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

BRIEF OPPOSING EXCEPTIONS OF CHAMPLAIN HUDSON POWER EXPRESS, INC. AND CHPE PROPERTIES, INC.

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Dated: February 1, 2013

TABLE OF CONTENTS

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Champlain Hudson Power Express, Inc. ("CHPEI") and CHPE Properties, Inc. ("CHPE Properties" and, collectively with CHPEI, the "Applicants") submit this Brief Opposing Exceptions pursuant to the Notice for Filing Exceptions in this proceeding issued by Acting Commission Secretary Jeffrey C. Cohen on December 27, 2012.

INTRODUCTION AND SUMMARY OF POSITION

On December 27, 2012, Administrative Law Judges Michelle Phillips and Kevin Casutto (the "ALJs") issued their Recommended Decision (the "RD") recommending the approval of most of the provisions of the Joint Proposal filed in this proceeding on February 24, 2012 (the "JP") and the issuance of a certificate of environmental compatibility and public need (the "Certificate") for the construction of Applicants' proposed 1,000 MW High Voltage Direct

Current ("HVDC") transmission line from the Canadian border to Astoria, Queens, New York (the "Facility").

Applicants have received Briefs on Exceptions challenging various determinations made in the RD from the following parties: the Independent Power Producers of New York, Inc. ("IPPNY"), Entergy Nuclear Marketing, LLC and Entergy Nuclear FitzPatrick, LLC ("Entergy" and, collectively with IPPNY, the "Incumbent Generators"), the Central Hudson Gas & Electric Corporation ("Central Hudson"), Local 97 of the International Brotherhood of Electrical Workers ("Local 97") and the Business Council of New York State (the "Business Council").[1] For the reasons noted below, all of the exceptions to the RD advanced by these are entirely without merit and must be rejected.

ANALYSIS

I. THE RD CORRECTLY CONCLUDED THAT THE FACILITY IS NEEDED AND IN THE PUBLIC INTEREST

In the RD, the ALJs found that the Facility was needed and in the public interest for many reasons, including:

(1) that the outlook for capacity need expressed in the 2012 Reliability Needs Assessment ("2012 RNA") issued by the New York Independent System Operator, Inc. ("NYISO") "buttresses proponents' arguments for granting a certificate for this facility;"[2]

(2) that the "uncontested emissions benefits [of the Facility] have been amply demonstrated and they support both the need and public interest findings;"[3]

(3) that the Facility will enhance fuel diversity and reduce reliance on natural gas as a fuel for electric generation serving New York City and surrounding areas;[4]

[1] Briefs were also filed by the Staff of the New York State Department of Public Service and the New York State Department of Environmental Conservation, but these briefs did not except to any of the determinations made by the ALJs in the RD and, accordingly, will not be addressed in this Brief Opposing Exceptions.

[2] RD at 30.

[3] RD at 33.

[4] RD at 34.

(4) that the long-term analysis of DPS Staff witness Dr. Thomas Paynter demonstrates that "the [Facility] will provide overall net societal benefits;"[5]

(5) that, "even after accounting for opponents' criticisms and proposed offsets, [the Facility] will have sizable benefits in the form or reductions in the wholesale price of electricity" which, while temporary should nonetheless be considered as evidence supporting both the need and public interest findings;[6] and

(6) that the Facility will provide additional capacity to the New York City load pocket that could benefit from such additional capacity.[7]

No party takes exception to the ALJs' determinations with respect to the emissions benefits or the fuel diversity benefits of the Facility, which alone are fully sufficient to establish both the need for the Facility and, given the modest environmental impacts of the Facility,[8] to justify a finding that the public interest requires issuance of the certificate of environmental compatibility and public need at issue in this proceeding.

The Incumbent Generators in particular have excepted to the portions of the RD finding that the Facility will serve the public interest by reducing the cost and price of electricity and by providing additional capacity that would benefit the New York City load pocket. These exceptions are uniformly without merit for the reasons set out below.

A. The ALJs Correctly Concluded That NYISO's 2012 RNA Supports A Finding That The Facility Is Needed

IPPNY and Entergy both contend that the ALJs erred in concluding that NYISO's 2012 RNA shows that the additional capacity provided by the Facility may be needed by 2020, and perhaps sooner. These parties contend that the projections of capacity needs in NYISO's 2012

[5] RD at 47.

[6] RD at 54.

[7] RD at 56-57.

[8] As the ALJs noted on page 74 of the RD, "To a great extent, the nature and minimization of environmental impacts have been addressed through the lengthy negotiation process leading to the development of the JP, and the facility's potential environmental impacts are not the primary disputed issues in this proceeding."

RNA should be discounted based on IPPNY witness Mark Younger's testimony that generating facilities that have mothballed their facilities did so to reserve the right to re-enter the market at some future date and can be expected to do so when needed. In support of this claim, IPPNY points to recent filings by NRG and Cayuga Operating Company with the Commission that seek to temporarily reactivate certain facilities to address local reliability issues.[9] IPPNY also discounts NYISO's finding that retirement of Entergy's Indian Point units could accelerate the capacity need date to as early as 2016 on the ground that Entergy is vigorously pursuing the licenses and permits required to continue operations of those facilities.[10]

The ALJs correctly rejected the Incumbent Generators' claim that the Commission should find no need for the Facility due to the possibility that mothballed facilities may be reactivated in the future, ruling instead that "entry of merchant projects in advance of a 'reliability need' is not only consistent with, but is in fact an integral part of the NYISO's market-based planning process."[11] The Incumbent Generators' claim that the Commission should instead provide these mothballed facilities with a guaranteed right to reenter the market before allowing Applicants (and perhaps any other new competitors) to construct new facilities to serve consumers in New York City belies IPPNY's oft-repeated claim that it "strongly favors the continued development of a fully competitive electric market in New York."[12]

Moreover, the Incumbent Generators have ignored a fundamental difference between Mr. Younger's "static" and simplistic assumption that all generating facilities currently in operation

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[9] *See* Case 12-E-0136, *Petition of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements*, Order Deciding Reliability Issues and Addressing Cost Allocation and Recovery (August 16, 2012); *and* Case 12-E-0400, *Petition of Cayuga Operating Company, LLC to Mothball Generating Units 1 and 2*, Order Deciding Reliability Issues and Addressing Cost Allocation and Recovery (December 17, 2012).

[10] IPPNY Brief on Exceptions ("BoE") at 35.

[11] RD at 30, *quoting* DPS Staff witness Dr. Thomas Paynter.

[12] IPPNY BoE at 23.

today will remain in operation through 2026, which is unsupported by any evidence in the record, and the detailed modeling of new entry and retirements performed for this proceeding by Ms Frayer. Unlike Mr. Younger, Ms Frayer carefully modeled the performance of each and every generating facility serving New York City and surrounding areas to develop a forecast of the extent to which such facilities can expect to operate profitably or whether fundamental economic pressures such fuel costs and energy efficiency will force those facilities to be retired. Ms Frayer made this clear in Hearing Exhibit 144, where she explained that:

> I have incorporated economic retirements in our model. I apply economically rational new entry and exit decisions. On the basis of economic rationality, plants choose to exit the market if their revenues cannot cover the minimum going forward fixed costs three years in a row, consistent with economically rational business behavior. Given the low projected gas prices, the significant wind capacity with virtually zero marginal cost entering in the UPNY, the projected low capacity prices, and the stringent EPA environmental rules, a large amount of economic retirements is projected.[13]

It is therefore hardly surprising that many of the retirements predicted by Ms Frayer in her direct testimony filed in this proceeding on June 7, 2012 were confirmed by NYISO in its 2012 RNA released three months later. [14]

Since the close of the record in this proceeding, several other developments well known to this Commission have occurred that underscore the need for the additional capacity provided by the Facility. Like the recent reactivation of certain mothballed facilities cited by the Incumbent Generators and discussed above, these recent developments should also be considered by the Commission in evaluating claims that the Facility is not needed. The first of these

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[13] Hearing Exhibit 144 at 12, lines 8 to 17 (JF-3: Julia Frayer Direct Testimony Exhibit 3).

[14] The mere fact that one or two plants that submitted mothball notices subsequently sought to restart their facilities provides no support whatsoever for Mr. Younger's claims, as Mr. Younger offers no hard evidence to support IPPNY's apparent claim that those facilities will remain profitable to operate over the entire period from 2013 to 2026.

developments occurred on November 30, 2012, when the Commission issued its Order Instituting Proceeding and Soliciting Indian Point Contingency Plan in Case 12-E-0503.[15] In that Order, the Commission expressly rejected the claim advanced by IPPNY in its Brief on Exceptions in this case that retirement of the Indian Point nuclear facilities creating a reliability violation in 2016 is "highly speculative."[16] Specifically, the Commission ruled in Case 12-E-0503 that:

> There is currently significant uncertainty as to whether Entergy will be able to obtain the necessary permits and approvals to keep the Indian Point Energy Center operational over the long-term.
>
> * * * * *
>
> A loss of the Indian Point units, which, when operating, supply over 2,000 MW, could result in significantly reduced reliability at the time of retirement and for several years thereafter until replaced. [17]

Based on these findings, the Commission concluded that it was required to institute a proceeding to develop alternatives to the Indian Point Energy Center to avoid the significantly reduced reliability that would result if that facility were forced to retire and no alternative sources of supply were available. Specifically, the Commission ruled that:

> The potential retirement of a significant electric generating facility, such as the Indian Point Energy Center, requires significant advanced planning. Specifically, the size, location, and uncertainties regarding the potential retirement of the Indian Point Energy Center warrant such planning activities at this time. We agree there is a need to develop a contingency plan now to ensure reliability in the event the Indian Point Energy Center is ultimately retired.[18]

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[15]Case 12-E-0503, *Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans,* Order Instituting Proceeding And Soliciting Indian Point Contingency Plan (Issued and Effective November 30, 2012) ("Indian Point Contingency Plan").

[16] IPPNY BoE at 35.

[17] Indian Point Contingency Plan at 4.

[18] *Id*. at 2-3 (footnote omitted).

The fact that the Commission has recently instituted a proceeding for the express purpose of developing contingency plans, including an RFP for new capacity, to potentially replace the Indian Point Energy Center provides powerful evidence of the need for additional capacity to serve New York City and the lower Hudson Valley.

A second important development occurred on January 3, 2013, when Dynegy Danskammer, L.L.C. ("Dynegy") provided the Commission with written notice of its intention to permanently retire all of the generating facilities at its 495 MW Danskammer Generating Station in Newburg, New York, and to transfer that facility to a salvage company for demolition. In that petition, Dynegy explained its reasons for seeking to permanently retire those facilities:

> On October 29, 2012, Units 1 through 4 at the Facility were flooded due to high water from Super Storm Sandy; Units 1 through 4 have been in a forced outage status since that time. Units 5 and 6 were not exposed to flood water, but the power transformer for these generators was damaged by flood water. During the intervening period, Dynegy has retained contractors to assess the full extent of the damage at the Facility. Their assessment indicates that the flooding damaged approximately 90% of the motors and 60% of the switchgear in the Facility. Based on this assessment, the estimated costs to repair the Danskammer Facility are significant.[19]

Permanent loss of this 495 MW of generating capacity in the lower Hudson Valley creates an additional need for new installed capacity in downstate markets, providing more compelling proof of the folly of the Incumbent Generators' claims that the Commission should refrain from granting siting approval for the construction of any new installed capacity designed to serve downstate markets prior to 2026.[20] For all these reasons, the Incumbent Generators' claims that

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[19] Case 13-E-0012, *Petition of Dynegy Danskammer, LLC For Waiver of the Generation Facility Retirement Notice Period and Requesting Other Related Relief,* Notice of Intent to Retire Dynegy Danskammer, L.L.C. Units 1 – 6 (January 3, 2013).

[20] As Applicants noted in their Initial Post-Hearing Brief, this contention is also undermined by the fact that many of IPPNY's individual members are presently in the process of developing new generating facilities to serve New York City and the lower Hudson Valley and have represented to Governor Cuomo's Energy Highway Task Force that

NYISO's Reliability Needs Assessment demonstrates that the Facility is not needed must be rejected.

B. The ALJs Correctly Concluded That The Long-Term Analysis Of DPS Staff Witness Dr. Thomas Paynter Demonstrates That The Facility Will Provide Overall Net Societal Benefits

The Incumbent Generators also except to the ALJs' reliance on the analysis of the net societal benefits of the Facility prepared by DPS Staff witness Dr. Thomas Paynter. In his direct testimony, Dr. Paynter compared the all-in costs of the Facility and the additional investments in Canada required to supply hydroelectric power to the Facility with the costs of a similarly-sized combined cycle natural gas-fired generating facility located in New York City, including the cost of the delivered cost of the natural gas supplies that would be used by that facility.[21] In his rebuttal testimony, Dr. Paynter revised this analysis to address many of the claims raised by Mr. Younger on behalf of the Incumbent Generators. On the basis of this revised analysis, Dr. Paynter concluded that the Facility would produce long-run production cost savings with a net present value of between $0.4 billion and $2.6 billion in 2015 dollars.[22]

In their Briefs on Exceptions, IPPNY and Entergy both contend that the long-run production cost savings documented by Dr. Paynter are not a benefit to "society" to the extent that those cost savings inure to the benefit of the owners of the Facility rather than to consumers generally.[23] This contention is impossible to reconcile with the Incumbent Generators' claims that reductions in electricity prices paid by consumers should not be viewed as a benefit to society because they "represent only transfer payments between generators and consumers and

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their proposed new facilities are "needed." *See* Hearing Exhibits 167 (NRG), 168 (Astoria Generating Company), *and* 173 (GenOn Energy, Inc.).

[21] Evidentiary Hearing Transcript in Case 10-T-0139 ("Tr.") at 199, lines 15-19 (Paynter Rebuttal).

[22] RD at 39.

[23] IPPNY BoE at 7, Entergy BoE at 20.

not sustainable benefits to society as a whole."[24] Thus, the Incumbent Generators appear to be claiming that neither long-term production cost savings nor wholesale price reductions should be viewed as benefits in this case. This contention must be rejected out of hand.[25]

The suggestion that the Commission should ignore the long-run cost savings identified by Dr. Paynter also directly conflicts with IPPNY's statements in other contexts about the benefits of competitive markets:

> [C]ompetitive market structures motivate power producers to undertake investments and improvements that lead to productivity gains, and many of the nation's generating facilities now are operated much more efficiently than in the past. Just as in any competitive market, market signals embedded in the competitive wholesale markets in New York have created incentives for producers to undertake needed investments and creative improvements in operating practices to achieve such cost savings.[26]

As the Commission has recognized in other contexts, over time competition will force producers to share such cost reductions with consumers as other suppliers achieve similar cost reductions. For example, in its Statement of Policy on Further Steps Toward Competition in Retail Energy Markets in Case 00-M-0504, the Commission specifically noted that competitive markets produce lower costs and reasonable rates and charges:

> Competitive markets, where feasible, are the preferred means of promoting efficient energy services, and are well suited to deliver

[24] IPPNY BoE at 19.

[25] This is especially true in light of Mr. Younger's testimony on behalf of TransGas Energy Systems, L.L.C., in which he testified that the benefits of a proposed 1,000 MW combined cycle generating facility proposed for construction in New York City included both reductions in long-run production costs and reductions in wholesale electricity prices. Hearing Exhibit 164: Mark Younger Direct Testimony in TransGas Energy LLC in Case 01-F-1276.

[26] Hearing Exhibit 165: IPPNY White Paper "*The Policies of Power: Energy Planning for New York's Future"* Recommendations from the IPPNY" November 2008 at p. 15.

> just and reasonable prices, while also providing customers with the benefit of greater choice, value and innovation.[27]

For these reasons, and because the benefits to "society as a whole" that the Incumbent Generators demand in other parts of their Briefs on Exceptions include benefits to producers as well as benefits to consumers, the Commission must reject the Incumbent Generators' claim that the long-run cost savings documented by Dr. Paynter do not constitute benefits to society as a whole.

IPPNY also claims in its Brief on Exceptions that Dr. Paynter's analysis should be rejected for the following additional reasons: (1) Mr. Younger's testimony that Dr. Paynter underestimated the costs of the hydroelectric plants in Canada that supply the Facility; (2) Mr. Younger's testimony that line losses from the hydroelectric plants in Québec to the Facility should be raised from the 10% used by D. Paynter to 19.4%; (3) Mr. Younger's testimony that Dr. Paynter's analysis should be revised to delay the construction of the combined cycle gas-fired alternative to the Facility until 2026; and (4) Mr. Younger's testimony that the cost of the Facility should be amortized over a period considerably shorter than the 35 year period used by Dr. Paynter.[28] Each of these contentions should be rejected for the reasons noted below.

Cost of Canadian Hydroelectric Facilities. It is unclear what IPPNY is claiming in its Brief on Exceptions with respect to Dr. Paynter's estimate of the cost of the Canadian hydroelectric facilities that will produce the electricity used by the Facility. At one point, IPPNY states that Dr. Paynter "correctly modified his modeling" in his rebuttal testimony, suggesting

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[27] Case 00-M-0504, *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities,* Statement Of Policy On Further Steps Toward Competition In Retail Energy Markets, slip op. at 18 (Issued and Effective: August 25, 2004).

[28] IPPNY BoE at 9.

that the changes made by Dr. Paynter fully address this concern.[29] Later on that same page, however, IPPNY asserts without explanation that the estimated costs for the hydroelectric facility in Dr. Paynter's rebuttal testimony "were still significantly understated."[30] What is clear is that Dr. Paynter dismissed Mr. Younger's concerns with respect to his use of the Eastmain-1-A, La Sarcelle and Rupert Diversion ("ELRD") on the ground that any "sunk" costs associated with that facility do not add to the economic cost of the Facility,[31] and that Dr. Paynter addressed Mr. Younger's concerns with respect to the facilities needed to transmit electricity from the La Romaine project and to interconnect with the Facility by including those costs in his analysis.[32] Dr. Paynter also noted that the cost of these transmission facilities should be adjusted to remove any benefits they provide to other customers in Québec.[33]

As the ALJs noted in the RD, the correctness of Dr. Paynter's testimony regarding the need for adjustments to the cost of these transmission facilities was borne out by two facts: (1) the Québec Energy Board limited the cost of the transmission upgrades out of the Romaine project that could be assigned to purchasers of energy produced by that facility to only $918 million, or about half, of the $1.8 billion total cost of those transmission facilities; and (2) the Open Access Transmission Tariff ("OATT") of TransÉnergie provides a credit against the costs of interconnecting with the Facility that will substantially exceed the costs of the upgrades in Canada required to connect with the Facility, preventing any of those costs from being passed

[29] IPPNY BoE at 11.

[30] *Id.*

[31] Tr. at 176, lines 9 to 11 (Paynter Rebuttal).

[32] Tr. at 177, line 17 to 178 line 2. (Paynter Rebuttal).

[33] Tr. at 177, lines 13-16 (Paynter Rebuttal).

on to shippers.[34] Thus, the evidence in the record strongly supports the ALJs' acceptance of Dr. Paynter's analysis.

Losses in Transmission. IPPNY's claim that losses in transmission in Canada should be increased from the 10 percent figure used by Dr. Paynter to 19.4 percent must be rejected. As Dr. Paynter explained in his rebuttal testimony, Mr. Younger's 19.4 percent line loss rate represents his estimate the losses on the 345 kV New York State Transmission System from Buffalo to New York City, across the highly congested Total/East Interface. In contrast, transmission from hydroelectric facilities in Québec to the Facility will occur on uncongested lines operating at 765 kV, with a documented history of line losses substantially below the levels proposed by Mr. Younger:

> HQ's bulk system is comprised mostly of high voltage (735 kV) AC lines, designed to transfer power over long distances with relatively small line losses. An archived posting from HQ's website, provided as Exhibit____(TSP-3), states that: "Between James Bay and Montreal (more than 1,000 km apart), transmission losses vary from 4.5% to 8%, depending on operating conditions and temperatures." Thus my assumption of 10% losses on the HQ system is indeed conservative; this rebuts Mr. Younger's claim that an additional, unspecified, factor would be needed to cover HQ operating costs.[35]

This record strongly supports the ALJs' rejection of IPPNY's claims regarding transmission line losses in Canada.

Delayed Entry of CCGT. By far the single greatest change that Mr. Younger made to Dr. Paynter's analysis was to change the date on which the proposed combined cycle plant would commence operations from 2016, when Dr. Paynter assumed the Facility would become

[34] RD at 45.

[35] Tr. at 178, line 10 to 179 line 1 (Paynter Rebuttal).

operational, to 2026 when, in Mr. Younger's view, a capacity need would first arise.[36] Thus, like many of the other claims advanced by the Incumbent Generators in their Briefs on Exceptions, this claim is completely dependent on Mr. Younger's flawed reliance on NYISO's now out-of-date 2010 RNA, which found that there would be no need for new installed capacity in New York City and surrounding areas before 2026. Because NYISO's 2012 RNA found that additional capacity would be needed in New York City by 2020,[37] and because the Facility is actually expected to enter service in 2018,[38] the ten year difference between the in-service date for the Facility and delayed in-service date for the CCGT assumed by Mr. Younger is not supported by the record in this case.

Moreover, as Dr. Paynter explained in his rebuttal testimony, Mr. Younger's "delayed entry" analysis must also be rejected because it results in an unfair apples-to-oranges comparison:

> Mr. Younger has introduced short-term market conditions into a long-term economic analysis. Specifically, my long-term production cost analysis assumes that, in the long run, NYC will require new resources, either due to load growth, to retirement of existing resources, or to satisfy environmental or other public policy goals. As mine is a long-term economic analysis, I considered all costs to be avoidable; thus my analysis did not account for the actual timing or sequence of decisions. Any actual investment decisions will obviously take into account current and expected short-term market conditions, and so will differ from this long-term analysis. Since CHPE is a merchant project, such decisions are properly made by the developer and its financial backers.[39]

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[36] IPPNY BoE at 9-10.

[37] NYISO Final 2012 RNA at 7.

[38] Hearing Exhibit 88, at pages 2-3 (LEI Memo on the Results of the 2018 Test Year Modeling Analysis).

[39] Tr. at 179 line 7 to 180 line 2 (Paynter Rebuttal).

Dr. Paynter also explained that if he corrected his analysis to include a recognition of short-term market conditions affecting the Facility in Canada to permit a meaningful comparison between the Facility and Mr. Younger's short-term analysis of market conditions in New York City, the result would be to reduce the total costs of the Facility to less than one-third of the costs of Mr. Younger's CCGT facility:

> I would also have to adjust for market conditions regarding the development of hydroelectric resources in Quebec. Specifically, HQ is already constructing large new hydroelectric resources (and associated transmission lines) in Québec, and indicates this new supply will be available for export. As a result, the construction costs of these hydroelectric resources (including any associated transmission facilities) are now effectively "sunk", and no longer avoidable.
>
> If HQ fails to find a market for this new supply, HQ could end up "spilling water," i.e. letting low-cost hydropower resources go to waste. In that case, I would have to eliminate those sunk costs from its economic analysis. As a result of this adjustment, the principal remaining (avoidable) cost of the hydroelectric resources would be the cost of CHPE, which I estimated at approximately $2.432 billion. I would add the cost of interconnecting CHPE with HQ, which would still be an avoidable cost, estimated to be $346 million. Thus the total economic cost of the CHPE/HQ supply would be reduced to approximately $2.8 billion, rendering it very economic compared to the cost of the CCGT alternative, even using Mr. Younger's estimate of $8.4 billion.[40]

Applicants would note that in light of the plain provisions of the TransÉnergie OATT prohibiting the collection of the $346 million in upgrade costs from shippers using the Facility, the Facility would actually be closer to one quarter of the cost of Mr. Younger's hypothetical CCGT commencing operations in 2026. Accordingly, the evidence in the record strongly supports the ALJs' rejection of this proposed change to Dr. Paynter's analysis.

[40] Tr. at 180 line 20 to 181 line 14 (Paynter Rebuttal).

Amortization Period. The ALJs rejected all of Mr. Younger's analyses based on a 10-year period as not "commensurate with the facility's expected service life" of at least 35 years.[41] IPPNY's contention that the ALJs erred in making this determination because "relying on such a long period proves that any benefits are not likely to occur for decades, long after substantial expenditures will be required"[42] fails to demonstrate any error in the RD in this regard. To the contrary, the ALJs' finding that the benefits of the Facility must be evaluated over its entire useful life is plainly rational. Similar long useful lives are routinely used by the Commission in amortizing other long-lived assets.[43] Because IPPNY has failed to provide any explanation in its Brief on Exceptions of why the Commission should refuse to follow those precedents in this case, its exception to this portion of the RD must be rejected.[44]

C. The ALJs Correctly Rejected Mr. Younger's "Cash Flow" And "Production Cost Savings" Analyses

Mr. Younger offered two analyses intended to demonstrate that the Facility would be so "grossly" uneconomic "that the only way it can be constructed and operated over the long term is through some form of out-of-market subsidy funded by New York consumers in some

[41] RD at 48.

[42] IPPNY BoE at 9-10.

[43] *See, e.g.*, 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, slip op. at (Issued and Effective September 15, 2010) ("Further, we find that the HTP facility sufficiently passes the "production cost test" on the basis of the study and evaluation provided on the record by DPS Staff. The facility can be expected to provide up to $ 900 million, or more, in production cost savings (both for energy and capacity) during the course of its 40-year useful life as compared to its estimated cost of $ 716 million.").

[44] In its Brief on Exceptions, IPPNY also requests that the Commission incorporate or take official notice of the issuance by the United States Department of Energy's Energy Information Agency ("EIA") of a preliminary version of its 2013 forecast of natural gas prices. In a Ruling Denying Motion to Incorporate or Take Official Notice issued on January 30, 2013, the Commission's Acting Secretary denied IPPNY's motion relating to this preliminary report. Accordingly, IPPNY's claims based on this preliminary report must be rejected as without foundation. Applicants would note that these claims are also flawed for other reasons as well, which Applicant's have not presented in this Brief Opposing Exceptions in reliance on the Acting Secretary's Ruling.

capacity."[45] IPPNY goes on in its Brief on Exceptions to assert that the RD is "remarkably silent on this point."[46]

Nothing could be further from the truth. In fact, the ALJs expressly rejected the Incumbent Generators' claims that the Facility would be "grossly uneconomic" at least three times in three different portions of the RD. On page 48 of the RD, the ALJs stated that "we find IPPNY's analyses unpersuasive" for several reasons. On page 67 of the RD, the ALJs found that "[T]here is persuasive record evidence rebutting claims that the project will be an uneconomic entrant." Similarly, in footnote 158 on page 106 of the RD, the ALJs rejected IPPNY's contention that the Commission could not find that the Facility would conform to a long-range plan for expansion of the electric power grid because the Facility was grossly uneconomic. The ALJs rejected this contention, ruling that "Consistent with our discussion of the project's economics, *supra*, we recommend that this claim be rejected."

In both of his analyses, Mr. Younger determined the annual operating costs of the Facility by, among other things, multiplying the construction cost of the Facility ($2.19 billion) by a "levelized generic carrying cost charge rate" of 16 percent. The only reason that Mr. Younger gave for the use of this 16 percent carry cost charge was that this is the number used by NYISO in its Congestion Assessment and Resource Integration Study ("CARIS") to determine when a proposed transmission upgrade seeking cost-based rates is sufficiently economic to justify funding of that project under the NYISO OATT.[47] Far from being "remarkably silent" on this issue, the ALJs expressly rejected any reliance on this CARIS model, finding that CARIS "is

[45] IPPNY BoE at 4.

[46] *Id.*

[47] IPPNY BoE at 12-13.

geared toward determining whether regulated solutions should be approved and thus sets a very high bar."[48]

IPPNY makes no effort in its Brief on Exceptions to justify the use of the CARIS test and in fact candidly admits that "IPPNY is not advocating that the CARIS Cost/Benefit test be used generally as the determinative factor to identify whether a truly merchant project is economic."[49] Nor does IPPNY make any effort to rebut Dr. Paynter's testimony that this 16 percent carrying charge is likely to be substantially overstated:

> CHPE anticipates other sources of financing, presumably at more favorable terms, including HQ, whose business model involves long-term investments in hydroelectric projects and associated transmission lines. As a result, CHPE's financing costs may be well below the generic financing costs assumed by the NYISO.[50]

This carrying charge is particularly excessive in light of today's historically low financing costs resulting from the Federal Reserve Bank's efforts to stimulate economic recovery in the aftermath of what Dr. Paynter referred to as "the great recession."[51]

Instead, IPPNY contends in its Brief on Exceptions that the ALJs erred in rejecting the CARIS standard for two reasons: (1) because other evidence also shows the Facility to be uneconomic; and (2) because no other evidence of the Facility's economics has been provided.[52] Neither of these claims is true. Both of Mr. Younger's analyses of the costs of the Facility were rejected by the ALJs on the ground that they all relied on the arbitrary and inapplicable CARIS 16 percent carrying charge. Thus, there are no "alternative measures" demonstrating that the Facility is uneconomic. Moreover, if any such analyses did exist, they would not justify reliance

[48] RD at 48.

[49] IPPNY BoE at 17.

[50] Tr. at 188 lines 12 to 19 (Paynter Rebuttal).

[51] Tr. at 170 line 16 (Paynter Rebuttal).

[52] IPPNY BoE at 17.

on Mr. Younger's flawed analyses based on the inapplicable CARIS model in either his "Cash Flow" or his "Production Cost" analyses. Instead, any such alternative measure should be evaluated entirely on its own merits.

IPPNY's claim that there is no other evidence demonstrating that the Facility will be economic was expressly rejected by the ALJs when they ruled that Staff's updated long-term analysis is "best suited" to evaluating the expected long-term societal benefits of the Facility.[53] As Entergy candidly acknowledge elsewhere in its Brief on Exceptions, Dr. Paynter's analysis demonstrates that Applicants will earn higher revenues developing the Facility than any IPPNY member could earn developing a new gas-fired generating facility serving New York City and surrounding areas.[54] Because the ALJs rejected Mr. Younger's claim that no new generating capacity will be needed in New York City until 2026 for the reasons discussed in detail above,[55] and because a number of IPPNY members have made clear their intention to proceed with the development of new gas fired generating facilities to serve New York City and surrounding areas,[56] the ALJs properly rejected IPPNY's claim that the record contains no other evidence of the economic viability of the Facility.

A second flaw in both of Mr. Younger's analyses is that each focuses entirely on energy revenues and ignores the other revenues available to the Facility, including installed capacity payments. Contrary to IPPNY's assertion in its Brief on Exceptions, the benefits of the Facility to a shipper such as Hydro-Québec are not limited to the impacts of the Facility on the price at

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[53] RD at 47.

[54] Entergy BoE at 20 (noting that the cost savings identified by Dr. Paynter will accrue in the first instance to "Applicants, their financial backers and/or users of the Facility.").

[55] RD at 48.

[56] *Id.* at 60, *also see* Tr. at 542-555, 592-595; Hearing Exhibits 161, 167, 168, and 173.

which the shipper can sell energy,[57] but also include capacity benefits and the ability to supply other generation-related services. Because NYISO's 2012 RNA reveals that additional installed capacity is likely to be needed to meet reliability requirements in New York City and surrounding areas as early as 2020,[58] and because recent retirements and the uncertain status of the Indian Point Energy Center raise the very real possibility of an even nearer capacity need date as discussed above,[59] this omission is clearly a fatal flaw in both these analyses.

In addition to sharing these common defects, Mr. Younger's analyses of the economic viability of the Facility each suffer from several unique defects, including the following:

Additional Defects in Mr. Younger's "Cash Flow" Analysis. The Incumbent Generators claim that the ALJs erred in rejecting Mr. Younger's "cash flow" analysis because that analysis was "conservative" and favored Applicants.[60] Again, nothing could be further from the truth. As both Dr. Paynter and Ms Frayer made clear in their rebuttal testimonies, Mr. Younger stacked the deck against the Facility in several important ways. To begin with, Mr. Younger used today's historically low energy prices, which are artificially depressed by the recent recession:

> On the revenue side, Mr. Younger chose to analyze electricity prices in 2010 and 2011, which were severely depressed by short-term market conditions, including the "Great Recession." Prices in other years have been substantially higher, yielding much greater potential revenues. For example, applying the same method to prices in 2007 and 2008 yields $20.28/MWh on average, roughly double the energy values from 2010-2011.[61]

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[57] IPPNY BoE at 13.

[58] NYISO Final 2012 RNA at 7.

[59] *See Infra* I A.

[60] Entergy BoE at 10; IPPNY BoE at 11.

[61] Tr. at 188 line 20 to 189 line 7 (Paynter Rebuttal); Tr. at 344-345 (Frayer Rebuttal).

The effects of this recession can also be seen in the carrying costs of utility operations, which as previously noted, have fallen far below the arbitrary 16 percent carrying cost used by Mr. Younger.[62] Thus, Mr. Younger's analysis must be rejected as clearly biased against the Facility.

Moreover, Mr. Younger made no effort to demonstrate that existing interconnections between New York and Québec would be sufficient to accept the full output of the massive hydroelectric generating facilities now under development in Québec. In fact, the record shows that those existing interconnections are already constrained during periods of peak demand, leaving little opportunity for HQ to sell additional hydroelectric power into New York over those existing interties.[63] For all these reasons, the ALJs properly found Mr. Younger's "cash flow" analysis to be unpersuasive.

Additional Defects in Mr. Younger's "Production Cost" Analysis. The Incumbent Generators also contend that the ALJs erred in rejecting Mr. Younger's "production cost" analysis. This analysis suffers from the fundamental flaw of comparing apples (the revenue requirements of the Facility as estimated by Mr. Younger) to oranges (the production cost savings, again as estimated by Mr. Younger). As the ALJs properly determined in the RD, this apples-to-oranges comparison has no relevance whatsoever to the Facility's ability to produce the benefits identified in the RD.[64]

Moreover, like the "cash flow" analysis discussed above, this analysis was properly rejected by the ALJs on the ground that it improperly assumed that the full output of the massive

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[62] Clear evidence of this is provided by National Grid's recently filed Joint Proposal in Cases 12-E-0201 - *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a National Grid for Electric Service* and 12-G-0202 - *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a National Grid for Gas Service*, where National Grid accepted an overall cost of capital of only 6.5 percent. See page 5 of the Joint Proposal.

[63] Tr. at 175, line 5-6 (Paynter Rebuttal)

[64] RD at 47.

hydroelectric generating facilities now under development in Québec could simply be sold into New York State across existing, already constrained transmission lines. Because Mr. Younger failed to demonstrate that existing transmission facilities would be able to accept such additional power flows, the ALJs properly rejected that analysis as well.[65]

In addition, as Ms Frayer pointed out in her rebuttal testimony, Mr. Younger's "production cost" analysis was also flawed by its assumption of perfect integration between energy markets in New York State and energy markets in neighboring control areas operated by the New England ISO and the PJM. In reality, differences in market design between these control areas, sometimes referred to as "seams," limit the extent to which energy can flow between these control areas in response to differences in market prices, as FERC recognized in a recent order:

> Respondents faced price spread risk when flowing energy between New York and New England. The "seam" between NYISO and ISO-NE compelled Respondents to absorb any hourly price spread between the two systems and markets. Moreover, a wide positive price spread between NYISO and ISO-NE in a given hour could largely eliminate an external capacity supplier's incremental monthly capacity sales revenues. As stated in the Initial Decision, the record shows that if an external capacity supplier had flowed capacity-backed energy in every hour of every day during the Transition Period, it would have sustained day-ahead market losses in approximately 60 percent of those hours.[66]

As Ms. Frayer pointed out in her rebuttal testimony, the effect of this error was to cause Mr. Younger's GE MAPS model to substantially overstate trading opportunities relative to reality:

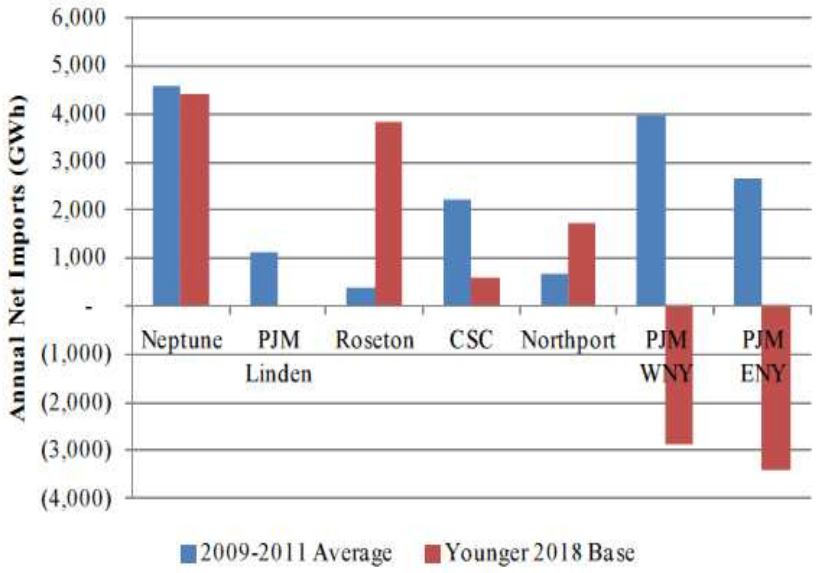
> Modeled outcomes using GEMAPS will be sensitive to assumptions on inter-regional trade and specifically the hurdle rates which the modeler inputs as defining commercial trade between markets. Mr. Younger has chosen very low hurdle rates for his modeling, which will allow GEMAPS to overstate trading

[65] *Id.*

[66] *Blumenthal v. ISO New England, Inc.*, 135 FERC ¶ 61,117 at P 44 (2011).

opportunities relative to commercial reality. This modeling outcome from Mr. Younger's analysis is evident in the chart below, which compares his modeled levels of imports/exports with historical levels of interchange.

Figure 4. Mark Younger's base case 2018 modeled imports and exports compared to 2009-2011 historical average



Note: Mr. Younger's ISO-NE Uncontrolled imports have been compared against Roseton imports

Overall Mr. Younger has under-modeled imports relative to actual conditions in the last three years. He has even modeled net exports to PJM, although in reality, PJM has routinely been a significant net importer to the NYCA. Such modeling outputs suggest that Mr. Younger's modeling is not a robust representation of real world conditions.[67]

Ms. Frayer also explained the impact of this error on the results of Mr. Younger's Production Cost Analysis:

Importantly, the effect of this unrealistic pattern of trade results in a diffusion of the production cost benefits of CHPE over a wide area. By limiting his reported results to only those benefits that remain in New York, Mr. Younger understates CHPE's true impacts on total production costs.[68]

[67] Tr. at 355 line 5 to 356 line 2.

[68] Tr. at 356 lines 10 to 14.

The full extent of this understatement of the Facility's benefits is revealed in Mr. Younger's rebuttal testimony, where he presents a chart showing that in his study, fully two-thirds of the output of the Facility would displace generation by facilities located outside the New York Control Area.[69] This projection is simply not credible in light of the seams issues still affecting energy sales between New York and neighboring control areas and amounts to an exercise designed to artificially reduce the apparent benefits of the Facility by exporting them to neighboring control areas and then ignoring them because they do not directly impact consumers in New York State. The Incumbent Generators' contention that the economic viability of the Facility can be determined by comparing its cost to only one-third of the benefits it produces is simply not credible. Because the assumptions used by Mr. Younger are not supported by the record, the ALJs correctly concluded that his "production cost" analysis was not credible.

D. The ALJs Correctly Concluded That The Facility Would Benefit Consumers By Reducing Energy Prices In New York City And Surrounding Areas

Although IPPNY and Entergy both except to the ALJs' conclusion that the Facility will benefit consumers by providing "sizable benefits in the form of reductions in the wholesale price of electricity" in New York City and surrounding areas,[70] neither of these Incumbent Generators contest the ALJs' finding that such price reductions will in fact occur. Instead, the Incumbent Generators candidly admit that these price reductions will occur, but contend that the Commission should not regard them as benefits justifying the Facility because these price reductions will be temporary and, in the view of the Incumbent Generators, will be the result of anti-competitive price suppression that should not be considered to be a benefit. Entergy alone

[69] Tr. at 513 above line 1.

[70] RD at 48 ("No party disagrees that this facility will (or is likely to) reduce wholesale electricity prices; parties disagree on whether these reductions should be viewed as a benefit, whether the estimates are accurate, and whether the metric should be relied on by the Commission in this proceeding.").

has the temerity to also contend for the first time in this proceeding that "a reduction in wholesale energy prices does not represent a benefit to society and so has no bearing on the public interest analysis to be undertaken here."[71]

Entergy's claim that reduced prices do not create a benefit to society is particularly hard to understand in light of its claim elsewhere in its Brief on Exceptions that the reductions in long-run costs found by Dr. Paynter do not represent a benefit to society *unless those cost reductions will be passed on to consumers in the form of lower prices.*[72] Such inconsistent and contradictory claims provide no basis for rejecting the conclusions reached by the ALJs in the RD. The Commission has consistently held that competition is "the most effective way of promoting markets, *lowering prices* and developing innovative services and products."[73] IPPNY too supports this position at several places in its Brief on Exceptions, stating at one point that: "competitive electric markets, over the long run, lead to more efficient operations and *support lower utility bills for customers*"[74] and at another point that "if the new entrant lowers prices because it has developed a method to produce and supply electricity at a lower cost, the price decrease can be sustained over the long term because the reduced prices will still be able to support this new lower-cost form of generation."[75] This is, of course, precisely what Applicants propose to do and is precisely why the Incumbent Generators have opposed the Facility in this proceeding

[71] Entergy BoE at 22.

[72] Entergy BoE at 20.

[73] Case 11-C-0425, *Joint Petition of PAETEC Holding Corp., Intellifiber Networks, Inc., McLeodUSA Telecommunications Services, LLC, US LEC Communications, LLC, PaeTec Communications, Inc., Talk America Inc., LDMI Telecommunications, Inc. and Windstream Corporation for Approval of an Indirect Transfer of Control of Authorized Telecommunications Providers*, Order Authorizing Transfer, slip op. at 12 (Issued and Effective November 17, 2011) (emphasis supplied).

[74] IPPNY BoE at 23-24 (emphasis supplied).

[75] IPPNY BoE at 21.

The New York State Board on Electric Generation Siting and the Environment (the "Siting Board") has also consistently recognized the lower prices resulting from the approval of a new generating facility as an important public benefit justifying the issuance of siting approval for such facilities[76] and, as noted in the RD, Mr. Younger himself has previously testified that such energy price savings should be a factor considered by the Siting Board in deciding whether to grant an Article X certificate to a proposed new generating facility.[77] Entergy's belated and novel claim that the Commission should disregard such a material benefit to consumers of electricity in New York State must therefore be rejected.

IPPNY's claim that the consensus position of IPPNY and Staff is that wholesale price savings are "inherently unreliable because, inter alia, they do not account for market responses"[78] is unsupported by any citation to the record in this case and cannot be reconciled with the testimony of DPS Staff witnesses Gjonaj and Wheat. Those Staff witnesses testified that they prepared their own analysis of the impact of the Facility on wholesale prices because they believed that "the Commission should be aware of these benefits when considering whether this project is in the public interest."[79]

The ALJs clearly considered and rejected the Incumbent Generators' claim that the lower wholesale electricity prices resulting from the Facility should be ignored simply because they are likely to be transitory. Specifically, the ALJs ruled in the RD that:

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[76] See, e.g., Case 99-F-1627, *Application by New York Power Authority for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 500 Megawatt Electric Generation Facility in the Astoria Section of Queens County*, Opinion And Order Granting A Certificate Of Environmental Compatibility And Public Need Subject To Conditions, slip op. at 17 (Issued and Effective October 2, 2002) ("The Siting Board finds, pursuant to PSL § 168(2)(e), that construction and operation of the NYPA facility in accordance with the Certificate conditions appended to this Opinion and Order would in the public interest. The proposed facility would contribute to the further development of a competitive electricity market in New York City, which should result in lower prices to consumers.").

[77] RD at 52.

[78] IPPNY BoE at 20.

[79] Tr. at 245 lines 3 to 5 (Gjonaj-Wheat Rebuttal).

> We find that, even after accounting for opponents' criticisms and proposed offsets, the proponents have successfully demonstrated that the project will have sizable benefits in the form of reductions in the wholesale price of electricity. These particular benefits will not be enduring but they nonetheless will be realized and thus should be considered as evidence supporting both the required need and public interest findings.[80]

The Incumbent Generators have provided no explanation in their Briefs on Exception why this obviously correct conclusion should be rejected by the Commission. Entergy's claim that Applicants have failed to demonstrate how long such cost savings would last is simply false, as the ALJs noted in the RD when they ruled that Ms Frayer had expressly addressed the impacts of changes in market conditions over time on the magnitude of such savings:

> Applicants note that Ms. Frayer expressly addresses the impact of changing market conditions on energy price savings in her analysis, which shows the amount of these benefits decreasing over time as a result of new entry.[81]

IPPNY's claim that lower prices can only be sustained over the long time where the new entrant has developed a method to produce and supply electricity at a lower cost[82] must also be rejected in light of the ALJs' previously-noted ruling accepting Dr. Paynter's testimony demonstrating that the Facility will reduce production costs.

The Incumbent Generators' claims that the ALJs failed to address their contention that the price reductions resulting from approval of the Facility should not be considered as a benefit because those price reductions will be the result of uneconomic entry must be rejected in light of the ALJs' repeated rejection of the Incumbent Generators' claims that the Facility is uneconomic.

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[80] RD at 53.

[81] RD at 48-49.

[82] IPPNY BoE at 21.

E. The ALJs Correctly Concluded That The Facility Would Benefit Consumers By Providing Needed Capacity To The New York City Load Pocket

IPPNY alone excepts to the ALJs' determination in the RD that the Facility will benefit consumers by providing needed capacity to the New York City Load Pocket.[83] IPPNY does not deny that the Facility will add an additional 1,000 MW of transmission capacity into the New York City load pocket, nor does it deny that 1,000 MW of generating capacity in Québec will be able to serve load in the New York City load pocket over that line. Instead, IPPNY argues that NYISO's buyer-side mitigation rules will prevent this capacity from being sold in the market and, as a result the Facility "cannot, in fact, provide any installed capacity benefits."[84] IPPNY's claims in this regard are misplaced for at least several reasons.

First and foremost, IPPNY's claims in this regard are once again dependent on its claims that the Facility will be uneconomic and that no new capacity will be needed in New York City and surrounding areas prior to 2026. Because the ALJs correctly rejected these claims for the reasons discussed above, they correctly concluded that the capacity supplied by the Facility would be needed and, consequently, would not be excluded from the market.[85], Second, IPPNY fails to recognize that the ALJs expressly ruled that the dollar amount of the capacity price savings resulting from that additional capacity cannot be precisely quantified at this time due to a variety of factors, including uncertainty about the precise impact, if any, of NYISO's buyer-side mitigation rules.[86] Thus, contrary to IPPNY's claims, the ALJs did not completely ignore the potential impact of the NYISO's rules on the Facility's ability to sell installed capacity in

[83] RD at 56 ("We are not persuaded that capacity price savings should be considered as a factor supporting the need or public interest findings. The analyses supporting these estimates are dependent on numerous assumptions about future developments and conditions, including, but not limited to, the application of buyer-side mitigation rules.").

[84] IPPNY BoE at 19.

[85] RD at 48.

[86] RD at 56.

NYISO markets. Third, in the unlikely event that any of the installed capacity provided by the Facility is excluded from participating in NYISO's capacity markets under these NYISO rules, that capacity would remain physically available to NYISO in its operation of the New York State Transmission System and would benefit consumers by enhancing the reliability of their electricity supply.

II. THE ALJs PROPERLY REJECTED THE INCUMBENT GENERATORS' OTHER OBJECTIONS TO THE FACILITY

The Incumbent Generators also criticize the ALJs for rejecting their other objections to the JP, which include: (1) alleged harm to competitive wholesale power markets; (2) alleged failure to ensure that the Facility will in fact be developed on a merchant basis; and (3) alleged increases in wholesale prices at the US-Canadian border. Each of these claims was properly rejected by the ALJs for the reasons noted below.

A. The ALJs Properly Rejected The Incumbent Generators' Claims That The Facility Will Harm Competitive Wholesale Power Markets

The Incumbent Generators claim that the ALJs ignored "without any analysis or explanation" their claims that approval of the Facility will harm competitive wholesale power markets.[87] Once again, their characterizations of the RD are misplaced. In fact, the Incumbent Generators have ignored the portion of the RD expressly rejecting this claim and support their claim that their contentions were ignored by the ALJs by pointing to portions of the RD addressing other issues. In the portion of the RD specifically rejecting the Incumbent Generators' claims that the Facility will harm competitive wholesale power markets, the ALJs make clear that they based their rejection of those claims in part on their previously noted rejection of the Incumbent Generators' claims that the Facility is "grossly uneconomic" and in

[87] IPPNY BoE at 28.

part on their finding that the buyer-side mitigation provisions of the NYISO Services Tariff will fully protect competitive wholesale power markets in the unlikely event that the Incumbent Generators' claims concerning the economics of the Facility are correct:

> [T]here is persuasive record evidence rebutting the claims that the project will be an uneconomic entrant. Alternatively, if some of the project's costs prove to be uneconomic, there are certificate conditions designed to protect captive ratepayers from a significant portion of any such costs; and, the buyer-side mitigation provisions of the NYISO Services Tariff were designed, are available, and, thus should be used, if necessary, to protect incumbent generators from any such uneconomic entry. In light of these factors, on this record, we conclude that the addition of such a facility should improve competitiveness of the market in New York City and is consistent with State, Commission, and City policies encouraging competitive markets. The opponents' arguments to the contrary should be rejected.[88]

The Incumbent Generators make no effort whatsoever to address either of these key findings in the portions of their Briefs on Exceptions demanding that the certificate in this case impose restrictions on the contracting practices of Hydro-Québec and other users of the Facility.

The seriousness of this omission is compounded by the Incumbent Generators' continuing practice of selectively quoting the orders of the Federal Energy Regulatory Commission addressing the issue of uneconomic entry. As Applicants noted in their Reply Post Hearing Brief, the Incumbent Generators have repeatedly quoted only the portion of Paragraph 103 of FERC's March 7, 2008 order in Docket No. EL07-39-000 (the "March 7 2008 FERC Order") that support their claims that uneconomic entry poses a threat to competitive markets, while omitting any reference to the portions of that order in which FERC made clear its intention

[88] RD at 67. *See also* RD at 70-71("[W]e do not agree that this record conclusively establishes that the project will need subsidies or will exact above-market costs. Accordingly, the potential for the type of contractual commitments complained of here does not provide justification for the additional certificate conditions proposed by the opponents.").

and obligation to adopt measures designed to prevent any such harm to competitive markets from occurring.

When the March 7, 2008 FERC Order is read in its entirety, the Incumbent Generators' misstatements are clearly revealed. In Paragraph 103 of that order, FERC did not stop after it identified uneconomic entry as a threat to the ability of competitive wholesale power markets to produce just and reasonable rates, as the Incumbent Generators' truncated excerpt suggests. Instead, FERC went on in Paragraph 103 to also rule that its mandate under the Federal Power Act provided it with both the authority and the obligation to take action to address that threat. Here is the full text of Paragraph 103, with the portions omitted by the Incumbent Generators shown in italics:

> 103. Markets require appropriate price signals to alert investors when increased entry is needed. By allowing net buyers to artificially depress prices, these necessary price signals may never be seen. While a strategy of investing in uneconomic entry and offering it into the capacity market at a lower or zero price may seem to be good for consumers in the short run, it can inhibit new entry, and thereby raise price and harm reliability, in the long-run."
>
> *Under the [Federal Power Act], the Commission must ensure that rates are just and reasonable. The courts have long held that establishing just and reasonable rates involves a balancing of consumer and investor interests.*[89]

Two paragraphs later in that order, FERC exercised this authority by directing NYISO to adopt tariff measures to protect New York's markets from competitive injury from uneconomic entry. In this passage, FERC's clear directive to NYISO to adopt rules providing effective mitigation of the adverse impacts of uneconomic entry is italicized for emphasis:

> 105. Furthermore, as described above, properly constructed capacity markets can also encourage reliable and efficient levels of investment only if market participants can expect prices that

[89] *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211 at P 103 (2008)(emphasis supplied).

> provide a reasonable opportunity to recover the costs of needed investment. *In order to prevent uneconomic entry by net buyers and the adverse effects that can follow from such entry, net buyer mitigation is necessary*.[90]

Thus, when read in its entirety, the March 7, 2008 FERC Order makes clear that FERC has taken the regulatory actions required to ensure that uneconomic entry will no longer pose a threat to New York's wholesale power markets.

The seriousness of the Incumbent Generators' failure to present the full context of this important FERC order is compounded by the fact that their own expert witness in this proceeding, Mr. Mark Younger, testified before FERC that the changes to NYISO's Services Tariff mandated by FERC in that very order were "generally sound in principle"[91] and "will provide a reasonable framework over the long run to deter further uneconomic entry and, consequently, will allow the Demand Curves to send the proper market signals."[92] Moreover, in another affidavit filed with FERC on this issue, Mr. Younger further stated that these new rules will enable NYISO to "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 or under-compensating generators."[93] In that second affidavit, Mr. Younger also testified that these rules were carefully tailored to avoid unnecessary interference with competition and market mechanisms:

> In fact, only contracts for uneconomic new entry will be impeded. "Impeding" (which to be clear is merely limited to not allowing these transactions to be used as a vehicle to artificially suppress

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[90] *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211 at P 105 (2008)(emphasis supplied).

[91] Hearing Exhibit 159 at 5

[92] *Id*. at 5.

[93] Hearing Exhibit 160 at 2.

> market clearing prices and does not otherwise stop the transaction itself) this kind of entry is appropriate.[94]

The Incumbent Generators' failure to provide the Commission with the full context of the March 7, 2008 FERC Order should not be tolerated by this Commission.

Moreover, the Incumbent Generators consistent failure to even mention – let alone address – the protections against uneconomic entry provided by the NYISO tariff provisions mandated in this and other FERC orders requires rejection of their claim that the Commission must impose additional requirements on shippers using the Facility in order to protect the Incumbent Generators from uneconomic entry.[95] Accordingly, the claims advanced in their Briefs on Exceptions provide no basis for rejecting the ALJs rejection of their claims of competitive injury.

B. The ALJs Properly Rejected The Incumbent Generators' Claims That Additional Certificate Conditions Are Required To Ensure That The Facility Will Be Developed On A Merchant Basis

The Incumbent Generators do not contend that Certificate Condition 15b exposes captive ratepayers to the possibility of having to subsidize the Facility through cost-based rates. Indeed, IPPNY candidly admits that Certificate Condition 15b provides "adequate assurances that the Applicants will not receive a direct subsidy,"[96] while Entergy concedes that this certificate provision "precludes Certificate Holders themselves from seeking a direct subsidy."[97] For this

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[94] *Id*. at 5.

[95] The Incumbent Generators' repeatedly claim that Hydro-Québec's response to the Energy Highway Initiative somehow demonstrate that Hydro-Québec "would likely only be willing to [agree to use the Facility] if it were offset by entering into an out-of-market, long term contract to recoup the price it paid to the Applicants to secure long term transmission rights on [the Facility]." *See, e.g.*, Entergy BoE at 7, IPPNY BoE at 15. This claim is based on nothing more than speculation and was properly rejected by the ALJs, who correctly concluded that: "In reality, if Hydro-Québec succeeds in securing a contract as a result of its RFI submission, the resulting contract, at best, will be evidence that two parties were able to agree on terms that were mutually agreeable and presumably mutually beneficial." RD at 70.

[96] IPPNY BoE at 28.

[97] Entergy BoE at 14.

reason, and because the commitments made by Applicants in Certificate Condition 15b go far beyond the commitments made by other merchant transmission facilities approved by the Commission,[98] the ALJs correctly concluded that Certificate Condition 15b adequately protects captive ratepayers from being forced to bear the costs of the Facility in cost-based rates.

Notwithstanding these facts, the Incumbent Generators still contend that the Facility is not a merchant facility. The Incumbent Generators contend that Certificate Condition 15b does not prevent a shipper using the Facility from itself obtaining a contract from a utility or state agency. The Incumbent Generators speculate that the utility or state agency might recover the costs of such an uneconomic contract from its captive retail customers. IPPNY in particular asserts that the ALJs have "ignored, without any analysis or explanation, the indirect subsidization risks inherent in this project well documented by IPPNY" and that, as a result, the RD "misses the mark entirely."[99] As previously noted, however, the ALJs expressly found in the RD that the Facility will require no such subsidization (direct or indirect) because the Facility has clearly been shown to be economic, and that the buyer-side mitigation rules contained in the NYISO's Services Tariff will protect the Incumbent Generators from uneconomic entry if it occurs.

Entergy alone complains about the fact that Applicants have reserved the right to impose cost-based rates on users of the Astoria-Rainey Cable other than: (1) shippers over the HVDC portions of the Facility; and (2) the existing capacity of the Astoria Energy II combined cycle

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[98] 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 Order").

[99] IPPNY BoE at 28.

generating plant also connected to NYPA's Astoria Annex.[100] Significantly, however, Entergy makes no attempt to explain how these provisions, which prevent other users of the High Voltage AC Astoria-Rainey Cable from taking a "free ride" on facilities constructed by Applicants, can have any possible adverse consequences for the public interest. Accordingly, the Commission should accept the ALJs' conclusion in the RD that the provisions of Certificate Condition 15 limiting the cost of the Astoria-Rainey Cable to no more than ten percent over the budgeted cost of $194 million[101] and precluding Applicants from imposing cost-based rates for electricity flowing over the HVDC portions of the Facility or produced from the existing capacity of Astoria Energy II are sufficient to ensure that Applicants' limited right to collect cost-based rates from other users of the Astoria-Rainey Cable (if any) will fully protect the public interest.[102]

C. The ALJs Correctly Rejected The Incumbent Generators' Claims That The Facility Would Increase Electricity Prices In Upstate New York

The Incumbent Generators also contend that the Facility will harm consumers in Upstate New York by increasing prices at the Canadian border.[103] The ALJs correctly rejected these claims as unsupported by record evidence.[104] While the Incumbent Generators claim that support for this position is provided by Dr. Paynter's testimony, this contention is wholly without merit. IPPNY's Brief on Exceptions contains no citations to the record to show where Dr. Paynter stated that such price increases would occur. Entergy does provide citations to the record, but those citations are inapposite and distorted.

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[100] Entergy BoE at 9.

[101] JP at ¶23 (DPS Staff estimated the cost of the Astoria-Rainey Cable to be $194 million in 2015 dollars).

[102] *See* RD at 69.

[103] IPPNY BoE at 22-23, Entergy BoE at 22-24.

[104] RD at 65 ("In fact, no basis for that assumption is substantiated in this record . . . .").

Specifically, Entergy quotes from Dr. Paynter's testimony on cross-examination at the hearing in this case, without including the very narrow question to which he was responding or the last fifteen words of Dr. Paynter's answer, both of which make clear that Dr. Paynter is answering a purely hypothetical question posed by Entergy's counsel. The complete question and answer, with the omitted portions highlighted in italics, is presented below:

> *Q. I haven't asked you that question. I am just saying in general, if prices -- I guess the simple question is: If prices at the border are $50 and they go to $70, that would have some impact on what the customers will bear in their retail bills that they incur; is that correct?*
>
> A. Yes. In general, the impact of CHPE would be to redirect flows from Québec directly into New York City as opposed to going into the existing New York transmission system. And, so, you would got a different pattern of price impacts. So, basically with CHPE you would have prices lower in New York City but higher in upstate regions at the border *compared to the case where HQ simply delivered all of that power at the border*.[105]

Once again, when viewed in context, the quotation presented by Entergy provides no support for its.[106] This is particularly true in light of Dr. Paynter's further testimony that Hydro-Québec could avoid these lower prices by funding other transmission upgrades that would enable it to reach other markets with higher prices:

> Q. * * * * If not building CHPE means that HQ must sell its additional energy at the border causing a substantial reduction in the market price, isn't it true that if the CHPE project is built, it will cause market prices at the existing border to substantially increase?
>
> A. Well, this gets into the timing of the decisions here. In general, if HQ commits to build projects and simply sells the additional

[105] Tr. at 215 line 13 to 215 line 2 (emphasis supplied).

[106] In fact, the only record evidence directly addressing the impact of the Facility on power prices in upstate New York is the testimony of Ms Julia Frayer of London Economics International, LLC., whose testimony included a chart clearly showing that the Facility will have no significant impacts on the price of electricity in upstate markets. Tr. at 279, lines 1-7.

> output at the border, then that would tend to depress the border price. Alternatively, if HQ were to finance transmission upgrades that allowed it to receive to avoid some of the congestion and reach higher price markets, then basically you would not see the price reduction, or at least as much price reduction at the border.[107]

Thus, contrary to the claims of the Incumbent Generators, the record fully supports the ALJs' determinations in the RD that: (1) there is no persuasive record support for the Incumbent Generators' claims that the Facility will increase the price of electricity in Upstate New York; and (2) Hydro-Québec will have powerful economic incentives to fund other transmission upgrades to permit its energy and capacity to reach other markets if the Facility is not approved.[108]

III. THE ALJS CORRECTLY CONCLUDED THAT THE APPLICANTS HAVE AVOIDED OR MINIMIZED POTENTIAL ADVERSE ENVIRONMENTAL IMPACTS OF THE FACILITY

A. The ALJs Correctly Concluded That Applicants Have Avoided Or Minimized The Impacts Of The Facility On Shortnose And Atlantic Sturgeon

In its Brief on Exceptions[109] Entergy reiterates the contention made in its Initial Post-Hearing Brief[110] that the Applicants have not done enough to characterize the possible nature of impacts from the installation of concrete mats on shortnose and Atlantic sturgeon ("sturgeon") listed under the federal Endangered Species Act ("ESA") and the New York Environmental Conservation Law ("State ESA"). Entergy speculates that the installation of mats will impact

[107] Tr. at 212 lines 9 to 25.

[108] This conclusion is also supported by the direct testimony of Mr. Donald Jessome, who explained that: "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. As Ms. Julia Frayer makes clear in her testimony on benefit issues, the consequences for New York State residents of a failure to capitalize on this unique opportunity in terms of higher energy costs, increased air pollution and reduced economic activity would be momentous." Tr. at 69, lines 4 to 10.

[109] Entergy BoE at 24-27.

[110] Entergy Initial Brief at 31-36.

sturgeon habitat, despite overwhelming contrary evidence in the record that the mats will have a minimal environmental impact. Using the unsupported assumption that sturgeon habitat will be adversely impacted, Entergy makes the scientifically baseless argument that the Facility may result in a statutorily prohibited "take" of sturgeon.[111]

The RD correctly found that the Applicant's Facility fully conforms to the relevant standards under PSL § 126.1, which requires the Commission to: (1) identify the nature of the probable environmental impact of the Facility; (2) find that the Facility represents the minimum adverse environmental impact considering various alternatives; and (3) find that the Facility conforms to applicable state laws and regulations. The conformance standard under the PSL includes conformance with State ESA, which prohibits the "taking" of a threatened or endangered species.[112] A "taking", as it relates to the impacts on sturgeon habitat alleged by Entergy, refers to "any adverse modification of habitat" that would alter the "occupied habitat" of a threatened or endangered species such that it "is likely to negatively affect one or more essential behaviors of such species."[113] Entergy has failed to demonstrate any factual basis for its argument that there will be a negative effect on the essential behavior of sturgeon.

Contrary to Entergy's contentions, the findings in the RD and the record clearly demonstrate that the Applicants have satisfied the applicable standards of the PSL, including conformance with the State ESA.[114] Entergy's argument that the installation of mats may result in a "take" ignores the substantial record supporting the Joint Proposal's finding that the Facility

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[111] Entergy BoE 25-26.

[112] State ESA, § 11-0535(2).

[113] 6 N.Y.C.R.R § 182(2012).

[114] Entergy's Brief on Exceptions also refers to the federal Endangered Species Act and related case law. It should be noted initially that these references are irrelevant to this proceeding under Article VII of the PSL and should be disregarded by the Commission. In addition, Entergy cannot cite any part of the record where the National Marine Fisheries Service has offered any opinion as to whether this project would constitute a take of any species, so Entergy's statements about the likely outcome of the federal review of the project is purely speculative at best.

"is not expected to have any significant impacts on shortnose sturgeon" or other "protected aquatic species."[115] The Joint Proposal was developed over months of collaborative discussions with the NYSDEC, the agency responsible for assessing sturgeon habitat and effects on the essential behavior of sturgeon. NYSDEC is also a signatory party to the Joint Proposal.

Entergy's "take" claim is belied by the complete record reviewed by the ALJs, a record that illustrates how the installation of the cable is designed to avoid or minimize environmental impacts. As the ALJs noted in the RD, the Applicants are: (1) largely avoiding routing the Facility within Exclusion Areas (or Zones) and Significant Coastal Fish and Wildlife Habitats ("SCFWH"); (2) designating seasonal construction windows for construction within Exclusion Areas and SCFWHs; and (3) developing a final Facility design in the EM&CP phase of the project that minimizes potential impacts in the five SCFWHs near the project as provided in the JP.[116] Accordingly, the ALJs made the requisite statutory finding under PSL § 126.1 that based on "the nature of the probable environmental impact, . . . the Facility represents the minimum adverse environmental impact" considering other alternatives.

The record amply supports the ALJs conclusion that, by largely avoiding SCFWHs and Exclusion Areas where sturgeon are believed more likely to occur, the Applicants will also avoid or minimize any potential impacts to sturgeon habitat, in accordance with the PSL § 126.1 and the substantive requirements of the State ESA. Entergy attempts to undermine this fact by suggesting that the loss of benthic habitat from the placement of mats outside of these areas has not been addressed. Entergy ignores the Applicants' efforts in consultation with the regulatory agencies and the environmental community to ensure benthic habitat is not lost. In its Conditional Concurrence with Consistency Certification, the NYSDOS noted: "The most certain

[115] JP at ¶¶ 57, 58.

[116] RD at 94.

way to minimize the impact on benthic habitats is by siting the cable route to avoid particularly sensitive habitats."[117] Working in collaboration with the NYSDEC, NYSDOS, DPS Staff, Riverkeeper, Scenic Hudson and Trout Unlimited, the Applicants have developed a route for the Facility, based on existing habitat information, that avoids, to the maximum extent possible, areas recognized as sensitive habitat for aquatic species.[118] By avoiding areas recognized as sensitive habitat, the Applicants will avoid potential impacts to sturgeon habitat. Accordingly, there is no need for a "quantitative estimate of impacts to ESA-listed sturgeon outside the Exclusion Areas or SCFWHs,"[119] as demanded by Entergy, and Entergy cites no scientific basis for its argument that such an analysis is needed to support the RD's finding that impacts to sturgeon have been minimized.

Entergy's argument ignores the fact that SCFWHs and Exclusion Zones were designated specifically because they contain sensitive habitat relative to other areas of the river. Discussions with NYSDEC and the other Signatory Parties resulted in the designation of fifteen "Exclusion Zones" to be avoided to the maximum extent possible. NYSDEC Staff developed the Exclusion Zones based on an extensive analysis of river bottom bathymetry, fisheries data,

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[117] Letter from the New York State Department of State to Applicants regarding Conditional Concurrence with Consistency Certification (June 8, 2011) at 6, *available at* http://docs.dos.ny.gov/coastal/cd/F-2010-1162%20CondCCR_web.pdf.

[118] Paragraph 51 of the JP requires Applicants to "take all necessary measures consistent with this Joint Proposal, the Proposed Certificate Conditions, the BMPs and the EM&CP Guidelines, to avoid and/or minimize impacts to threatened or endangered wildlife species listed at 6 N.Y.C.R.R. Part 182 ("TE species") and their occupied habitats that are found to be located in the Construction Zone."

Paragraph 54 of the JP provides, in pertinent part, that "NYSDOS, Division of Coastal Resources, together with the NYSDEC, has designated seventeen (17) Significant Coastal Fish and Wildlife Habitats ('SCFWHs') within or in the vicinity of the HVDC Transmission System area. The routing as outlined in this Joint Proposal would avoid directly transiting twelve (12) of these areas. Within the remaining five (5) SCFWHs (Kingston Deepwater Habitat, Esopus Estuary, Poughkeepsie Deepwater Habitat, Hudson River Mile 44-56, and Lower Hudson Reach), the settlement parties have identified certain 'Exclusion Zones' (Appendix B) that will be avoided to the maximum extent possible. The overall installation plan and construction windows will be designed to accommodate location-specific and season-specific restrictions intended to avoid and/or minimize potential impacts on TE species." (footnote omitted).

[119] Entergy BoE at 27.

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.[120] The Exclusion Zones go above and beyond identifying legally protected habitats to include other areas that NYSDEC considered to be areas of high quality habitat.[121] NYSDEC identifies the State ESA as its authority for development of the Exclusion Zones 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."[122] Consequently, the avoidance of the Exclusion Zones was specifically designed to avoid the possibility of a "take."

The Applicants are also avoiding SCFWHs to the maximum extent possible. SCFWHs are designated by the NYSDOS because they are essential to the survival of a large portion of a particular fish or wildlife population, support populations of rare and endangered species, are found in low frequency, support fish and wildlife that have significant commercial and/or recreational value, and/or would be difficult or impossible to replace.[123] Moreover, to the extent the Facility is within a SCFWH or Exclusion Area, construction windows will be used to avoid times when these areas are more likely to contain sensitive species,[124] and the Applicants will develop a final facility design for five nearby SCFWHs to minimize environmental impacts.[125] Given the collaborative discussions and resulting protections adopted by the Signatory Parties,

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[120] Hearing Exhibit 102 (Description of Protected Areas within Hudson River); Hearing Exhibit 127: Revised Certificate Condition ¶ 156(b)(1).

[121] *Id*.

[122] *Id*.

[123] *Id*.

[124] Hearing Exhibit 127: Revised Certificate Condition ¶ 156(b)(1); Hearing Exhibit 121 at 250-52 (Revised Environmental Impacts Assessment).

[125] All of these efforts were premised on the existing information from the agencies responsible for protecting these endangered species.

Entergy's assumption that segments of sturgeon habitat have gone unstudied and unprotected is completely speculative.

Moreover, Entergy vastly overstates the use and effect of concrete matting. Entergy cites data provided to the NYSDOS by the Applicants' consultants as support for its claim that the impact of concrete matting represents "approximately 6.41 miles of indeterminate width."[126] However, Entergy's assertion is based on a table that was clearly developed using the Applicants' original routing, as evidenced by the note that "route modifications are being discussed during the confidential settlement discussions."[127] Under the settlement routing, the concrete matting would extend for only 4.45 miles or approximately 25% less than Entergy would have the Commission believe.[128] In addition, as Entergy acknowledges, a portion of this concrete matting (17%) would be installed over existing hard substrate and yet Entergy offers no explanation as to how this surface, or any other section of the mat surface, would function differently in terms of habitat. In fact, the relevant evidence in the record is contrary to Entergy's assumption: "In areas of hard bottom, the mats will create similar habitat, and in soft bottom areas the mats will, in essence, create small artificial patch reefs. The surface of the mats may develop an epibenthic community over time as well as provide structure that is important for some benthic species and fish."[129] Moreover, the letter to the NYSDOS specifically points out that the final design will "optimize the placement of protection to minimize the area of the

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[126] Entergy BoE at 25.

[127] 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).

[128] A comparison of the original routing (Hearing Exhibit 2) against the current proposed routing (Hearing Exhibit 126) shows that the route would no longer cross nine of the infrastructure locations or natural barriers shown in Hearing Exhibit 92 at 4. These locations correspond to the portions of the Hudson River between Coeymans, New York and Cementon, New York and one location within Haverstraw Bay.

[129] *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.").

bottom covered by concrete mattresses or other protective devices" and that "[t]he actual area of additional protection is likely to be substantially less than the total width of the cable/pipeline area as depicted on the NOAA charts."[130]

Entergy's arguments also overlook the beneficial effects of the $117.5 million trust for the enhancement of the Hudson River and Lake Champlain that resulted from collaborative discussions among the Signatory Parties. Paragraph 144 of the Joint Proposal provides:

> The Signatory Parties have agreed upon the establishment of the Hudson River and Lake Champlain Habitat Enhancement, Restoration, and Research/Habitat Improvement Project Trust (the "Trust"), as detailed at Proposed Certificate Condition 165 in Appendix C, to be used exclusively for in-water mitigation studies and projects that have a direct nexus to the construction and operation of the Facility. The Signatory Parties have participated in extensive discussions to develop a variety of studies and projects that will minimize, mitigate, study and/or compensate for the short-term adverse aquatic impacts and potential long-term aquatic impacts and risks to these water bodies from construction and operation of the Facility.

Based on the required analysis under the PSL § 126.1 and the information in the record, the ALJs correctly identified the nature of the environmental impact and found that the Facility conforms with the substantive requirements of the State ESA. The Applicants have identified and avoided potential sturgeon habitat to the maximum extent possible and the record shows that the environmental impact of the mats will be minimal. Entergy has not presented any evidence or legal authority to support its "taking" claim that the placement of concrete mats will result in the adverse modification of sturgeon habitat and there is no record of any state or federal agency that would substantiate their speculations. The RD is fully consistent with the requirements of PSL § 126.1 and, therefore, should be accepted by the Commission.

[130] Hearing Exhibit 92 at 3.

B. The RD's Finding That The EMF From The Facility Will Have A Minimal Impact, If Any, On Sturgeon Is Consistent With The Requirements Of The PSL § 126.1 And Fully Supported By The Record

The contradictory assertions in Entergy's Brief on Exceptions that the record lacks adequate studies of electromagnetic field ("EMF"), and that the EMF emitted from the cables will impact the orientation and migration of sturgeon, ignore both the documents in the record and the conclusions supported by those documents.[131] Entergy does not dispute whether the technical and construction design of the Facility, including sheathing and burial, will reduce EMF, but rather makes an unfounded assertion that the amount of reduction is not sufficient to minimize potential impacts on migratory species such as sturgeon, particularly in areas where the cables cannot be buried. Entergy uses this baseless argument that the EMF emitted by the cables will impact sturgeon to imply that the Facility will result in a statutorily-prohibited "take" under the State ESA.

However, the RD properly recognizes the designed reduction of EMF and the assessments of EMF by the Applicants in the record,[132] and supports the ALJ's finding that the "emanation of EMFs from the cables will have minimal impact, if any, on migratory species, including ESA sturgeon."[133] The facts supporting this conclusion are uncontroverted and Entergy has failed to provide any factual support for its position. This ALJs' conclusion, based on the record, supports the finding under the PSL § 126.1 that the Facility "represents the minimum adverse environmental impact" and conforms with the substantive requirements of the State ESA.

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[131] Entergy BoE at 27-30.

[132] 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 (Applicants' Letter to New York State Department of State regarding Updated Alternatives Analysis (January 18, 2011)), Hearing Exhibit 92, Hearing Exhibit 100 (Applicants' Letter to New York State Department of State, dated March 18, 2011).

[133] RD at 98-99.

As a point of clarification, it is important to distinguish between EMF and magnetic field and note that the Facility will not actually produce EMF, but only magnetic field. The HVDC cables will be buried in the ground or installed in a trench at the bottom of the waterways. When installed in this manner, electric field levels are reduced to inconsequential levels because of the earth cover over the cables.[134] Accordingly, the remainder of this brief will refer to "magnetic field" rather than "EMF."

As shown in the record, the minimum amount of magnetic field that would be emitted by the Facility would not rise to the level of a "take" of sturgeon. A "take" under the State ESA includes the killing of an endangered species and lesser acts including "disturbing, harrying or worrying" of the species.[135] A take also includes an "interference with or impairment of an essential behavior" of an endangered species. "Essential behavior means any of the behaviors exhibited by a species listed as endangered or threatened in this Part [182] that are a part of its normal or traditional life cycle and that are essential to its survival and perpetuation. Essential behavior includes behaviors associated with breeding, hibernation, reproduction, feeding, sheltering, migration and overwintering."[136]

Contrary to Entergy's unsubstantiated assertions that magnetic emissions have gone unstudied, the record contains multiple models of expected magnetic and heat fields at varying depths showing that impacts, if any, will be minimal and not affect sturgeon.[137] Entergy did not contest the findings of any of these studies in their March 16, 2012 Statement in Opposition to the Joint Proposal.

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[134] Hearing Exhibit 22 at 4 (Electric and Magnetic Fields Report (Appendix H to the Application)).

[135] State ESA § 11-103(13).

[136] 6 N.Y.C.R.R § 182.2(f)(2012).

[137] Hearing Exhibit 24 at 10-16, 36-37, Hearing Exhibit 64, Hearing Exhibit 87, Hearing Exhibit 92, Hearing Exhibit 100.

Dr. William H. Bailey of Exponent Inc. gave uncontroverted testimony regarding potential impacts on aquatic species from magnetic fields. Commenting on the potential magnetic field impact on eggs and larvae, Dr. Bailey stated 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."[138] Moreover, Dr. Bailey concludes, "research studies on a variety of fish and other marine species have not reported adverse effects of exposure to magnetic fields."[139] As Dr. Bailey notes, the research is clear that no single environmental stimulus such as current flow, light, smell, taste, magnetic field, temperature, salinity, or other factors dominates migratory behavior.[140] Marine organisms have the means to coordinate and make use of multiple cues and resolve discrepancies.[141] At the time that Dr. Bailey made these statements, it was understood that certain portions of the cables would be under protective matting. Moreover, the zone of influence from the cables is small[142] and, as the RD found, "migrating fish could potentially travel the full length of the Hudson without encountering the zone of influence of the cables."[143] Accordingly, there is no basis for Entergy's unsupported argument that the low level of magnetic field emissions from the Facility will impact sturgeon based on the existing record.

The technical design of the cables and the construction of the Facility will further reduce any influence from magnetic fields. As mentioned above, the Facility has been routed to avoid

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[138] Hearing Exhibit 64 at 59.

[139] *Id*. at 57.

[140] Hearing Exhibit 64 at 57.

[141] *Id*.

[142] Hearing Exhibit 121.

[143] RD at 97.

to the maximum extent practicable SCFWHs and Exclusion Areas. The Applicants have further 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"[144] outside of the Federal navigation channels, which will further reduce magnetic fields.[145] The Environmental Management and Construction Plan ("EM&CP") will also include "a work plan for reducing magnetic fields . . . overland and underwater with the Facility in operation."[146]

The RD correctly concluded that the "[magnetic fields] from the cables will have a minimal impact, if any, on migratory species, including ESA sturgeon."[147] The Applicants in collaboration with the Signatory Parties have conducted numerous assessments supporting this conclusion. Contrary to Entergy's opinion that more studies are needed, the ALJs correctly noted that the Applicants are "not required to conduct every conceivable study to support required findings on nature and minimization of impacts."[148] The assessments in the record confirm that the magnetic field from the cables is minimal and would not impact the essential behavior of sturgeon. Accordingly, the Commission should accept the RD, which is consistent with the requirements of PSL § 126.1 requiring the minimization of adverse impacts and conformance with state law.

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[144] Hearing Exhibit 127: Revised Condition ¶ 95(a)(ii).

[145] Hearing Exhibit 100 at 2-3.

[146] Hearing Exhibit 127: Revised Condition ¶ 159(t).

[147] RD at 99.

[148] *Id*.

C. The RD Correctly Found That The JP's Proposed Certificate Conditions Requiring Compliance With The ACOE's Final Determination On Cable Placement And Burial In The Navigation Channel Is Consistent With The Requirements of PSL § 126.1

Entergy's Brief on Exceptions improperly accuses the ALJs of substituting their judgment for that of the Army Corps of Engineers ("ACOE") regarding the placement of the cables in the federally-maintained navigation channel.[149] The crux of Entergy's argument rests on its mischaracterization of correspondence between the Applicants and the ACOE, which Entergy incorrectly describes as the ACOE's "refusal to approve" the burial of approximately nine (9) miles of cables longitudinally in the navigation channel. Under this false characterization, Entergy takes exception to the RD by arguing that the Certificate Conditions adopt a standard that is actually less stringent than the ACOE's standards.

Contrary to Entergy's argument, the proposed Certificate is expressly conditioned on the outcome of the ACOE permitting process. The RD defers to the ACOE's permit review and determination,[150] which, contrary to Entergy's characterization, has not been finalized. Compliance with the ACOE is an express condition of Revised Certificate Condition 11, which states that, prior to construction, the Applicants 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.[151] Moreover, contrary to the reliance Entergy has placed on a preliminary letter, the ACOE has not yet made a final determination regarding the placement of the cables in the federally-maintained navigation channel and discussions between the ACOE and the Applicants

[149] Entergy BoE at 30-33.

[150] RD at 87-88.

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

are ongoing. [152] Therefore, Entergy's unsupported argument that the RD adopts standards "that are at odds with the ACOE's likely resolution of the permit"[153] is a gross mischaracterization of the status of the pending federal process. As with the discussion of "takings" above, Entergy is in fact guilty of the accusation it made of the ALJs — attempting to substitute its own judgment (or its preference) for that of the agencies involved.

More importantly, Entergy fails to explain how the outcome of the ACOE permitting process could undermine the RD's finding that the environmental impacts of cable burial have been minimized. The ACOE's review is a pending federal process under the Clean Water Act and is completely independent and outside of the Article VII process. The RD, and ultimately the Commission's decision, rests instead on the PSL § 126.1, which requires a showing of "the nature of the probable environmental impact" and that "the facility represents the minimum adverse environmental impact" considering other alternatives. The record shows that cable burial impacts have been minimized, and the ACOE's review will not change that fact. Based on the application of these standards to the record in this proceeding, the ALJs findings in the RD are proper and should be adopted by the Commission.

IV. THE EXCEPTIONS TO THE RD RAISED BY OTHER PARTIES SHOULD ALSO BE REJECTED

A. Central Hudson's Exceptions To The RD Are Without Merit

Central Hudson advances three exceptions to the RD in its Brief on Exceptions. Each of these exceptions is without merit for the reasons noted below.

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[152] Moreover, the ACOE previously authorized longitudinal projects within the navigation channel at depths that are shallower than those that have been proposed by the Applicants. Bayonne Energy Center, LLC ACOE Permit, NAN-2008-01564-M3, July 7, 2011, *available at* http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={EADD1AF6-8451-4660-A9D4-5C150BB29BA8}.

[153] Entergy BoE at 33.

1. Central Hudson's Objections To Proposed Certificate Conditions 28 and 29 Are Without Merit.

Proposed Certificate Conditions 28 and 29 require the Applicants to consult with utilities and other infrastructure owners that could be affected by the construction of the Facility and establish detailed procedures that the Applicants will be required to adhere to in planning and constructing the Facility in a manner that is fully consistent with existing utility infrastructure located along the Facility's proposed right-of-way. These procedures include early consultation with such utilities to identify existing facilities along the proposed right of way, the provision of detailed construction plans to such utilities at least six months before their submission to the Commission in any Environmental Management and Construction Plan ("EM&CP") filing, and the obligation to compensate utilities for costs incurred in reviewing such plans.[154] In the event that Applicants are unable to amicably resolve any differences of opinion with respect to either Applicants' construction plans or Applicants' reimbursement obligations with any such neighboring utility, these Proposed Certificate Conditions provide that such disagreements concerning Applicants' obligations under the proposed Certificate shall be resolved by the Commission.[155]

Although these provisions are strongly supported by a number of other utilities owning assets along the Facility's route,[156] Central Hudson alone contends that these provisions somehow limit its "pursuit of judicial remedies and otherwise constrain Central Hudson's rights."[157] The ALJs flatly rejected this concern, ruling that "there is no basis for concluding that

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[154] Appendix C to the JP: Proposed Certificate Conditions ¶¶ 28 and 29(c).

[155] *Id.* at 29(d).

[156] Initial Post Hearing of the New York Power Authority in Case 10-T-0139 (filed on August 22, 2012); Reply Statement of Vermont Electric Company Inc. in Case 10-T-0139 (filed on March 29, 2012) at p. 1-2, Con Edison Brief on Exceptions in Case 10-T-0139 (filed on January 17, 2013).

[157] Central Hudson BoE at 3.

the provisions are designed to affect or displace laws governing parties' existing rights and obligations."[158]

In its Brief on Exceptions, Central Hudson raises this issue again, but offers no explanation of why the ALJs erred in their assessment of the impact of these Proposed Certificate Conditions on Central Hudson's legal rights. Contrary to Central Hudson's claim, nothing in Proposed Certificate Conditions 27 to 29 purport to address Central Hudson's exercise of any legal rights it may have outside the Certificate in any way. This is hardly surprising, because the Certificate deals exclusively with Applicants' construction and operation of the Facility, rather than with Central Hudson's existing legal rights.

That having been said, Applicants believe that Central Hudson may be subject to other legal obligations, including the obligation to prudently manage its own facilities in the public interest under PSL § 66, that would require it to take advantage of the provisions established by the Commission for the protection of utility infrastructure. Any failure by Central Hudson to avail itself of the protections provided by these certificate conditions could adverse ramifications for Central Hudson in subsequent proceedings before the Commission or in any civil action outside the Commission's jurisdiction.

However, any such action would not arise under the Article VII certificate at issue in this case. Accordingly, there is no need to address them further in this proceeding. The Commission should, however, make clear that any ruling rejecting Central Hudson's claims in this proceeding is not intended to insulate Central Hudson from the consequences that may arise in such subsequent proceedings from its failure to cooperate in good faith with the provisions established by the Commission in this case for the protection of existing utility infrastructure.

[158] RD at 128-129.

2. Central Hudson's Objections To Proposed Certificate Condition 27 Are Without Merit.

Proposed Certificate Condition 27 would require Applicants to "engineer, construct, and install the Facility so as to make it fully compatible with the continued operation and maintenance of Co-located Infrastructure ("CI"), as herein defined, and affected railroads, railways, highways, roads, streets, or avenues."[159] Central Hudson objected to this provision on the ground that, as the developers of a new merchant facility in Central Hudson's service territory, Applicants should be required to insulate Central Hudson from any and all risks associated with construction and operation of the Facility. The ALJs rejected this contention on the ground that the provisions of the Proposed Certificate are carefully tailored to protect existing CI and to provide reimbursement to CI owners on reasonable terms:

> [I]t is clear that the JP provisions at issue are designed to protect existing CI to the maximum extent practicable and to provide for reimbursement on reasonable terms.[160]

Central Hudson excepts to this contention, claiming once again that in light of Applicants' undertaking to develop the Facility on a merchant basis, Applicants should be required to insulate Central Hudson from any and all "risk, damage or loss" associated in any way with the construction and operation of the Facility.[161]

This exception should be rejected for several reasons. First, Central Hudson ignores the fact that it is only one of a number of utility companies operating facilities in its franchise area. Each of these utilities is providing important services to the public under the supervision of the Commission or some other governmental authority. The Commission has long required utilities in such circumstances to cooperate with one another so that they can all serve the public

[159] Appendix C to the JP: Proposed Certificate Conditions ¶ 27.

[160] RD at 128.

[161] Central Hudson BoE at 9.

efficiently and has never given any single utility the right to demand strict indemnification from any other utility company for any conceivable "risk, damage or loss," as Central Hudson demands. The ALJs' clearly recognized this fact when they approved the Proposed Certificate Conditions over Central Hudson's objections on the ground that those certificate conditions "protect CI to the maximum extent practicable" and "provide for reimbursement on reasonable terms." This is particularly true in light of the ALJs' previously-noted finding that the Proposed Certificate Conditions do not limit Central Hudson's legal rights to seek compensation from Applicants for any legally cognizable injury to their facilities caused by the actions or inactions of Applicants or their agents.

Central Hudson's claim that Applicants should be subject to a stricter liability standard than Central Hudson and other utility companies because it operates under market-based rates rather than cost-based rates is also without merit. Central Hudson distorts Applicants' position with respect to the risks that they have agreed to accept as a developer of a merchant transmission line. As the ALJs recognized elsewhere in the RD, the risks assumed by Applicants differ from the risks assumed by other utility companies only in the areas of financing and cost recovery:

> With respect to the project's merchant status, we find it is more appropriate to consider the following: will the risks associated with the financing and recovery of project costs be borne by private investors and will project revenues be recovered from wholesale power transactions? We would answer those questions affirmatively.[162]

Accordingly, the Commission must reject Central Hudson's attempt to force Applicants to indemnify it from all risk, damage or loss.

[162] RD at 68.

3. The ALJs Correctly Rejected Central Hudson's Objections To Proposed Certificate Condition 5.

In order to provide the access required for future maintenance of the Facility, Proposed Certificate Condition 5 requires, among other things, that Applicants "acquire and maintain the continuing right to enter onto and use certain additional lands immediately adjacent to the Facility ROW needed for repair and maintenance purposes . . . ."[163] Central Hudson objects to this provision on two grounds. First, Central Hudson claims that this certificate provision would give Applicants "paramount rights" over its existing facilities. Second, Central Hudson contends that under existing law, it will actually hold paramount rights over the Facility.[164] The ALJs rejected both these claims, finding that:

> We recommend rejecting Central Hudson's proposed modifications because they reflect an interpretation that is contrary to JP ¶5's plain language and wholly unsupported when viewed in the context of all of the provisions regarding CI.[165]

Central Hudson's exceptions to these determinations should be rejected as without merit.

As the ALJs noted in the RD, Central Hudson's claim that this provision will give Applicants "paramount rights" over its existing facilities falls when this provision is viewed in the context of all of the provisions of the Proposed Certificate relating to CI. Specifically, those provisions require Applicants to develop the EM&CP in collaboration with utilities such as Central Hudson. Any disagreements between Applicants and a utility over that EM&CP filing, including disagreements over the location of access easements retained by Applicants to allow future repairs to the Facility, will be resolved by the Commission.[166] So long as Central

[163] Appendix C to the JP: Proposed Certificate Conditions ¶ 5.

[164] Central Hudson BoE at 10.

[165] RD at 131.

[166] Appendix C to the JP: Proposed Certificate Conditions ¶ 29(c).

Hudson's positions with respect to the protections required for its existing infrastructure are reasonable, it should have nothing to fear from this Commission review.

Central Hudson's alternative claim that it has the right to take the property owned by Applicants at some future date is premature and based on flawed legal analysis. Central Hudson's concerns are premature because it has not identified any situation in which it needs to acquire the right to use property owned or operated by Applicants for any legitimate public utility purpose. Accordingly, there is no need for the Commission to address this purely theoretical issue at this time.

The flawed nature of Central Hudson's legal analysis is revealed by the very quote from the court's opinion in *Long Island Railroad v. Long Island Lighting Company*, 103 A.D.2d 156 (2d Dept. 1984) presented by Central Hudson in its Brief on Exceptions. Contrary to Central Hudson's claim, that case did not hold that an existing utility "has the right to interfere with the new facility"[167] Rather, that case held that the Long Island Lighting Company ("LILCO") could use its powers of condemnation under New York's Transportation Corporation Law to acquire a needed easement from the Long Island Railroad (the "LIRR") "unless the evidence establishes that its proposed easement will materially interfere with the LIRR's existing public use."[168] Thus, the key factor supporting the court's decision to allow LILCO to condemn the easement in question was in fact the *absence* of any interference with the LIRR's ongoing railroad operations.

[167] Central Hudson BoE at 11.

[168] *Long Island Railroad v. Long Island Lighting Company* 103 A.D.2d 156, 167 (2d Dept. 1984).

4. The ALJs Correctly Rejected Central Hudson's Claim That The Facility Fails To Conform With Long-Range Plans For Expansion Of The Electric Power System.

Central Hudson characterizes the Facility as "a long extension cord" between Québec and New York City and asserts without explanation or analysis that this characterization somehow prevents the Commission from finding that the Facility "conforms to a long-range plan for expansion of the electric power grid of the electric systems serving this state" as required by PSL § 126(1)(d)(2). The ALJs rejected this contention in the RD, finding that:

> [B]oth the 2009 State Energy Plan and the Governor's 2012 State of the State address encourage facilities like this one that would provide infrastructure investments that support the State's transition to a clean energy economy, reduce greenhouse gas emissions, and allow the State to fully exploit the potential benefits of additional Canadian imports.
>
> The facility advances a goal, expressed in NYC's *PlaNYC*, of increasing NYC's clean energy supply by effectuating one of its strategies, i.e., increasing the amount of clean energy that can be imported into the City. Moreover, NYC asserts that the facility represents a unique opportunity to dramatically increase the amount of renewable energy available in-City in a way that, due to the project being developed on a merchant basis, will not burden electric delivery rates. In addition, as noted *supra*, the facility's so-called "extension-cord" configuration means that system disturbances from the Hydro-Québec system would be prevented from propagating into New York (and vice versa).
>
> The facility would directly expand the State's electrical grid by providing an additional tie to Québec and to Québec's hydroelectric power. This would, according to Staff, indirectly help relieve congestion on the existing HVAC electric transmission system, because absent the facility, the new hydroelectric resources anticipated to enter service in 2012 and beyond would tend to increase supply at the State's northern border, likely leading to additional imports over the existing tie lines to Québec, which in turn would likely lead to increased congestion on the existing NYS HVAC transmission system and increased bottling of upstate generation. In addition, energy imports over the facility would increase supply downstream of the congested interfaces, thus

> reducing congestion on the State's HVAC transmission interfaces.[169]

In its Brief on Exceptions, Central Hudson contends that these reliability and other benefits of the Facility are not sufficient to justify the Facility because of the potential that it may interfere with the development of unspecified projects at some unknown date in the future:

> A Commission policy that allows merchant developers to utilize the limited public resource of transmission routes for narrow, point-to-point purposes reduces the future options available to redress major constraints, or makes future solutions more expensive, or does both. Transmission corridor developers, including merchants, should be expected to propose more than only a point-to-point delivery project like the present one so that the important public interest in achieving meaningful improvements to known grid constraints and problems can be served.[170]

This contention must be rejected for at least two reasons. To begin with, if Central Hudson's position were to be adopted by the Commission, it would prevent the development of any future merchant transmission lines in New York State. As the Commission is aware, merchant transmission lines can only be successful when the developer is able to exclude non-paying customers. This is possible on HVDC lines and on radial generator leads, but is not possible on the networked HVAC lines that would be required to meet Central Hudson's proposed requirements. Second, Central Hudson has failed to meet its burden of identifying any concrete alternative to the Facility that it will be unable to develop if the Facility is approved. As the ALJs noted in rejecting similar arguments presented by other parties in another context:

> [O]ther than advocating the no build alternative, project opponents have not identified an actual, reasonable alternative to this project that is as far advanced in the certification review process as this proposal. Even more importantly, there is no persuasive support for the assertions that approval of this project would preclude or

[169] RD at 106-108 (footnotes omitted).

[170] Central Hudson BoE at 12-13.

> prevent some other entity or any other party from moving forward with an alternative project designed to meet New York's electric power needs by constructing additional generation and/or HVAC transmission facilities.[171]

In the absence of any competent evidence of such a concrete alternative to the Facility, Central Hudson's speculative concerns about the impacts the Facility may or may not have on unidentified future projects at some unknown future date provide no basis for overturning the ALJs' finding that the Facility is consistent with long-range plans for the expansion of New York's electric power grid for the reasons noted above.

B. The Commission Should Reject Local 97's Exception To The RD

Local 97, which represents unionized workers in generating facilities in upstate New York, acknowledges that customers in the New York City load pocket would be "generously supplied" by the Facility, resulting in lower prices for both energy and capacity in New York City and surrounding areas. Despite its recognition of these substantial benefits, Local 97 nonetheless urges the Commission to reject the Facility because these lower prices will deprive generators in upstate New York of the ability to compete to serve downstate markets:

> The ALJs seem to dismiss the fact that with 1,000 mW [sic] being delivered from Canada to downstate electric customers, there would be no immediate need for renewable or fossil generated power generated in New York State to be transmitted downstate since the downstate load pocket would be generously supplied by the proposed facility. This fact would indeed curtail the ability of transmission entities to finance the needed additional transmission facilities to move the power generated by the upstate renewable and fossil generators to fertile markets. Local 97 believes that this project would indeed hasten the exodus of fossil or renewable generation from upstate New York and is inimical to the best interests of New York State. [172]

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[171] RD at 66 (footnote omitted).

[172] Local 97 BoE at 3.

This exception should be rejected for several reasons. First, generators in upstate New York are already free to compete to serve customers in New York City using transmission capacity between upstate New York and downstate New York on the existing facilities of the New York State Bulk Power System. Second, the record in this case reveals that the Facility will actually reduce congestion on New York's constrained Total-East Interface, making more transmission capacity available to generators in New York State.[173] Third, Local 97 has failed to identify any concrete transmission expansion projects that will not go forward if the Facility is approved. The ALJs correctly ruled in the RD that mere speculation about the possibility that the Facility may impact the development of unidentified future projects that might go forward at some unspecified future date provide no basis for rejection of the Facility in this proceeding:

> [O]ther than advocating the no build alternative, project opponents have not identified an actual, reasonable alternative to this project that is as far advanced in the certification review process as this proposal. Even more importantly, there is no persuasive support for the assertions that approval of this project would preclude or prevent some other entity or any other party from moving forward with an alternative project designed to meet New York's electric power needs by constructing additional generation and/or HVAC transmission facilities.[174]

Accordingly, Local 97's exception must be rejected.

C. The Commission Should Reject The Claims Of The Business Council

Section 4.10(c)(2) of the Commission's Procedural Regulations establishes the requirements for briefs on exceptions filed in Commission proceedings. In particular, § 4.10(c)(2) requires that all briefs on exceptions contain:

> (iii) the grounds on which the exceptions rest; and

[173] Tr. at 309, lines 4 to 7 (Frayer Direct).

[174] RD at 66 (footnote omitted).

> (iv) the argument in support of the exceptions, including references to the record and the authorities relied on.[175]

Although the Business Council filed a document on January 17, 2013 entitled "Brief on Exceptions of the Business Council of the State of New York," that document does not in fact contain either: (1) any exceptions to the determinations made by the ALJs in the RD; or (2) any references to the record in this proceeding. Instead, as the Business Council candidly acknowledges, that document presents only the "comments" of the Business Council. These comments do not rise to the level of exceptions to the RD and therefore need not be considered by the Commission at this late stage of this proceeding. Moreover, the Business Council's comments are uniformly without merit for the reasons noted below.[176]

1. The Commission Must Reject The Business Council's Request To Further Delay This Proceeding.

The Application in this proceeding was deemed complete by the Commission's Secretary on August 11, 2010. Thereafter, Applicants engaged in protracted settlement negotiations that resulted in the filing on February 24, 2012 of a Joint Proposal characterized by what the ALJs characterized as "a remarkable degree of consensus by many parties with diverse environmental interests."[177] Importantly, the Business Council did not participate in any of these settlement negotiations and instead intervened in this proceeding on March 29, 2012. As part of its belated intervention, the Business Council agreed to accept the record in this proceeding as it found it as of the date of its intervention.

For the Business Council to suggest in such circumstances that the Commission should deny Applicants' request for an Article VII certificate or delay action on that request pending

[175] 16 N.Y.C.R.R. § 4.10(c)(2) (2012).

[176] Because the Business Council's Brief on Exceptions also lacks page numbers, Applicants have assigned page numbers to that document with page 1 being the page after the cover page.

[177] RD at 74.

resolution of proceedings initiated only last month is nothing short of unconscionable. Adoption of this arbitrary and capricious proposal would cast a pall on all applications for siting authority in New York State, as it would expose developers considering whether to seek siting authority in this state to a new and unreasonable risk that their siting application might be delayed or denied not on the merits of their proposal, but rather on the pretext that proceedings initiated many years after the completion of their siting applications may have some impact on the need for their proposed facilities.

The Business Council's proposal to delay this proceeding is particularly objectionable in light of the fact that, like every other party to this proceeding, it had every opportunity to identify a feasible alternative to the Facility during the course of this proceeding, but failed to do so. Thus, the Business Council's concerns about the impacts of the Facility on unknown potential future projects that might be developed at some unspecified future date were expressly rejected by the ALJs in the RD,[178] and the Business Council provides no explanation of why that determination was incorrect. Moreover, as previously noted, the Commission's proceedings in Case 12-E-0503 to consider alternatives to the Indian Point Energy Center in the event it is unable to continue operations underscores the need for the additional installed capacity that the Facility will supply to the New York City load pocket. For these reasons, the Business Council's proposal to delay this proceeding must be rejected.

2. The Commission Must Reject The Business Council's Comments On The Need For The Facility.

In the portion of its Brief on Exceptions addressing the need for the Facility, the Business Council concedes that the wholesale energy price savings that would be produced by the Facility

[178] *Id.* at 66.

are crucial to determining whether the Facility is in the public interest.[179] This contention directly contradicts the claims of the Incumbent Generators that such wholesale price impacts should be ignored by the Commission in assessing the benefits of the Facility.

Moreover, the Business Council's claim that there is "ample concern" about the evidence in the record in this case with respect to such ratepayer savings was flatly rejected by the ALJs, who ruled that:

> No party disagrees that this facility will (or is likely to) reduce wholesale electricity prices; parties disagree on whether these reductions should be viewed as a benefit, whether the estimates are accurate, and whether the metric should be relied on by the Commission in this proceeding.[180]

The Business Council fails to explain why this determination was incorrect or to identify any specific error in the forecasts of wholesale energy price savings prepared for the Applicants by Ms Julia Frayer or the strikingly similar estimate of such wholesale energy price savings prepared for DPS Staff by Mr. Wheat and Mr. Gjonaj.[181] The Business Council also fails to recognize that even the wholesale energy price savings implicit in the analysis prepared by Mr. Younger for the Incumbent Generators demonstrates the existence of substantial wholesale energy price savings resulting from the Facility.[182] In such circumstances, the Business Council's unexplained assertion that "the economic analyses projecting ratepayers savings [sic] is fundamentally flawed" must be rejected.

The Business Council's concerns about the cost of the Facility and the impacts of that cost on captive retail customers is also flawed for several reasons. First, the Business Council relies primarily on statements made by Con Edison prior to their entry into a stipulation with

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[179] Business Council BoE at 1.

[180] RD at 48.

[181] Tr. at 277, lines 8-11 (Frayer Direct) and Tr. at 246, line 18 to 247, line 2 (Gjonaj and Wheat Rebuttal).

[182] Tr. at 360, line 8 to 361, line 4 (Frayer Rebuttal).

Applicants dated June 4, 2012. These statements are not supported by any evidence in the record and are therefore not entitled to any weight in this proceeding. Moreover, in the June 4, 2012 Stipulation, Con Edison stipulated and agreed that in light of the commitments made by Applicants in the revised Certificate Condition 15 agreed to therein, Con Edison was fully satisfied that the costs of the Facility would not be imposed on retail customers in New York:

> **IT IS FURTHER STIPULATED AND AGREED**, that upon filing by the Applicants of this Stipulation with the Commission, Con Edison would no longer contend or file testimony in this proceeding contending that the alleged $11 billion costs of the Facility and related upgrades in Canada may be imposed on its ratepayers on the grounds that this concern is addressed by the provisions of the changes to proposed Certificate Condition 15 agreed to herein and that this revised Condition will fully protect Con Edison's customers. . . .[183]

The ALJs confirmed this conclusion in their acceptance of these Proposed Certificate Conditions in the RD:

> Proposed certificate condition 15 memorializes Applicants' commitment to construct and operate the HVDC portion of the facility (HVDC transmission system plus the Astoria-Rainey cable to the extent used to deliver energy and capacity that was also transmitted over the HVDC transmission system) on a merchant basis and imposes certificate invalidation as the consequence if Applicants do not honor their commitment.[184]

For this reason, and because the Business Council has failed to identify any evidence in the record – as opposed to unsupported allegations in pleadings – that the costs of the Facility will exceed the estimates supplied by Applicants, its claims in this regard must be rejected.[185]

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[183] Hearing Exhibit 150 at 5.

[184] RD at 68.

[185] The Business Council's passing reference to the testimony of IPPNY witness Younger raises claims that have already been full addressed in the first section of this Brief on Exceptions and need not be revisited here.

3. The Commission Must Reject The Business Council's Claims With Respect To The Impact Of The Facility On Central Hudson's Existing Infrastructure

The Business Council also expresses concern that the Facility may be located on top of Central Hudson's existing utility infrastructure in the Hudson River and requests that the Commission require Applicants to accept responsibility for all incremental costs incurred by Central Hudson from such actions.[186] In advancing this claim, however, the Business Council appears to have ignored two important facts: First, the ALJs determined in the RD that it is by no means clear at this time how the Facility will be installed in the portions of the Hudson River where Central Hudson's facilities are located and the certificate conditions proposed in the JP will be wholly adequate to address that issue if and when it does arise:

> Central Hudson's concerns are premised on assertions that Applicants' cable would be placed on top of Central Hudson's existing infrastructure and that the facility and its construction, operation and maintenance will cause harm to existing CI and impose unrecompensed costs on regulated utilities. It is not yet clear where the proposed transmission line would be placed relative to existing infrastructure, but it is clear that the JP provisions at issue are designed to protect existing CI to the maximum extent practicable and to provide for reimbursement on reasonable terms.[187]

Second, Central Hudson appears to have seen the wisdom of this ruling, as it did not except to this determination. Because Central Hudson has accepted the ALJs' determination on this issue, and because the Business Council has failed to identify any error of law or fact in that determination, the Business Council's concerns with respect to Central Hudson's existing infrastructure in the Hudson River must be rejected as premature.

[186] Business Council BoE at 3.

[187] RD at 128.

CONCLUSION

WHEREFORE, for the above-stated reasons, Applicants Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. respectfully request that the Commission reject all exceptions to the Recommended Decision issued in this case on December 27, 2012 and that the Commission approve the Joint Proposal filed February 24, 2012 and issue an Article VII certificate for the construction of the Facility.

Respectfully submitted,

/s/ George M. Pond

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Dated: February 1, 2013

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