a motion to strike the Entergy and Business Council briefs on exceptions because they were filed late and further, the Business Council failed to serve its brief on Applicants. Applicants opine that the Commission has a long history of strictly applying the time limits for filings in Commission proceedings where the party or parties in question fail to seek an extension for good cause prior to the filing date established by the Commission. On January 28, 2013, Entergy filed a response brief and affidavit in opposition to Applicants' motion.

Applicants cite two cases in support of their motion to strike, a July 13, 2012 ruling in this proceeding, Ruling

Denying Motion to Strike, at footnote 3 (issued July 13, 2012); and an order denying rehearing, in Case 09-E-0299, Village of Frankfort PSL Section 68 Proceeding, Order Denying Petition For Rehearing And Clarification, at 4-5 (issued January 21, 2011).

As a general matter, determinations on motions to strike are case-specific, depending upon the facts and circumstances of the particular proceeding. Moreover, the two cases cited by Applicants are distinguishable from this proceeding because both are premised upon substantive grounds as well as procedural grounds. The July 13, 2012 ruling in this proceeding does not support Applicants' motion to strike. In that Ruling, at footnote 3, the Judge denied the motion to strike on substantive grounds, but noted that the motion was also subject to dismissal on procedural grounds (i.e., late filing absent a request for exception to the filing deadline, when the Judges had previously explicitly provided that parties could only seek exception to the filing deadline for good cause shown).

In Village of Frankfort, National Grid's petition seeking rehearing was filed late, and had not been served upon a party, Department of Public Service Staff, as required by Rule 3.7(a). The order noted these procedural defects, but went on to discuss the myriad of substantive reasons that also provided a basis for denial of National Grid's motion for rehearing. Village of Frankfort, Ruling at 5.

Entergy has provided documentation showing that its brief was transmitted to the Secretary on January 17, 2013 at 3:19 p.m., and attributes the delay in receipt by the Secretary until 4:06 p.m. to a 47-minute server delay after Entergy transmitted its brief. Rule 3.5(d) provides that a document presented for filing electronically will be deemed filed at the time it is received by the Secretary. (Regarding service of

documents on other parties, however, Rule 3.5(e)(2) provides that electronic filing is deemed complete upon sending.)

In administrative proceedings, procedures may be more informal in application as compared to judicial proceedings. Actual prejudice or unfairness to parties is the paramount concern, and no substantial unfairness or prejudice occurred here. The better practice is that Entergy and the Business Council should have filed their briefs in a timely manner and the Business Council should have complied with Rule 3.7. Entergy's brief on exceptions filing substantially complies with Rule 3.5(d) and the 4:00 p.m. filing requirement. Therefore, Applicants' motion to strike the Entergy brief is denied.

Regarding the Business Council brief on exceptions, Applicants acknowledge obtaining a copy of the brief from the Department's web page on the morning of January 18, 2013. Granting Applicants' motion to strike would preclude consideration of the Business Council's brief on the merits. Instead, any minimal prejudice suffered by Applicants or any other party can be remedied by extending the schedule for filing opposition to exception briefs, providing an additional day to respond to the Business Council's brief on exceptions. Applicants' motion to strike the Business Council's brief on exceptions is denied.

Applicants and other parties may file briefs opposing the Business Council's exceptions by 4:00 p.m. on February 2, 2013. Briefs opposing other parties' exceptions remain due by 4:00 p.m. on February 1, 2013, as provided in the December 27, 2012 Notice for Filing Exceptions.

(SIGNED)

JEFFREY C. COHEN
Acting Secretary