

**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

**RESPONSE OF RIVERKEEPER, INC.  
IN OPPOSITION TO REQUEST OF ENTERGY NUCLEAR  
POWER MARKETING, LLC AND ENTERGY NUCLEAR FITZPATRICK, LLC**

Riverkeeper, Inc. (“Riverkeeper”) submits this Response to the Request of Entergy Nuclear Power Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC (collectively, “Entergy”) for Clarification, or, in the Alternative, Limited Reconsideration, of the Ruling on Issues (the “Request”) pursuant to Rule 3.6 of the Commission’s Rules, 16 N.Y.C.R.R. § 3.6 (2011).

**INTRODUCTION**

Riverkeeper respectfully submits that all of the relief request by Entergy in its Request must be denied for two reasons. First, Entergy’s Request represents an attempt to impermissibly raise new factual, legal and policy issues that were not raised in its Statement in Opposition to the Joint Proposal as required by Your Honors’ prior procedural rulings. Second, the factual allegations in Entergy’s request do not raise any contested issues of material fact for which a hearing is required.

## BACKGROUND

On February 22, 2012, Your Honors issued your Ruling in Response to Report in this proceeding. Your Honors ruled therein that parties filing statements in opposition to the anticipated Joint Proposal of Settlement (“JP”) would be required to inform Your Honors and the parties of the grounds on which that party opposed the settlement and whether each such ground was asserted as an issue of material fact:

“To assist us in determining the scope and duration of the evidentiary hearings, any party who files an initial opposing statement must set forth its reasons and bases for opposing the JP and issuance of a certificate and must state whether each such basis is asserted as a material issue of fact for which the party intends to provide expert testimony or other evidence at the hearing.”<sup>1</sup>

Pursuant to Your Honors’ Ruling on Schedule issued March 2, 2012, Initial Statements supporting and opposing the JP were filed on March 16, 2012. Entergy submitted a Statement in Opposition to the JP raising a number of objections to the JP. There is no reference in that Statement to any concern about either the electromagnetic fields (“EMF”) allegedly generated by the Project, the alleged impacts of the Facility on sturgeon or, with the exception of a very brief reference to dredging impacts, the effect of the Facility on endangered species.<sup>2</sup>

Your Honors issued your Ruling on Issues on May 8, 2012. In that Ruling, Your Honors determined that only three claims advanced in the statements of opposition of various parties raised contested issues of material fact requiring an evidentiary hearing: (1) deliverability; (2) the suitability of the proposed Luyster Creek converter station site; and (3) cost/benefit analyses and

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<sup>1</sup> Ruling in Response to Report, at 2-3.

<sup>2</sup> See Entergy Initial Statement in Opposition to Joint Proposal and Article VII Application of Champlain Hudson Power Express, Inc.

Facility costs. The Ruling on Issues stated that, “The parties’ other proposed issues are legal issues, policy issues or mixed issues of law and policy that are properly addressed in briefs.”<sup>3</sup>

On May 23, 2012 Entergy submitted the Request seeking for Your Honors to “clarify” or confirm that Entergy is not precluded by the Ruling on Issues from addressing in its briefs new legal or policy, issues with respect to the impact of the Facility on endangered sturgeon populations. Alternatively Entergy seeks for Your Honors’ to add a fourth issue for adjudication in the evidentiary hearing related to the impacts of the Facility on Sturgeon.

**I. ENERGY SHOULD BE PRECLUDED FROM CONTESTING LEGAL, POLICY, OR FACTUAL ISSUES NOT RAISED IN ITS STATEMENT IN OPPOSITION TO THE JP**

The new allegations made by Entergy in its Request must be rejected on the ground that they were not raised in its Statement in Opposition to the JP as legal, policy, or factual issues. Your Honors’ Ruling in Response to Report was clear in its requirement that parties opposing the JP to must specify the legal, policy, or factual grounds on which their opposition to the JP is based and whether any such basis was asserted as an issue of material fact.

Entergy’s Statement in Opposition makes no mention nor raises any issues regarding endangered sturgeon populations in the Hudson River, potential impacts from EMF, or the impact of the limited use of concrete mats to protect the Facility’s cables in certain sections.

Entergy’s only statement regarding endangered species of any kind was raised in the context of dredging impacts in a challenge to the adequacy of the Water Quality Certificate, which was characterized as “skeletal”. Entergy’s Statement in Opposition states in relevant part that “Likewise, the proposed Water Quality Certificate (“WQC”) for the TDI Project, which involves extensive dredging in New York waters, is skeletal in several key areas, including,

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<sup>3</sup> Ruling on Issues, at 5.

without limitation, with respect to impact mitigation, contaminant management and endangered species protection.<sup>4</sup>

Nothing in this section of the Statement in Opposition identifies any legal or policy issues, or material facts Entergy disputes involving either the alleged impacts of the concrete mats used to cover the Facility's underwater cables or the EMF allegedly produced by the Facility on sturgeon in the Hudson River.

Your Honors' February 22, 2012 Ruling in Response to Report stated that all issues of law, policy, and material fact must be identified in parties Statements in Opposition. In addition Your Honors' May 8, 2012 Ruling on Issues was not limited to evidentiary matters alone and would also apply to legal and policy claims as well. Although Your Honors' gave examples of issues of legal, policy, or mixed issues that may be addressed in briefing, the ruling was clearly not an invitation for Parties to raise additional issues not identified in parties' Statements in Opposition. Accordingly, Your Honors should rule that Entergy waived its rights to make either of these claims on a factual, legal or policy basis when it failed to raise them in its Statement in Opposition to the JP.

**II. ENTERGY'S REQUEST FAILS TO RAISE ANY CONTESTED ISSUES OF MATERIAL FACT.**

The new allegations made by Entergy in its Request must be rejected on the ground that they fail to raise any contested issues of material fact. Entergy's Request does not identify any statement in the JP or supporting materials that Entergy claims to be untrue. Further, Entergy does not claim that its proposed testimony will demonstrate any other factual claims to be true.

Entergy's Request asserts that its proposed testimony would show:

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<sup>4</sup> Entergy Statement in Opposition at 6

“that in the absence of a quantitative analysis of the effects of sediment deposition on and around the mats, such as CFD modeling, the Joint Proposal’s conclusion that the concrete mats will not have a significant impact on ESA-listed sturgeon habitat is not supported”; and

“that, given the wealth of information...demonstrating the potential effects of EMF on fish, including sturgeon, the assessment of potential effects of EMF on Hudson River sturgeon is cursory at best, and that the JP’s conclusions with respect to potential effects on sturgeon migration are unsupported by site-specific scientific assessment.”<sup>5</sup>

This proposed testimony does not proffer any new facts or refute any facts already in the record. Instead, it simply summarizes facts already established in the JP and advances legal and policy arguments based on those facts.

Entergy’s Request indicates they would sponsor testimony that, rather than contesting an issue of material fact, would demonstrate that the “record fails to adequately address” potential adverse impacts to sturgeon.<sup>6</sup> This amounts to a legal and policy argument questioning whether the JP’s analysis of the facts in the record and its conclusion that the Facility “represents the minimum adverse environmental impact” are correct. Nowhere in its Request does Entergy claim that it will offer new evidence that disputes facts in the record; only that they will offer testimony that the record is inadequate and that there are “questions” as to the adequacy of the post-energizing sturgeon monitoring plan.<sup>7</sup>

Entergy’s purely legal argument does not raise any contested issue of material fact that would be appropriate for an evidentiary hearing. Entergy does not dispute any fact in the record as to environmental impact, but merely asserts that the facts in the record are insufficient to support the conclusion that the Project “represents the minimum adverse environmental impact.”

Because Entergy does not raise any issues of contested material fact in its Request, the list of material facts set for hearing in this proceeding should not be modified. Further, raising these legal and policy issues so late in the proceeding, despite having ample opportunity to raise issues in earlier submissions, prejudices other parties with respect to preparing their testimony for the hearing.

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<sup>5</sup> Entergy Request, at 9.

<sup>6</sup> *Id.* 8.

<sup>7</sup> *Id.* at 9.

**CONCLUSION**

WHEREFORE, for the foregoing reasons, Riverkeeper, Inc. respectfully requests that Your Honors deny all of the relief requested by Entergy in the Request of Entergy Nuclear Power Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC for Clarification, or, in the Alternative, Limited Reconsideration, of the Ruling on Issues.

Respectfully submitted

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