

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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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 PSL for the Construction, Operation and Maintenance of  
a High Voltage Direct Current Circuit from the Canadian  
Border to New York City

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Case 10-T-0139

**BRIEF IN OPPOSITION TO APPLICANTS' MOTION TO STRIKE THE BRIEF ON  
EXCEPTIONS SUBMITTED BY ENTERGY NUCLEAR POWER MARKETING, LLC  
AND ENTERGY NUCLEAR FITZPATRICK, LLC**

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Dated: January 28, 2013  
Albany, New York

## PRELIMINARY STATEMENT

Entergy Nuclear Power Marketing, LLC and Entergy Nuclear FitzPatrick, LLC (collectively referred to as “Entergy”) respectfully submit the following brief in opposition to Applicants’ motion to strike Entergy’s Brief on Exceptions to the Recommended Decision (“RD”) issued in this N.Y. Public Service Law (“NYPSL”) Article VII proceeding. As demonstrated below, Applicants’ motion should be denied because Entergy served its Brief on Exceptions on the New York State Public Service Commission (“Commission”) Secretary and the Active Parties at 3:19 p.m. on January 17, 2013,<sup>1</sup> in accordance with the Notice for Filing Exceptions issued on December 27, 2012 (“Notice”).<sup>2</sup> However, due to an unforeseeable internet server delay of which Entergy had no prior notice and over which it had no control, the Commission Secretary’s office apparently did not docket Entergy’s Brief until 4:06 p.m. – 47 minutes after Entergy electronically served it and six minutes beyond the 4:00 p.m. deadline contained in the Notice. In the utter absence of prejudice to any party,<sup>3</sup> the *de minimis* six-minute delay in filing caused by an unforeseeable server issue does not support the drastic remedy of striking a brief that Entergy, an active participant with innumerable hours invested in this proceeding, duly and timely served on the Secretary and the Active Parties.

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<sup>1</sup> A true and correct copy of Entergy’s original transmittal e-mail message is annexed as Exhibit “A” to the accompanying affirmation of William A. Hurst, Esq. (“Hurst Aff.”).

<sup>2</sup> Case 10-T-0139, 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 PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City, “Notice for Filing Exceptions” (issued December 27, 2012).

<sup>3</sup> Pursuant to the Notice, Briefs opposing exceptions are not due until February 1, 2013.

## INTRODUCTION

Administrative Law Judges (“ALJ”) Michelle L. Phillips and Kevin J. Casutto issued the RD in this proceeding on December 27, 2012. In pertinent part, the Notice issued by the Commission’s Acting Secretary Jeffrey C. Cohen contemporaneous with the RD stated, “Briefs on exceptions are due electronically to the Secretary at [secretary@dps.gov](mailto:secretary@dps.gov) and to all active parties by 4:00 p.m. on January 17, 2013.”<sup>4</sup>

Over the following weeks, Entergy studied the 140-page RD, consulted the voluminous record on which it is based and drafted its Brief on Exceptions. At 3:19 p.m. on January 17, 2013, Entergy (as instructed by the Notice) transmitted its Brief to the Commission Secretary electronically via e-mail at “[secretary@dps.gov](mailto:secretary@dps.gov).”<sup>5</sup> Entergy appropriately copied all of the Active Parties in this proceeding on its transmittal e-mail to the Secretary, exactly as it has done with each of its prior filings in this case.

Following service of its Brief, Entergy received three (3) automated responses, which is not unusual in this proceeding where there are more than 100 party representatives. Those automated responses confirm Entergy’s timely service of the Brief, and none indicates that the recipient network had rejected Entergy’s e-mail due to a server error. The first response, received from [gedenotto@indeckenergy.com](mailto:gedenotto@indeckenergy.com) states, in pertinent part, “[T]he e-mail address you entered couldn’t be found.”<sup>6</sup> At page 2, the automated response shows that Entergy transmitted the e-mail to which it was responding on “Thu, 17 Jan 2013 15:19:30.” Entergy’s original transmittal message exhibits the same date and time.

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<sup>4</sup> Case 10-T-0139, supra, “Notice for Filing Exceptions.”

<sup>5</sup> Hurst Aff., Ex. “A.” The 3:19 p.m. time-stamp on Exhibit A is presumably also present on the e-mail message allegedly received by Applicants at 4:58 p.m. Although Applicants have annexed other e-mail messages to their motion to strike, they did not include Entergy’s original transmittal e-mail.

<sup>6</sup> A true and correct copy of this automated response is annexed as Exhibit “B” to the Hurst Aff.

Next, Entergy received a single automated response on behalf of “Jeffrey.Meyers@oprhp.state.ny.us” (Jeffrey Meyers is no longer with that agency) and dan@schusterassociates.com.<sup>7</sup> Page 2 of the Meyer/Schuster response also shows that the original message to which it replied was transmitted on “Thurs, 17 Jan 2013 15:19:30.”<sup>8</sup>

Finally, Entergy received an “out of office” response from DPS Staff attorney Ashley Moreno. In pertinent part, that response stated:

Note: This is an automated response to your message “Case 10-T-0139 – Champlain Hudson Power Express, Inc., et al. – Brief on Exceptions” **sent on 01/17/2013 15:19:28.**<sup>9</sup>

Accordingly, none of the automated responses suggested that Entergy’s transmittal message was being returned due to a server delay or error, and, more importantly, each confirmed that Entergy had timely served its Brief on Exceptions.

Applicants have appended to their motion to strike what they characterize as an e-mail exchange dated January 18, 2013 between Applicants’ counsel Ekin Senlet and a DPS Central Operations staffer named Eva Gnacik. In that correspondence, Ms. Gnacik states that Entergy’s Brief on Exceptions “was received with a time stamp of 4:06pm.” Accordingly, it appears that there was a 47-minute server delay after the time that Entergy electronically served the Brief on Exceptions that caused the Secretary to receive the Brief at 4:06 p.m. Applicants’ latest motion to strike centers on that six-minute delay.

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<sup>7</sup> A true and correct copy of this automated response is annexed as Exhibit “C” to the Hurst Aff.

<sup>8</sup> Id.

<sup>9</sup> A true and correct copy of Attorney Moreno’s out-of-office message is annexed hereto as Exhibit “D.” (Emphasis added).

## ARGUMENT

### I. APPLICANTS' MOTION TO STRIKE ENTERGY'S BRIEF ON EXCEPTIONS SHOULD BE DENIED.

#### A. Entergy Timely Served its Brief on Exceptions.

The Commission's procedural rules make clear that "[E]lectronic service is complete on sending."<sup>10</sup> Entergy transmitted its Brief on Exceptions to the Secretary and the Active Parties via e-mail at 3:19 p.m. on January 17, 2013 – 41 minutes before the deadline for doing so set forth in the Notice. Therefore, pursuant to §§3.2(b)(3) and 3.5(e) of the Commission's procedural rules, Entergy timely served its Brief. Applicants' motion to strike should thus be denied to the extent it seeks relief based on allegedly untimely service.<sup>11</sup>

#### B. The Commission Should Excuse the Apparently Six-Minute Delay in Filing.

As to filing, the Commission's procedural rules further state, in pertinent part:

Any filing deadline, method of filing, number of copies, or page limitation for any document required or authorized to be filed with the Commission (other than a document filed in response to a specific Commission order) may be modified by the Secretary for the purpose of promoting the fair, orderly, and efficient conduct of the case.<sup>12</sup>

Several factors should compel the Commission (and/or the Secretary) to find good cause and excuse the unforeseeable and unavoidable six-minute delay in the Secretary's receipt of Entergy's Brief on Exceptions here (assuming there was any delay at all).<sup>13</sup> First, the record demonstrates Entergy's timely, good-faith electronic service of the Brief on the Secretary and the

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<sup>10</sup> 16 N.Y.C.R.R. §§3.2(b)(3) & 3.5(e)(3).

<sup>11</sup> See Motion to Strike, p. 2.

<sup>12</sup> See 16 N.Y.C.R.R. §3.3(a)(1).

<sup>13</sup> The Notice does not specify whether Briefs on Exceptions were due to be served on the Secretary by 4:00 p.m. on January 17, which Entergy's Brief was, or whether the Briefs were due to be served and filed with the Secretary by that time. In any event, Entergy acted in all respects as if 4:00 p.m. was a filing deadline, and transmitted its Brief electronically to the Secretary and the Active Parties fully 41 minutes before the 4:00 p.m. deadline.

Active Parties, fully in accordance with the Notice and the Commission’s procedural rules.<sup>14</sup> This factor clearly distinguishes the instant matter from the rulings Applicants cite in their motion to strike as purported authority supporting their position.<sup>15</sup>

For example, the circumstances here are not analogous to those present when the ALJs noted the untimeliness of Applicants’ motion to strike portions of the pre-filed testimony of IPPNY witness Mr. Mark D. Younger, but nonetheless went on to deny Applicants’ request for relief on the merits.<sup>16</sup> There, the ALJs were faced with Applicants’ more than four-hour, unexplained delay in filing their second motion to strike portions of Mr. Younger’s testimony (and fourth motion to strike or compel filed within a 3-week period). Indeed, notwithstanding the ALJs’ clear directive that, “[P]re-hearing motions to strike pre-filed testimony . . . shall be filed by noon July 6, 2012,”<sup>17</sup> and Applicants’ obvious familiarity with the Younger testimony (and prior litigiousness), Applicants inexplicably failed to file their second motion to strike portions of Mr. Younger’s testimony until 4:15 p.m. Applicants offered no excuse whatsoever for their more than four-hour filing delay, much less establish good cause for an extension. That is not the case here, where there exists both a reasonable excuse for the short delay and good cause for granting an extension that is far more limited than that which would have applied to Applicants’ untimely filing.

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<sup>14</sup> See 16 N.Y.C.R.R. §3.5(a)(1).

<sup>15</sup> Motion to Strike, pp. 2-3.

<sup>16</sup> Case 10-T-0139, supra, “Ruling Denying Motion to Strike,” p. 2 n. 3 (issued July 13, 2012) (“July 13 Ruling”). In stating that the July 13 ruling “refused to consider arguments made by Applicants in a pleading filed shortly after an unusual 12:00 p.m. filing deadline . . . even through that pleading was properly served on all parties shortly after that deadline” (Motion to Strike, p. 3), Applicants have completely misstated both the ALJs ruling and the underlying facts. First, the ALJs unquestionably considered the merits of Applicants’ arguments, expressly holding, “[B]ecause the challenged testimony addresses an issue approved in our Ruling on Issues, the motion is denied.” (July 13 Ruling, p. 2) In an accompanying footnote, the ALJs reiterated that “[T]he motion is denied on substantive grounds,” but also made clear that “[the motion] is also subject to dismissal on procedural grounds.” (Id., p. 2 n. 3) The July 13 Ruling then notes that Applicants’ made their filing **4.5 hours** after the 12:00 p.m. deadline.

<sup>17</sup> *Id.*, “Ruling Establishing Schedule and Hearing Procedures,” p. 3 (issued May 8, 2012).

The Commission's order in the Village of Frankfort proceeding, also cited in Applicants' motion, is similarly inapposite.<sup>18</sup> National Grid's service of the rehearing petition there was not only untimely, but was also insufficient because National Grid failed to serve DPS Staff.<sup>19</sup> Thus, even had National Grid timely filed the rehearing petition before the deadline, its filing would have remained defective due to the company's failure to meet the applicable service requirements. By contrast here, Entergy timely served the Active Parties and, but for the internet server delay of which Entergy was completely unaware at the time of service, Entergy's Brief on Exceptions would have been filed with the Secretary almost immediately after it was served electronically at 3:19 p.m., well in advance of the 4:00 p.m. deadline.

Next, the circumstances described above establish that Entergy gained no advantage from the delay in filing. Entergy served its Brief on Exceptions at 3:19 p.m. -- 41 minutes before the 4:00 p.m. deadline. Nor is this a case where Entergy waited until the last minute to serve its Brief, then transmitted an unusually large file that could foreseeably "clog" the server and delay delivery. Instead, this is a case where Entergy served its papers well in advance of the applicable deadline using exactly the same method of service it has always used in this proceeding, without any notice or expectation that delivery might be delayed. To the contrary, at the time of service, Entergy reasonably expected that electronic service and filing would occur virtually simultaneously, as it had with respect to all of Entergy's prior filings in this case.

Finally, Entergy has been a party to this proceeding in some capacity since September of 2010.<sup>20</sup> Entergy participated in the post-Joint Proposal briefing phase, cross-examined witnesses

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<sup>18</sup> Case 09-E-0299, Petition of the Village of Frankfort for Approval, Pursuant to Section 68 of the Public Service Law, of the Provision of Electric Service to an area of the Town of Frankfort, "Order Denying Petition for Rehearing and Clarification" (issued January 21, 2011).

<sup>19</sup> Id., pp. 4-5.

<sup>20</sup> Entergy Nuclear Power Marketing, LLC intervened in this proceeding on September 10, 2010. Entergy Nuclear FitzPatrick, LLC intervened on March 16, 2012.

at the evidentiary hearing, timely filed Initial and Reply post-hearing briefs then prepared and timely served its 34-page Brief on Exceptions. Entergy has never missed a deadline in this case. In short, because Applicants do not (and cannot) claim that they have been prejudiced by the six-minute exceedence of the 4:00 p.m. deadline, granting the motion would accomplish nothing other than to impose undue prejudice on Entergy and promote administrative inefficiency. In other words, Applicants' latest motion to strike elevates form over substance in the extreme. Under these circumstances, the Commission and/or the Secretary have, and should exercise, their discretion to excuse Entergy's *de minimis* delay in filing for good cause shown. That outcome will promote "the fair, orderly, and efficient conduct of the case."<sup>21</sup>

### CONCLUSION

For all of the foregoing reasons, Entergy respectfully requests that Applicants' January 18, 2013 motion to strike Entergy's Brief on Exceptions be denied in all respects.

Dated: January 28, 2013  
Albany, New York

Respectfully submitted,

**GREENBERG TRAURIG, LLP**

/s/ William A. Hurst \_\_\_\_\_

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<sup>21</sup> See 16 N.Y.C.R.R. §3.3(a)(1).