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August 28, 2012

Hon. Kevin J. Casutto
Hon. Michelle L. Phillips
Administrative Law Judges
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

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

Dear Judges Casutto and Phillips:

This correspondence is submitted on behalf of Entergy Nuclear Marketing, LLC ("ENPM") and Entergy Nuclear FitzPatrick, LLC ("ENFP," and, together with ENPM, "Entergy") in opposition to the renewed joint motion of Department of Public Service Staff ("DPS Staff") and the New York State Department of Environmental Conservation ("NYSDEC"),[1] concerning a draft report titled "RCRA Facility Investigation Report Con Edison, Astoria NY" ("Draft RFI").

INTRODUCTION

In the Renewed Joint Motion, Movants first reiterate their request that Your Honors incorporate into the record by reference or take official notice of the Draft RFI. The Movants, however, provide no new facts or any legal basis to support their renewed request. For the first time, Movants also request in their Joint Renewed Motion, that, alternatively, Your Honors merely incorporate into the record by reference or take official notice of the "facts" allegedly cited in the Draft RFI. As demonstrated below, and as Your Honors have already found,[2] the Renewed Joint Motion should be denied on the grounds of unreasonable delay and undue prejudice, and further on the ground that the Draft RFI is not final and subject to

[1] DPS Staff and NYSDEC are collectively referred to as "Movants," and their latest motion is referred to as the "Renewed Joint Motion."

[2] Case 10-T-0139, Application of Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City, "Ruling on Motions to Incorporate by Reference or Take Official Notice Filed by DEC, Jointly with Applicants and Staff; And, Separately, by IPPNY and Entergy" (issued August 21, 2012) ("August 21 Ruling"), p. 3.

change. Moreover, the "facts" contained therein were also never finalized, and thus, are no more reliable to be used as proof to support Applicants' position on this disputed factual issue than the Draft RFI in its entirety. Lastly, because the "facts" in the Draft RFI highlighted by Movants in this motion are sample results from an environmental investigation into historic solid waste management and disposal practices at a former industrial site, they are not within the "specialized knowledge" of DPS Staff, and thus, are not suitable for official notice under the parameters of the State Administrative Procedures Act ("SAPA").

BACKGROUND

In their first Joint Motion, filed on August 2, 2012, Movants, joined by the Applicants in this proceeding, asked Your Honors to incorporate by reference and/or take official notice of the entire Draft RFI.[3] The ostensible impetus for the Joint Motion was that "during the evidentiary hearings in proceeding [sic], [Entergy] indicated its view that the Luyster Creek site may not be suitable for use as the site for the Converter Station."[4] Presumably, the Joint Motion was referring to that part of Entergy's cross-examination of Applicants' witness Sean Murphy, Ph.D., which established that his opinion as to the suitability of the proposed converter station site for the Project's ambitious development plans largely rested on reports prepared by third-parties between twelve (12) and eighteen (18) years ago,[5] and/or testimony in which Dr. Murphy admitted that, notwithstanding his review of those historic reports, he was "not in a position to come up with a probability of the [underground storage] tanks being" on the proposed converter station site,[6] and was similarly unable to testify to the scope of the identified groundwater contamination potentially affecting the site.[7]

Importantly, Entergy identified these environmental issues in its initial and reply statements opposing the Joint Proposal ("JP") in this proceeding many months ago.[8] In response, Your Honors identified the Luyster Creek converter site issues as among the three factual issues in dispute to be addressed by the parties in pre-filed testimony and at hearing, specifying that "the issues of suitability and availability of the Luyster Creek site" must be

[3] Case 10-T-0139, supra, "Joint Motion of New York State Department of Environmental Conservation, the Staff of the New York State Department of Public Service, Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. For Incorporation by Reference or Official Notice of RCRA Facility Investigation Report dated February 2008" (August 2, 2012) (the "Joint Motion"), p. 2. It appears that original joint movants Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. are not parties to the Renewed Joint Motion.

[4] Id.

[5] Case 10-T-0139, supra, Evidentiary Hearing Transcript ("Tr."), p. 144, lines 8-25 through p. 145, line 6.

[6] Id., p. 149, lines 9-20.

[7] Id., p. 151, lines 3-8.

[8] Other parties also raised issued with the Luyster Creek site.

addressed.[9] Thus, all parties to this proceeding -- including Movants -- were well aware for months that the Applicants were required to address these factual issues. To the extent Movants wished to provide evidence on this point, it was incumbent on them to appear at the hearing and present such evidence then.[10]

In the August 21 Ruling, Your Honors denied the Joint Motion, without prejudice, noting this Tribunal's "concern[] that Movants are asking us to incorporate or take official notice of a draft, not final, report without indicating whether there are ongoing efforts aimed at, or an imminent likelihood of, finalizing the draft report."[11] The August 21 Ruling also expressed Your Honors' concern about the timing of the motion, "since the issue of Luyster Creek's suitability as a proposed converter station site was set forth for evidentiary hearing months ago."[12] Your Honors instructed the joint movants, should they renew the Joint Motion, to "address the concerns" expressed in the August 21 Ruling, i.e., to establish the reliability of the Draft RFI given that it was being proffered as proof of a disputed factual issue and to establish the absence of undue prejudice to other parties caused by the joint movants' seemingly unreasonable delay in bringing the Joint Motion.[13]

[9] See Case 10-T-0139, supra, "Ruling on Issues" (issued May 8, 2012) ("Issues Ruling"), p. 4 (emphasis added). In the Issues Ruling, Your Honors held, inter alia, "[T]he factual issues that may be addressed in the pre-filed testimony and the evidentiary hearings" are as follows: (i) Deliverability, including the need for and feasibility of the SPS and/or other operational measures; (ii) the "suitability and availability of [the proposed converter station site]"; and (iii) Cost/Benefit Analyses, Facility Costs, revenues and expected benefits.

[10] While DEC elected not to appear formally at the hearing, DPS Staff was present throughout and had ample opportunity to offer this evidence into the record when this issue was being addressed. Had they done so, Entergy would have objected to the relevance of this document as proof of the factual issues in dispute given that it is only a draft report, and Your Honors would have been able to dispense with this matter then.

[11] August 21 Ruling, p. 2.

[12] Id. (parenthetical omitted). This distinguishes the Joint Motion (and the instant request) from Entergy's request for incorporation by reference or official notice of a federal agency report and published scholarly work cited therein bearing on issues that Your Honors ruled would **not** be addressed at the evidentiary hearing. In stark contrast to the Draft RFI that is the subject of both the Joint Motion and the Renewed Joint Motion, regardless of when Entergy moved for that relief, no party would have had any opportunity to cross-examine a witness concerning the documents that are the subject of Entergy's pending motion for reconsideration because Your Honors found that they inform "legal and policy issues" (or mixed issues of law and policy) and not issues that would be the subject of proof at the hearing. Further, unlike here, Entergy's submissions also related to the issue of notice and the legal sufficiency of the record, and not to the proof of any disputed factual issue set for hearing. Indeed, where "policy" issues are under consideration in an administrative proceeding, as is the case with Entergy's pending motion, or where extrinsic materials may assist the Tribunal in evaluating the sufficiency of the evidence adduced on the entire record (and not just at the hearing), the concept of evidentiary relevance would seem to be completely misplaced.

[13] Id., p. 4.

Initial Post-Hearing Briefs were filed in this proceeding on August 22, 2012. In their respective transmittal letters filing their initial briefs, DPS Staff and NYSDEC stated, in sum and substance, that "[N]o plans exist for finalizing the [Draft RFI]."[14] Nevertheless, they again requested incorporation by reference or official notice of the Draft RFI in its totality, or, alternatively, "of all the facts contained therein,"[15] or, failing that, of "Figures 4.37-1 through 4.37-4."[16] In addition, both Movants discussed and cited the Draft RFI in their respective Initial Post-Hearing Briefs in blatant disregard for, and in clear violation of, Your Honors' August 21 Ruling.[17]

DISCUSSION

I. ALLOWING THE DRAFT RCRA REPORT -- OR ITS "FACTS" -- INTO THE RECORD WOULD UNDULY PREJUDICE ENTERGY.

As demonstrated below, Entergy would be unduly prejudiced should the Draft RFI -- or its "facts" -- be incorporated into the record by reference or should Your Honors take judicial notice thereof. In preparing for the evidentiary hearing, Entergy reasonably relied on the record as it had been developed by the Applicants to refute the Applicants' claims that they had satisfied their burden of demonstrating the "nature of the probable impact" of the converter station portion of their proposed Project.[18] To do so, Entergy, in part, cross-examined Dr. Murphy using the documents Applicants had put into the record on this point. With the hearings now long concluded, neither Entergy nor any other party to this proceeding can cross-examine Dr. Murphy (who opined on the suitability of the converter station site) on the Draft RFI, or, for that matter, any other witness (because NYSDEC produced none). Indeed, because the hearing record is now closed, no party can even conduct discovery of the NYSDEC concerning, e.g., the source, origin or status of the Draft RFI itself or whether there are other NYSDEC documents or correspondence related to it. Therefore, allowing entry of the Draft RFI itself or its "facts" into the record at this late hour would be unduly prejudicial to all other parties to this proceeding, including Entergy.

[14] See, e.g., DPS Staff's Transmittal Letter dated August 22, 2012, p. 1.

[15] Id., p. 2; NYSDEC's Transmittal Letter dated August 22, 2012, p. 2.

[16] Id.

[17] Again in contrast, Entergy filed an Initial Post-Hearing Brief that respected the proscriptions set forth in the August 21 Ruling, then moved for reconsideration of that Ruling and attached to its motion, as an offer of proof, a version of its brief that contained the matters that had been excluded by the August 21 Ruling.

[18] PSL § 126.1(b).

Moreover, the record in this proceeding compels rejection of the Renewed Joint Motion. As noted supra, in the Issues Ruling published several months ago, Your Honors identified the disputed factual issues in this proceeding that would be addressed at the evidentiary hearing.[19] The identified factual issues expressly included the "suitability and availability of [the proposed converter station site."[20] From at least that date (actually as early as Entergy's March, 2012 IRs),[21] until the close of the evidentiary hearing record, Applicants and other Signatory Parties had every opportunity to develop the record on that disputed factual issue.

Instead, on June 7, 2012, Applicants submitted Dr. Murphy's pre-filed Direct Testimony, in which he plainly stated that "Applicants have not completed any independent environmental assessments [of the proposed converter station site] at this time."[22] Dr. Murphy explained that rather than independently assess the underlying environmental conditions at the proposed converter station site, Applicants chose to review "certain environmental reports" Con Edison had filed with the Commission a decade ago in Case 02-M-0741.[23] Based solely on his review of "some" of those environmental reports[24] (the most recent of which was dated January 11, 2000), Dr. Murphy opined that "[T]he proposed Luyster Creek converter station site clearly has some level of contamination but other infrastructure projects have proceeded at the Astoria Complex in locations even closer to the 'hot spots' on the site. There would be no worker safety issues post-construction as the converter station site would be unmanned."[25]

Evidentiary hearings then proceeded in this case on July 18, 19 and 20, 2012.[26] Entergy's counsel cross-examined Dr. Murphy on the first day of the hearing concerning the

[19] See Issues Ruling, pp. 3-5.

[20] Id., p. 4.

[21] Approximately two months before Your Honors published the "Ruling on Issues," Entergy had propounded a series of Information Requests ("IRs") to Applicants that pertained directly to the environmental conditions at the proposed Converter Station site. True and correct copies of these IRs, designated Entergy-6, Entergy-7, Entergy-8 and Entergy-9, are annexed hereto as Attachment A.

[22] Tr., p. 123, lines 14-15.

[23] Id., lines 15-21.

[24] Id., p. 154, lines 3-7.

[25] Id., p. 127, line 21 through p. 128, line 2.

[26] On July 11, 2012, Applicants and Con Edison entered into a "Stipulation on Converter Station Location" ("Stipulation") (Hearing Exhibits 129 & 130). Among other things, the Stipulation authorized Applicants' use of approximately 4.5 acres of Con Edison's utility property (delineated on Hearing Exhibit 130) for the siting of the proposed Converter Station.[26] Additionally, the Stipulation recites that it:

proposed converter station site including as to the site's environmental conditions.[27] Apart from the exhibits entered by Entergy during Dr. Murphy's cross-examination, no additional documents pertaining to the proposed Converter Station site conditions were proffered at the hearing by any party.[28]

Indisputably, the Draft RFI bears directly on, and seeks to provide proof (i.e. to demonstrate the accuracy of) of, the Applicants' position concerning a disputed factual issue that Entergy raised in its statements in opposition five months ago. Your Honors identified this disputed factual issue nearly three months ago in the Issues Ruling. The parties fully aired this issue at the evidentiary hearing -- Applicants produced documents purporting to establish the "suitability" of the proposed converter station site and proffered a witness for cross-examination thereupon. Entergy conducted its cross-examination of the Applicants' witness on this disputed issue of fact using the documents and materials Applicants had placed into the record. Under those circumstances, Your Honors should reject Movants' transparent attempt to rehabilitate Dr. Murphy's hearing testimony by advancing new "evidence" at this juncture -- and, worse yet, in the form of a draft report -- into the record.[29]

Lastly, there is no reason for the Movants' delay in seeking to make this information part of the record. The 2008 Draft RFI has been available to the NYSDEC -- yet remained

> resolves Con Edison's only remaining objection to the JP and, as a result, upon satisfaction of the immediately preceding stipulation, Con Edison will drop all of its objections to the JP and to the issuance to Applicants of a [CECPN] for the construction of the Facility on the terms agreed to herein and in the other agreements and Stipulations between Con Edison and Applicants.

See Hearing Exhibit 129, p. 2.

[27] Tr., pp. 129-154.

[28] Given that NYSDEC did not appear at the hearing, there is a significant question as to whether it can bring the instant motion, the intent of which is to supplement the hearing record to provide factual proof concerning one of the disputed issues addressed during the hearing.

[29] As Dr. Murphy admitted on cross-examination, his Direct Testimony not only summarized draft reports, it is at least double-hearsay:

> Q. And, so, let me see if I can say it a different way that makes a little more sense. So, this part of your Direct Testimony is really your summary of another consultant's summary of a third consultant's draft summary report?
>
> A. Yes.

Tr., p. 152, line 24 through p. 153, line 4.

undisclosed to the parties -- throughout the entire course of this proceeding.[30] Even if Your Honors credit NYSDEC's claim that the Draft RFI could not be publicly disclosed without Con Edison's assent -- a proposition which Entergy does not concede -- NYSDEC was free to conduct discovery on this point. Had they done so, Con Edison's response could have been accorded confidential treatment as has been the case with other materials in this proceeding. In any event, such assent presumably could have been obtained from Con Edison as early as July 11, 2012 when Con Edison withdrew its remaining objections to the JP -- a full week before the hearings. Yet Movants made absolutely no mention of this document during the hearings and did not otherwise seek incorporation by reference or official notice of the Draft RFI until August 2, 2012 -- two weeks after the close of the evidentiary record. In short, entering the Draft RFI into the record now when Movants had every opportunity to introduce it during the time that this issue was being addressed at hearing would reward the Movants' unreasonable delay and would be patently unfair and prejudicial to Entergy.

II. THE DRAFT RCRA REPORT IS NOT SUITED TO INCORPORATION BY REFERENCE OR OFFICIAL NOTICE.

To be entirely clear, the Draft RFI appears to have been prepared -- and the underlying data collected -- by Con Edison's environmental consultant, ENSR Corporation. The purpose of the document appears to be to report on some aspect of the ongoing characterization of "environmental impacts that resulted from operational activities and spills during the facility's 100-plus-year history of operation."[31]

According to the Movants, ENSR Corporation, presumably acting in its client's interests, recommended no further action at what is referred to as the "Eastern Parcel."[32] Yet the Draft RFI was never finalized, and there is thus no indication whatsoever -- largely because NYSDEC offered no direct testimony or witnesses on the topic at the hearing -- that NYSDEC Region 2 (or Central Office) RCRA Staff have ever reviewed, much less validated or otherwise agreed with, ENSR's assessment of the study results. Therefore, the so-called "facts" in the Draft RFI are as nonfinal and unreliable in this context as the remainder of the report's text.

The Commission's regulations at 16 N.Y.C.R.R. § 85-2.7 state, in pertinent part, that "[a]ny party or staff counsel may move to incorporate by reference information contained in

[30] While NYSDEC baldly asserts that the RCRA Report was, until August 21, a "non-public document," it offers no basis for that conclusory assertion.

[31] Draft RFI, p. ES-1.

[32] Notably, there is no testimony or proof in the record that correlates the proposed converter station footprint shown in Hearing Exhibit 130 with the "Eastern Parcel." Consequently, the Draft RFI -- surely its "facts" standing alone -- would appear to be as irrelevant as they are unreliable.

any filing with the commission, or contained in any other public document." Since Movants do not claim that the RCRA Report, or its "facts," have been filed with the Commission, their request for incorporation by reference rests entirely on the convenient happenstance of the document becoming "public" on the very day the Joint Motion was filed, with absolutely no attempt to establish its reliability or accuracy.

Nor is the RCRA Report, including its "facts," suitable for official notice. SAPA Section 306(4) states, in pertinent part, that "[o]fficial notice may be taken of all facts of which judicial notice could be taken and of all other facts within the specialized knowledge of the agency." Here, Movants do not claim that the "facts" in the RCRA Report qualify for judicial notice. Instead, in their original Joint Motion (but inexplicably, not in the Renewed Joint Motion), Movants (and Applicants) attempted to shoehorn the Draft RFI into the second judicial notice category, claiming that the "facts" contained therein somehow fall within the "specialized knowledge" of DPS Staff.[33] That claim, even were it repeated here, remains wholly without merit.

First, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, et seq., addresses the management, treatment and disposal of solid and hazardous wastes. On its face, RCRA has absolutely nothing to do with utility regulation, or the siting of major electric generation or transmission facilities, which is the purview of DPS Staff. Indeed, as NYSDEC states in its Initial Brief in this proceeding, "NYSDEC is a statutory party to all Article VII proceedings. In that role, NYSDEC advises the Commission on matters arising under the Environmental Conservation Law (ECL), Navigation Law, **applicable Federal statutes**, and the rules, regulations and policies implementing these statutes."[34] In short, if DPS Staff had "specialized knowledge" of all aspects of environmental law and regulation, for all purposes, the NYSDEC's statutorily mandated presence in Article VII siting matters would, at best, be superfluous.

The text of the Draft RFI supports the above proposition:

> As defined under RCRA, the objective of an RFI is to characterize the nature, extent, direction, rate, movement, and concentration of release(s) of hazardous waste and/or hazardous constituents at various Solid Waste Management Units (SWMUs) and Areas of Concern (AOCs) at an operating facility. The RFI phase of activity is an essential part of an overall RCRA Corrective Action Program. **At the Con Edison Astoria facility, the New York State Department of Environmental Conservation (NYSDEC) oversees this program**. Administrative documents related to this work include a 1994 Consent Order (NYSDEC Index No. R2-1023-88-06) and the most recent

[33] Joint Motion, pp. 5-6.

[34] NYSDEC Initial Brief, p. 5 (emphasis added).

RCRA Corrective Action Permit (NYSDEC Permit No. 2-6301-00006/00002-0).[35]

Thus, the Draft RFI itself also establishes that it was prepared -- not pursuant to any provision of the PSL or in accordance with any Commission Order -- but pursuant to RCRA. More specifically, it was prepared pursuant to a NYSDEC Consent Order and a NYSDEC RCRA permit issued under that agency's delegated RCRA program. Thus, there was no reason for it to be filed with the Commission. Based on the information provided by the Movants, it never was. In short, neither the Draft RFI, nor its "facts," fall within the DPS's "specialized knowledge," as that phrase is used in SAPA § 306(4).

Put simply, the DPS has no "specialized knowledge" of RCRA RFIs or of the "facts" contained therein. Therefore, taking official notice of Draft RFI, and/or any of its "facts," would be flatly inconsistent with the plain language of SAPA § 306(4).

CONCLUSION

While the parameters of incorporation by reference and official notice are broad, the instant request falls far outside these parameters. The Draft RFI is a nonfinal document that previously was submitted to the NYSDEC by a regulated entity with an obvious interest in minimizing its exposure to environmental investigation and cleanup costs. It has been presented here to provide after-the-fact proof as alleged support for the Applicants' position concerning a disputed factual issue that was set for, and fully addressed during, the hearing. This draft opinion of that regulated entity's environmental consultant, and/or the data that its consultant collected, is unreliable and irrelevant hearsay -- a point that would have been exposed on the hearing transcript had the document been sponsored by a witness at the evidentiary hearing as it should have been. Under those circumstances, neither the Draft RFI, nor any of its "facts," may be incorporated by reference or admitted into the record by official notice.

Respectfully submitted,

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[35] RCRA Report, p. ES-1.