

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
STATE OF NEW YORK**

\_\_\_\_\_) )  
Application of Champlain Hudson Power ) )  
Express, Inc. for a Certificate of ) )  
Environmental Compatibility and ) )  
Public Need Pursuant to Article VII of the ) )  
Public Service Law for the Construction, ) )  
Operation and Maintenance of a High-Voltage ) )  
Canadian Border to New York City ) )  
\_\_\_\_\_ ) )

Case No. 10-T-0139

**OPPOSITION OF NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION TO REQUEST OF ENTERGY NUCLEAR POWER MARKETING,  
LLC AND ENTERGY NUCLEAR FITZPATRICK, LLC FOR PARTIAL  
RECONSIDERATION OF THE RULING ON MOTION TO INCORPORATE BY  
REFERENCE OR TO TAKE OFFICIAL NOTICE**

New York State Department of Environmental Conservation (NYSDEC) submits this Opposition to the Request of Entergy Nuclear Power Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC (collectively, Entergy) for partial reconsideration of the Ruling on Motion to incorporate by reference or to take official notice.

**INTRODUCTION AND BACKGROUND**

In the Joint Proposal filed in this proceeding on February 24, 2012 (JP), the Signatory Parties propose to construct, operate and maintain a 1,000 MW High Voltage Direct Current transmission line (the Facility) from the Canadian Border to New York City. In the Ruling dated May 8, 2012, Administrative Law Judges (ALJs) Michelle Phillips and Kevin Casutto concluded that the factual issues that could be addressed in the pre-filed testimony and the evidentiary

hearings included: 1) deliverability; 2) availability and suitability of the proposed Luyster Creek converter station site; and 3) facility costs and cost/benefit analyses.

Subsequently, by Motion dated May 23, 2012, Entergy requested clarification or reconsideration of a portion of the ALJs' May 8, 2012 Ruling and asked, inter alia, if Entergy could address in briefs the Facilities' potential adverse environmental impacts including potential adverse impacts on federally and State regulated endangered species. Entergy also asked if it need not sponsor expert witness testimony or cross-examine the Applicant's witnesses before it could cite publically available information contained in a report prepared by consultants to the United States Department of Interior (DOI) entitled "Effects of EMFs from Undersea Power Cables on Elasmobranchs and other Marine Species" (EMF Report). Soon thereafter, on June 7, 2012, the ALJs issued a Ruling on Entergy's Motion (i) clarifying the scope of legal or policy issues that may be briefed, (ii) denying the request for reconsideration and (iii) clarifying the parties' use of publicly available or government sponsored studies in closing briefs.

Significantly, in the June 7, 2012 Ruling, the ALJs also stated that in order for Entergy to use the referenced EMF Report in its briefs on legal or policy issues, "Entergy must successfully move the report into the record. Because the issue of EMF impacts is not a fact issue for hearing, we will not allow testimony on the issue. During the hearing, Entergy could request that we take official notice of the report." Despite the fact that the ALJs conceivably opened the door to Entergy's request and indicated that Entergy's request would be reconsidered and evaluated during the hearing, Entergy failed to make the requisite request at the time of hearing.

Instead of seeking to enter the EMF Report into evidence at the hearing as the ALJs had instructed, on August 17, 2012 and after the conclusion of the hearing, Entergy filed its second motion seeking to incorporate by reference or take official notice of: (1) the EMF Report, and (2)

a report cited in the EMF Study, titled “A model of fish population distribution in the space of inhabitation,” V.V. Gertseva and V.I. Gertsev, 147 Ecological Modeling 161 (2002) (Gertseva Report). The ALJs denied Entergy’s Motion in a Ruling dated August 21, 2012. In the Ruling, the ALJs indicated that it was not clear what kind of transmission lines were reviewed in the Gertseva Report of the Caspian Sturgeon in the Volga River, i.e., whether the transmission line was AC or DC, overhead, underground, or subaquatic, and that the Entergy motion was untimely.

Finally, Entergy filed its third Motion on August 22, 2012 repeating its request to incorporate by reference or take official notice of the same EMF Report and the referenced Gertseva Report and asked the ALJs to reconsider the Ruling they issued on the previous day. NYSDEC objects to Entergy’s August 22, 2012 Motion because it is untimely and not relevant to the proceeding.

### **DISCUSSION**

#### **ENTERGY’S REQUEST MUST BE REJECTED BECAUSE IT IS UNTIMELY; THE DOCUMENTS AT ISSUE DO NOT RELATE TO AN ISSUE SET FOR HEARING AND WILL NOT CONTRIBUTE TO DECISION MAKING.**

Entergy’s most recent motion is untimely according to the ALJs Ruling on June 7, 2012. In that Ruling, the ALJs allowed Entergy to cite to the EMF Report in its briefs only if Entergy successfully moved the EMF Report into the record during the evidentiary hearing. Entergy did not attempt to move the EMF Report into the record at the hearing despite the fact that other parties adhered to the ALJs’ instructions and moved numerous documents into the record at that time.

Furthermore, the documents which are the subject of Entergy’s Motion do not relate to the issues set for hearing in the ALJs Issues Ruling on May 8, 2012. As noted above, the ALJs

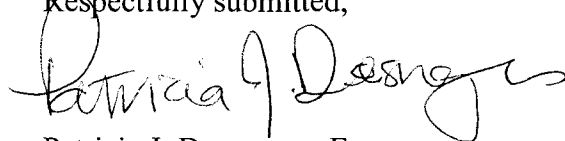
concluded that the factual issues that could be addressed in the pre-filed testimony and the evidentiary hearings included: 1) deliverability; 2) availability and suitability of the proposed Luyster Creek converter station site; and 3) facility costs and cost/benefit analyses. The ALJs subsequently clarified this Ruling for the Parties on June 7, 2012 when it denied Entergy's Motion with respect to the EMF Report and indicated that in order for Entergy to use the EMF Report in its briefs on legal or policy issues, Entergy must successfully move the report into the record. Since the issue of EMF impacts was not a fact issue for hearing, and it was Entergy's burden to demonstrate the relevancy and reliability of the EMF Report at the hearing and failed to do so, it would be prejudicial to allow Entergy to cite to the EMF Report in its brief.

Finally, the EMF Report should not be allowed into evidence, in whole or in part, due to the questionable nature and reliability of the information contained therein. The EMF Report does not relate materially to any evidence admitted into the record and, despite Entergy's exertions, it is unclear how or if this information is even relevant to Sturgeon in the Hudson River. Moreover, JP Attachment 4, entitled the "Atlantic Sturgeon Pre-Installation and Post-Energizing Hydrophone Scope of Study" along with future research and enhancement projects identified in the JP Environmental Trust are designed to address the site-specific nature of any potential EMF exposures to aquatic species (including Sturgeon) and directly inform the Commission and others as to the impact of the Facility on the Sturgeon in the Hudson River. These studies, performed over the next few decades, will provide invaluable information about how the habits and behaviors of aquatic life in the Hudson are affected by the installation, operation and maintenance of linear HVDC cables. Any effort to examine or question the factual efficacy of the Trust's efforts, or its essential feasibility to satisfy the findings required by PSL §126.1(b), (c), and (f), would have to have been raised at the issues conference conducted

for this proceeding. Entergy failed to adequately raise or satisfy that threshold requirement and may not now attempt to skirt such procedural requisites through judicial notice or incorporation tactics.

On the basis of the above, it is clear that Entergy is looking for multiple bites at the apple in a manner not contemplated or allowed by the established adjudicatory process. Inclusion of the EMF Report and associated materials pursuant to Entergy's motion would also bias the record by importing unsupported materials of questionable scientific relevance that other parties would not be able to adequately answer, except possibly in briefs, which would not serve the essential fact-finding principles of these proceedings. The Department therefore requests that Entergy's motions be dismissed with prejudice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Patricia J. Desnoyers". The signature is fluid and cursive, with a large initial "P" and "D".

Patricia J. Desnoyers, Esq.  
Senior Attorney  
NYSDEC  
625 Broadway  
Albany, New York 12233

Dated: August 28, 2012