

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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Application of Champlain Hudson Power :
Express, Inc. for a Certificate of :
Environmental Compatibility and Public : CASE 10-T-0139
Need Pursuant to Article VII of the :
PSL for the Construction, Operation :
and Maintenance of a High Voltage :
Direct Current Circuit from the :
Canadian Border to New York City. :
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EXCEPTIONS AND BRIEF ON EXCEPTIONS
ON BEHALF OF
CENTRAL HUDSON GAS & ELECTRIC CORPORATION

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Dated: Poughkeepsie, New York
January 17, 2013

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I. PRELIMINARY STATEMENT

These exceptions and brief on exceptions are submitted on behalf of Central Hudson Gas & Electric Corporation ("Central Hudson") in accordance with the Secretary's Notice for Filing Exceptions (Issued December 15, 2012).

Although the Recommended Decision ("RD") of Administrative Law Judges Kevin Casutto and Michelle Phillips agreed with some of Central Hudson's contentions, the RD did not correctly resolve all of the issues presented by Central Hudson. Accordingly, Central Hudson presents three exceptions to the RD. First, Central Hudson excepts to the fashion in which the RD resolved the issue of whether the Joint Proposal bound non-signatories. On this issue, Central Hudson had sought a

determination that the Joint Proposal bound only the Applicants. The RD agreed. However, the RD then made additional determinations that contradict its conclusion. These further statements are inconsistent and therefore arbitrary. They also reflect errors of law.

Second, Central Hudson excepts to the RD's treatment proposed Certificate Condition 27.

Third, Central Hudson excepts to the RD's treatment of the statutory element requiring conformance to a long-range plan for the grid. The RD applied policies developed in the context of short electric lines near New York City to the very different case of a long "extension cord" electric line running virtually the length of the State from North to South. Consideration of the need for grid improvements to the deliverability of bottled renewable and other upstate generation was simply not relevant to those earlier, near-NYC lines, but is very germane to a proposal running the length of the State. As a matter of policy, the Commission should indicate that merchant Article VII proposals should address needs of the grid beyond the point-to-point extension cord approach of the present proposal.

II. SINCE CENTRAL HUDSON IS NOT A SIGNATORY TO THE JP, AND DID NOT WAIVE ITS RIGHTS THROUGH EXECUTING THE JP, THE RD SHOULD HAVE CLARIFIED, AND THE COMMISSION SHOULD NOW CLARIFY, THAT CENTRAL HUDSON'S RIGHTS TO SEEK REMEDIES IN THE COURTS ARE NOT DIMINISHED

The RD (at 128) stated that: "there is no basis for concluding that the provisions [Certificate Conditions 27-29] are designed to affect or displace laws governing parties' existing rights and obligations." However, the RD's conclusions are inconsistent with that statement because the RD approved Certificate Conditions 27-29 that would require Central Hudson to "exhaust" administrative remedies as a condition precedent to pursuit of judicial remedies and otherwise constrain Central Hudson's rights. In so doing, the RD exceeded its authority. Exhaustion of administrative remedies is a judicial doctrine that is applied by the courts in circumstances where the court determines it is applicable. It is not correct for the RD to have interfered with the authority of the Courts to subject Central Hudson's access to the Courts to the conditions precedent contained in Certificate Conditions 27-29.

Central Hudson does believe that Certificate Conditions 27-29 are unreasonable, as the RD noted. However, a key part of Central Hudson's position was not to prevent the parties that signed the Joint Proposal from having recourse to those provisions, but to ensure that Central Hudson's rights to pursue

judicial remedies were not affected in any way. In fact, the proposition actually advanced in Central Hudson's post-hearing brief (at 12) was:

IF THE PROPOSED PROJECT IS CERTIFICATED, THE COMMISSION SHOULD CONFIRM THAT NOTHING IN THE CERTIFICATE IS INTENDED TO RELIEVE APPLICANTS FROM THE USUAL RULES OF RESPONSIBILITY UNDER THE COMMON AND STATUTORY LAW OF NEW YORK, AS ARE DETERMINED BY THE COURTS

Central Hudson also pointed out that its rights to access the Courts were being inappropriately limited:

As a party that will be directly affected [by the proposed facility], Central Hudson must retain the right to seek judicial redress under any applicable theory of responsibility for any injury to its operations or property cause[d] by Applicants or for which Applicants are legally responsible. Accordingly, the provision requiring Central Hudson to submit any disagreement to the Commission is inappropriate.

Central Hudson went on to state:

The Commission's Order should clearly state that (i) the conditions bind Applicants only, (ii) are optional, not mandatory, as applied to Central Hudson, and (iii) do not constrain or limit Central Hudson's rights to seek judicial redress. Applicants can have no objection because they have conceded in their Reply Statement (at 19-20) that the Commission's Order can properly include such conditions:

Central Hudson's claim that the Certificate limits Central Hudson's legal rights is

wrong as a matter of law, as PSL Article VII does not authorize the Commission to take any action other than establishing the terms and conditions Applicants must comply with if they wish to construct Facility.

Central Hudson also made similar points in relation to other portions of Certificate Conditions 27-29:

subsection 29(c) imposes advance notice and other burdensome requirements on a person seeking reimbursement that are unreasonable in the context of harm to pre-existing facilities that results from the Applicants' new facility and could be asserted subsequently by Applicants as defenses to claims.

subsection 29(d) prevents an affected owner of pre-existing infrastructure from pursuing its remedies in court and is an attempted denial of due process that also violates separation of powers. The Commission lacks the authority to impose such a condition. Central Hudson cannot agree to a provision that limits its ability to pursue legal remedies it is entitled to pursue in the Courts.

Since the RD and the Commission lack the authority to restrict Central Hudson's access to the courts, the RD should have concluded, and the Commission should now confirm, that nothing in the certificate is intended to preclude Central Hudson from seeking to pursue remedies it may have in the Courts and nothing in the certificate is intended to relieve applicants from the usual rules of responsibility under the common and statutory law of New York, as are determined by the Courts.

The Commission's Order should clearly state that (i) the conditions bind Applicants only, (ii) are optional, not mandatory, as applied to Central Hudson, and (iii) do not constrain or limit Central Hudson's rights to seek judicial redress. Applicants can have no objection because they have conceded in their Reply Statement (at 19-20) that "PSL Article VII does not authorize the Commission to take any action other than establishing the terms and conditions Applicants must comply with if they wish to construct Facility.¹

Central Hudson's position is also consistent with the interpretation of Article VII presented by Staff in its Reply Brief (at 39-40):

It is axiomatic that a Certificate granted pursuant to PSL Article VII only places obligations and limitations upon the Certificate Holder...To the extent the proposed Certificate Conditions contain provisions for the Certificate Holders to reimburse certain costs, and for the Commission to consider disputes as to that responsibility under the Certificate, Staff views such reimbursements as separate and distinct from any common law or statutory law causes of action that Central Hudson may have.

¹ Emphasis added and Applicants' footnote omitted.

III. CERTIFICATE CONDITION 27 SHOULD BE REVISED

The sponsors of the Proposed Project have repeatedly represented that they will assume all risks created by the Proposed Project (and retain all rewards). In December, 2010, Central Hudson submitted the following formal IR to Applicants and received the response also shown in relevant part below:

7. Champlain Hudson has indicated that the project is planned as a merchant transmission project. Will Champlain Hudson agree to include a condition in the certificate requiring that the project operate only as a merchant transmission facility?

a. Please describe the characteristics of the proposed facility that will make it a "merchant" project.

b. Will Champlain Hudson agree to include a condition in the certificate requiring that the project operate only as a merchant transmission facility?

7. a. The project is properly characterized as a "merchant" project because the Applicants are shouldering all risks and opportunities associated with its construction and operation. The Applicants do not seek in any way to pass these risks or opportunities on to a captive rate base.... [Emphasis added.]

That representation was not inadvertent or aberrational.

Applicants continue to make the same representation and to seek

favorable action from the Commission on the basis of the same representation.² The JP itself states that

the Commission should recognize that, as a merchant project, all the risks associated with the HVDC Transmission System - as well as all risks associated with the use of the Astoria-Rainey Cable by shippers also using the HVDC Transmission System - would be borne by private investors rather than by utility rate payers.³

Applicants' Reply Statement concerning the JP contains this headline statement: "**CONSUMERS WILL NOT BEAR THE RISKS OF THE FACILITY.**"⁴ Condition 27, however, shifts risks of the proposed facility to Central Hudson and its customers through conditioning and limiting the Applicants' responsibilities for risk, damage or loss impacts that Applicants create.

² See, JP paragraph 22.

³ According to CHPEI's public webpage, "TDI's lead investor is the Blackstone Group, one of the world's leading investment and advisory firms with total fee-earning assets under management of over \$136 billion. Blackstone specializes in private equity and has emerged as one of the largest private equity firms in the world."
<http://www.chpexpress.com/qna.php>

⁴ March 30, 2012 Reply Statement Of Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. In Support Of Joint Proposal, at 6. Inconsistently with that assertion, Applicants are seeking to transfer risks to Central Hudson's ratepayers through failing to accept responsibility for costs and harm that Applicants impose on Central Hudson's facilities and operations, and through seeking to impose pre-conditions to, and limitations on, recoveries.

In addition, contrary to the Applicants' representations, a lesser standard of responsibility has been used in the proposed certificate conditions. The operative standard of certificate condition 27 is that the "Certificate Holders shall engineer, construct, and install the Facility so as to make it fully compatible with the continued operation and maintenance of Colocated Infrastructure." There is no inherent meaning to the phrase "fully compatible." Rather than the unknown "fully compatible" standard, Applicants repeated representations to the Commission that Applicants will bear all risks of their venture require that the standard be that "Certificate Holders shall engineer, construct, and install the Facility so as to protect pre-existing infrastructure and the owners of such infrastructure against risk, damage or loss."

IV. THE RD'S CONCLUSIONS REGARDING CERTIFICATE CONDITION 5 ARE INAPPROPRIATE AND SHOULD BE REVERSED BY THE COMMISSION

Central Hudson had objected to Certificate Condition 5 on two grounds. First, it is overly broad because it purports to mandate greater acquisitions of property rights than may be actually required. Second, it contains language that provides the certificate holder with paramount authority over adjoining utility owners of pre-existing infrastructure. The RD (at 130-131) rejected these positions. Central Hudson excepts.

Certificate Condition 5 is overly broad. This condition should be revised to change the language commencing with "shall also acquire and maintain the continuing right to enter onto and use certain additional lands." If a Certificate is issued by the Commission, it should merely authorize the certificate holder to acquire such lands and/or land rights, to the extent consistent with all applicable requirements of law and necessary for project construction, but should not mandate that the applicants make such acquisitions.

Certificate Condition 5 should be further revised by striking the language referring to "terms prohibiting the owners of such land from taking any action on that land that would interfere with such repair and maintenance activities." As recognized in the RD, the proposed facility will be very near several existing Central Hudson facilities both upland and below the Hudson River. The language identified would have the effect of unjustifiably establishing categorically paramount rights in the certificate holders over Central Hudson's pre-existing facilities. There is no justification in Article VII for any such authority. Central Hudson is prior in time and prior in right and its rights may not be divested.

In addition, the authority in Condition 5 is not consistent with, and would have the effect of seeking to overrule *sub silentio*, settled law in New York. An existing utility has the right to interfere with the new facility under at least some circumstances. See, *LIRR v. LILCO*, 103 AD2d 156 (2d Dept 1984), which, among other things, holds that "Consequently, we hold it to be the law in this State that the grant of authority found in section 11 of the Transportation Corporations Law is sufficient to empower LILCO to condemn the limited interest sought herein unless the evidence establishes that its proposed easement will materially interfere with the LIRR's existing public use." Thus, it is potentially feasible that Central Hudson, in the future, would need to exercise the right to condemn some portion of the new facility, should the facts warrant.

The Staff assertion (Reply Brief at 42) that Certificate Condition 5 is limited by Conditions 27-29 is not accurate. There is no limitation within Certificate Condition 5. Moreover, the language identified in Certificate Condition 5 could be read to mandate interference by the certificate holder with Central Hudson's existing facilities on the basis of a mere assertion of a need to repair or maintain the proposed new facility.

V. GRID EXPANSION

Article VII requires that the proposed facility conform

...to a long-range plan for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems, which will serve the interests of electric system economy and reliability....

The RD (at 106-108) concluded that the fact that the proposed facility would provide some electric system benefits was sufficient. Central Hudson requests that the Commission review this approach. The basic difficulty with the present proposal is that it does no more than meet the most narrow of definitions of "expanding" the grid, in the very limited sense that the proposed facility would add a long "extension cord" interconnection between two points (one source and one sink) only.

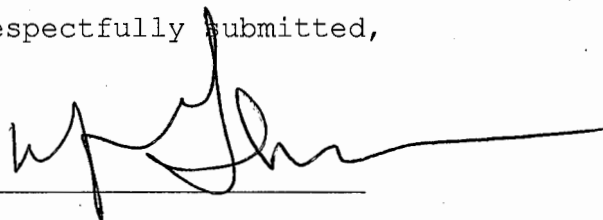
As a matter of Commission policy in applying Article VII, the Commission should require more. Known grid issues include the major Central East/Total East constraint that "bottles in" some of the low-cost upstate sources of generation and renewable sources. A Commission policy that allows merchant developers to utilize the limited public resource of transmission routes for narrow, point-to-point purposes reduces the future options available to redress the 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.

VI. CONCLUSION

Central Hudson respectfully requests that the RD be reviewed by the Commission and revised as described herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Robert J. Glasser', written over a horizontal line.

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January 17, 2013