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 CERTIFICATE HOLDERS
IN OPPOSITION TO ENTERGY'S BRIEF SEEKING
ACCEPTANCE OF ITS LATE-FILED REHEARING REQUEST

Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. (the "Certificate Holders") submit this Opposition to the Brief in Response to Notice Regarding Entergy Petition for Rehearing (the "Entergy Brief") Submitted by Entergy Nuclear Power Marketing, LLC and Entergy Nuclear FitzPatrick, LLC (collectively, "Entergy") pursuant to the Commission's Notice Regarding Entergy Petition for Rehearing issued in this proceeding on May 23, 2013 (the "Notice").

INTRODUCTION AND SUMMARY OF POSITION

As the New York Times recently noted, Entergy is making an "all-out push" on all fronts in an attempt to defend its embattled Indian Point nuclear power plants. According to a report recently released by Common Cause and summarized by the New York Times in this recent article, Entergy "has spent millions of dollars on lobbying and

campaign contributions to make its case in every nook and cranny of the state." These efforts have included substantial campaign contributions to key legislators at both the state and federal levels, as well as the creation of ostensibly independent groups to argue its case, which the New York Times referred to in that article as "astroturfing." [1]

In light of this "all-out push" by Entergy and the Commission's finding in its Order Granting Certificate of Environmental Compatibility and Public Need issued in this case on April 18, 2013 (the "Certificate Order") that Certificate Holders' 1,000 MW HVDC merchant transmission facility (the "Facility") could replace a portion of the output of Entergy's Indian Point facility, [2] it should come as no surprise that Entergy was the only party to submit a request for rehearing in this proceeding. Nor should it be surprising that Entergy's rehearing request simply rehashes the meritless claims previously rejected by the Commission in the Certificate Order in an apparent attempt to delay development of the Facility for as long as possible through an exhaustive pursuit of all available administrative and judicial remedies.

What is surprising is: (1) that while engaged in such conduct, Entergy somehow managed to miss the statutory deadline for submission of the rehearing request that is a condition precedent to any judicial review of the Certificate Order; and (2) that Entergy now has the temerity to claim that "good cause" exists for the Commission to waive that statutory deadline so that Entergy can continue to pursue these meritless claims long after

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[1] *See* New York Times, *Owner Makes All-Out Push for Indian Point* (May 30, 2013) also available at the following link: http://www.nytimes.com/2013/05/31/nyregion/going-all-out-in-support-of-indian-point.html.

[2] Certificate Order, slip op. at 28-29 ("[I]t is indisputable that if . . . Indian Point retires . . . then a Project like this one would be beneficial as a means to help alleviate such adverse impacts.").

every other party to this proceeding has accepted the determinations reached by the Commission in the Certificate Order in what can only be regarded as part of Entergy's "all-out push" to protect its Indian Point facilities by delaying or derailing the Facility.

Certificate Holders respectfully submit that the Commission can and must prevent Entergy from abusing the Article VII process in this fashion by finding that the thirty day time limit for rehearing requests in this proceeding is an integral part of a statute of limitations that the Commission may not alter or extend. If the Commission concludes that it can waive or extend this time limit, the Commission must exercise that discretion to reject Entergy's late filed rehearing request in light of: (1) the meritless nature of Entergy's claims; (2) Entergy's inability to provide any justification for its failure to meet this important deadline other than law office failure, which New York's courts have consistently rejected as a basis for finding "good cause"; (3) the adverse impacts of further delay on Certificate Holders in terms of higher development costs that may jeopardize the continued financial backing and shipper support required for successful development of the Facility; and (4) the fact that any delay in the commercial operation of the Facility will unjustly enrich Entergy at the expense of consumers in New York City and surrounding areas, who will unfairly be deprived of the tens if not hundreds of millions of dollars of electricity price savings and the substantial air emissions benefits that the Commission has recognized will be provided by the Facility once it achieves commercial operation. Entergy's attempts to parse the Commission's rules to extend the time within which it was required to file its rehearing request in this proceeding must also be rejected without merit for the reasons discussed below.

PROCEDURAL HISTORY

1. The Notice

In the Notice, the Commission found: (1) that the last day for filing of requests for rehearing of the Certificate Order was May 20, 2013; (2) that the Commission's Secretary did not receive Entergy's request for rehearing of the Certificate Order until May 21, 2013; and (3) as a result, Entergy's rehearing request "is apparently untimely as filed."[3] The Commission gave Entergy until May 29, 2013 to show good cause why that document should still be accepted or to demonstrate that its document was timely filed and authorized other parties to reply to Entergy's claims on or before June 4, 2013. The Notice also provided that after reviewing these pleadings, the Commission would determine whether Entergy's rehearing request would be accepted as timely filed and, if so, a date for parties wishing to reply to that rehearing request would be established.

2. Certificate Holders' Request for Partial Reconsideration of the Notice

On May 29, 2013, Certificate Holders filed their Request for Reconsideration of Certain Portions of the Notice (the "Partial Reconsideration Request"). In that Request, Certificate Holders explained that while the courts would be unlikely to overturn a Commission order rejecting Entergy's rehearing request as untimely, if that were to occur this proceeding would then be remanded to the Commission to address the merits of Entergy's rehearing request. Once the Commission issued its order addressing those claims, that order would in turn be subject to another round of judicial review. To avoid the delay in the development of the Facility that would result if this occurred, Certificate

[3] Notice, slip op. at 1.

Holders requested that the Commission refrain from issuing an order or ruling addressing the timeliness of Entergy's rehearing request until it could also rule on the merits of the claims raised by Entergy in its rehearing request. By addressing all of these issues in a single order, the Commission will avoid any possibility of a remand to address the claims advanced by Entergy in its rehearing request.[4]

3. The Entergy Brief

In its Brief filed May 29, 2013, Entergy contends: (1) that the Commission's filing requirements are satisfied when a filing is "sent" by a party rather than when it is "received" by the Commission's Secretary; (2) alternatively, that the Commission misapplied its counting rules in determining that May 20, 2013 was the last day for the submission of rehearing requests and should have found that the last day for such filings was May 21, 2013; and (3) alternatively, that it would be unfairly prejudiced if the Commission refused to consider its request for rehearing simply because that request was filed one day out of time and that the failure of the electronic mail system used by Entergy's counsel provides "good cause" for extending the time for submission of rehearing applications in this case by one day. Each of these claims is without merit for the reasons noted below.

[4] Certificate Holders would note that the Commission issued precisely such an order in Case 09-E-0299, *Petition of the Village of Frankfort for Approval, Pursuant to Section 68 of the Public Service Law, of the Provision of Electric Service to an area of the Town of Frankfort*, Order Denying Petition For Rehearing And Clarification (Issued and Effective January 21, 2011).

ANALYSIS

I. ENTERGY'S CLAIM THAT ITS REHEARING PETITION WAS FILED ON MAY 20, 2013 IS WITHOUT MERIT

This case involves an issue that is seldom encountered in today's world of instant electronic communication, but that was far more common in the past when documents were transmitted and delivered by mail: whether a party's obligation to provide a document is met when the document in question is placed into the mail or when it is received by the party to which it is addressed. The reason that this problem arose in this case is clearly revealed by the Affirmation of Entergy's attorney in this case, who explained that his law firm retained a private electronic mail delivery and verification agent known as RPost to transmit its rehearing request to the Commission by electronic mail and to verify that delivery had occurred.[5] Specifically, Entergy's counsel transmitted its rehearing petition to RPost on May 20, 2013, but RPost failed to re-send that document by electronic mail to the Commission's Secretary until the next day, May 21, 2013.[6]

In light of these uncontested facts, Entergy's first claim is that its rehearing request was "filed" on May 20, 2013 because Entergy's counsel "sent" that document to the Commission's Secretary on that date must be rejected for several reasons. To begin with, Entergy's claim in this regard is based on Rules 3.2(b)(3) an 3.5(e)(3) of the Commission's Procedural Rules, both of which provide that "electronic service is

[5] Affirmation of William A. Hurst at 3.

[6] Id. at 5.

complete on sending." Entergy's reliance on these rules is misplaced, since Rule 3.2(b)(3) deals only with the manner in which the Commission may serve its orders and other issuances on parties to proceedings before it,[7] and Rule 3.5(e)(3) deals only with how parties must serve documents filed with the Commission on the other parties in such proceedings.[8] Thus, neither of these rules deals with how parties are to file pleadings with the Commission.

In contrast, Rule 3.5(d) expressly addresses the filing of documents with the Commission. That rule provides as follows:

> (d) A document presented for filing electronically will be deemed filed at the time it is received by the Secretary. A document presented for filing in paper form only will be deemed filed at the time it is received at the Commission's Albany office. The Secretary, for the purpose of promoting the fair, orderly, and efficient conduct of the case, may authorize other arrangements.[9]

Because the Commission's Secretary did not establish any special arrangements for the filing of rehearing requests in this proceeding, the Commission's rules clearly and unambiguously required that Entergy's rehearing request be received by the Secretary on May 20, 2013. Because Entergy did not satisfy this requirement, the Commission correctly determined in the Notice that Entergy's rehearing request was untimely filed.

Moreover, even if the Commission were to accept Entergy's claim that pleadings submitted to the Commission are "filed" when sent to the Secretary by electronic mail, based on the uncontroverted facts in this case as demonstrated in Entergy's Brief and

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[7] 16 N.Y.C.R.R. § 3.2(b)(3) (2012).

[8] 16 N.Y.C.R.R. § 3.5(e)(3) (2012).

[9] 16 N.Y.C.R.R. § 3.5(d) (2012).

supporting materials, the Commission would still be required to reject Entergy's claim that it timely filed its rehearing request in this proceeding. As previously noted, the information provided by Entergy in its Brief clearly demonstrates that Entergy hired RPost to act as its agent and that Entergy "sent" Entergy's rehearing request to RPost rather than directly to the Commission's Secretary at 3:20 PM on May 20, 2013. This crucial distinction between sending a document to RPost for re-delivery to the Commission and sending a document directly to the Commission's Secretary is also confirmed by the Frequently Asked Questions section of RPost's web site:

> Q: What if I do not get an Acknowledgement email? How can I tell the email has been sent?
>
> The Acknowledgement email arrives in the sender's inbox as soon as the email has been inducted into the RPost Registration System for processing. If the Acknowledgement does not arrive within several minutes of sending the Registered Email® message, contact your IT director. In general, if you do not get an Acknowledgement email, your Registered Email® message has not reached the RPost Registration System and therefore will not be delivered. Note that in some installations, the sender can turn off the Acknowledgement email receipt.[10]

Because Entergy's actions in e-mailing its rehearing request to the "Registration System" operated by its agent RPost cannot be regarded as sending that filing directly to the Secretary by electronic mail, and because Entergy alone is responsible for the failure of RPost to send its rehearing request to the Commission's Secretary by electronic mail in the short time available to it, the Commission must reject Entergy's claim that it properly

[10] http://www.rpost.com/faq.

served its rehearing request on the Commission's Secretary by electronic mail on May 20, 2013.

II. ENTERGY'S ALTERNATIVE CLAIM THAT ITS REHEARING REQUEST WAS TIMELY WHEN FILED ON MAY 21, 2013 IS ALSO WITHOUT MERIT

Entergy also claims that its rehearing request was timely filed on May 21, 2013 under Rules 3.7(a) and 3.5(f) of the Commission's Procedural Rules.[11] Rule 3.7(a) of the Commission's rules provides that rehearing requests may be submitted "within 30 days of service of the order." Rule 3.5(f) of the Commission's Rules extends the time for any "action taken within a specified number of days from the service of a document" by one day when service is made electronically, as occurred in this case. This contention also suffers from several fatal flaws.

To begin with, Entergy has failed to even mention the requirements of section 128(1) of the Public Service Law, which make clear that in this Article VII proceeding, Entergy's rehearing request was required to be filed within thirty days of the ***issuance*** of the Certificate Order. Specifically, PSL § 128(1) provides, in pertinent part, that:

> Any party aggrieved by any order issued on an application for a certificate may apply for rehearing under section twenty-two within thirty days after issuance of the order and thereafter obtain judicial review of such order in a proceeding as provided in this section.

In light of this clear statutory requirement, Entergy's attempt to construe the Commission's Rules to add another day to the time for submission of its rehearing request must be rejected.

[11] 16 N.Y.C.R.R. §§ 3.5(f) and 3.7(a) (2012).

Moreover, even if the Commission were to accept Entergy's strained interpretation of its rules notwithstanding the clear expression of Legislative intent to the contrary, that reading of the Commission's rules would not be sufficient to make Entergy's May 21, 2013 rehearing request timely. As Entergy candidly acknowledges in its Brief, "[t]he 30th calendar day after entry of the April 18 Order . . . fell on a Saturday."[12] If Entergy had thirty-one calendar days to make that filing, as it claims, that period would have expired on Sunday, May 19, 2013. In either event, the due date for Entergy's filing would have been extended under section 25-A of the General Construction Law ("GCL") to Monday, May 20, 2013.

Entergy seeks to avoid this result through the sleight-of-hand of claiming that since the last day of the thirty day period fell on Saturday, May 18, it was extended by GCL § 25-A to Monday May 20 and then further extended by an additional day to Tuesday May 21 because the Certificate Order was served on Entergy electronically. This contention cannot be reconciled with either the express provisions or the purpose of GCL § 25-A(1). By its terms, GCL § 25-A(1) applies only when the period of time for an action falls on a weekend or on a public holiday and serves only to extend the period for performance to the next business day:

> When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day . . . .

[12] Entergy Brief at 6.

Thus, if Entergy is right that it had thirty-one rather than thirty days to submit its rehearing request in this proceeding, this provision clearly requires that all of those thirty-one days must be counted before any extension of the date for action can be provided. Moreover, the extension of the date for such performance is expressly limited to "the next succeeding business day." Entergy's claim that GCL § 25-A(1) should be construed in a manner that would grant Entergy an extension until the second succeeding business day must be rejected as inconsistent with the limited purpose of this provision to allow obligations falling on weekends or public holidays to be performed on the very next business day.

III. THE THIRTY DAY PERIOD FOR FILING REHEARINGS ESTABLISHED IN PSL § 128(1) IS AN INTEGRAL PART OF A STATUTE OF LIMITATIONS THAT MAY NOT BE WAIVED OR EXTENDED BY THE COMMISSION

In the event that the Commission rejects all of its claims that its rehearing request was filed on a timely basis, Entergy contends that the Commission should extend the period for the submission of that filing by one day "for good cause shown." This contention must be rejected for two reasons: (1) the thirty day time limit established by PSL § 128(1) is an integral part of the statute of limitations for appeals of Commission orders in Article VII proceedings that may not be waived or extended by the Commission; and (2) neither Entergy's apparent desire to continue to pursue meritless claims already rejected by the Commission as part of an "all-out" effort to defend its Indian Point nuclear facilities nor its claim that its failure to meet that statutory deadline was due to law office error is sufficient to establish constitute "good cause" for granting a

waiver even if the Commission did have authority to do so. This section will demonstrate that PSL § 128(1) is a statute of limitations that may not be waived. The flaws in Entergy's claims of "good cause" are addressed in the following sections.

Article 2 of New York's Civil Practice Laws and Rules ("CPLR") is entitled "Limitations of Time" and specifies the time limits within which various judicial actions may be commenced. CPLR § 201 provides as follows:

> An action . . . must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action.

The time limit for most proceedings seeking judicial review of a Commission decision under the PSL is CPLR § 217, which establishes a four-month limitations period.

In the case of Commission decisions issued under PSL Article VII, however, this four-month limitations period is displaced by the two-step limitations period prescribed in PSL § 128(1). Under this provision, any party claiming to be aggrieved by a Commission decision must first seek rehearing of that decision within thirty days and must thereafter commence a special proceeding in the Appellate Division of the Supreme Court within thirty days of the issuance of a Commission decision denying that rehearing request. Because PSL § 128(1) displaces the limitations period established in CPLR § 217, all of its provisions must be regarded as a statute limiting the rights of any party claiming to be aggrieved by a Commission decision issued under Article VII.

Unlike deadlines established under judicial or administrative rules of practice and procedure, the limitations on judicial review rights established in CPLR Article 2 and

other statutes of similar effect, including PSL § 128(1), cannot be waived by any court or administrative agency. This fact was recognized by the Court of Appeals in *Arnold v. Mayal Realty Company, Inc*., 299 N.Y. 57 (1949), where the Court explained that such limitations periods must be strictly enforced to fulfill the intentions of the Legislature:

> A Statute of Limitations is not open to discretionary change by the courts, no matter how compelling the circumstances and when given its intended effect such a statute is one of repose, and experience has shown that the occasional hardship is outweighed by the advantages of outlawing stale claims.[13]

This is true even where the actions required to preserve a claim are taken only one day out of time and even where the party claims that "good cause" exists to forgive the failure to take such actions within the time prescribed by law. For example, in *Evans v. Hawker-Siddeley Aviation, LTD*, 482 F. Supp. 547 (S.D.N.Y. 1979), the court rejected an imaginative interpretation of the time limit for filing of a claim offered in an attempt to extend the statute of limitations by one day in a personal injury case:

> To compute as plaintiff request would add an additional day to this two year period. This I cannot do. Under § 201 of the Civil Practice Laws and Rules, the time within which an action may be commenced cannot be extended. The statute of limitations is not subject to discretionary judicial extension no matter how good the reasons for delay may be.[14]

Further support for the fact that this limitation period may not be extended by the Commission is provided by the plain language of both PSL §§ 129 and 130. PSL § 129

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[13] 299 N.Y. at 60 (citations and internal quotations omitted).

[14] 482 F. Supp. at 550 (internal quotations omitted).

provides that no court may hear any claim relating to any Commission decision under Article VII except as ***expressly*** authorized in PSL § 128:

> Except as expressly set forth in section one hundred twenty-eight and except for review by the court of appeals of a decision of the appellate division of the supreme court as provided for therein, no court of this state shall have jurisdiction to hear or determine any matter, case or controversy concerning any matter which could have been determined in a proceeding under this article or to stop or delay the construction or operation of a major transmission facility except to enforce compliance with this article or the terms and conditions of a certificate issued hereunder.

Because PSL § 128(1) expressly limits judicial review of Commission decision issuing an Article VII certificate to parties that apply for rehearing "within thirty days after issuance of the order," the plain language of PSL § 129 clearly prohibits the Commission from extending the date for rehearing petitions under any circumstances whatsoever.

This conclusion is further bolstered by the provisions of PSL § 130, which prohibits all state agencies and municipalities from imposing any regulatory requirement on the construction or operation of a major transmission facility that has received an Article VII certificate from the Commission. Specifically, PSL § 130 provides, in pertinent part, that:

> Notwithstanding any other provision of law, no state agency, municipality or any agency thereof may require any approval, consent, permit, certificate or other condition for the construction or operation of a major facility with respect to which an application for a certificate hereunder has been issued . . . .

Importantly, this provision contains no carve-out for any state agency, including the Commission itself. Thus, once an Article VII certificate is issued and the thirty day

period for rehearing has expired, the Commission is without jurisdiction to impose any further approval, consent, permit or other condition on the issuance of that certificate. Because the Certificate in this case became administratively final on May 20, 2013, the Commission too is without jurisdiction to conduct any further proceedings with respect to the issuance of the Certificate at this time.

IV. ENTERGY'S APPARENT DESIRE TO CONDUCT "ALL OUT" LITIGATION TO DELAY OR DERAIL THE FACILITY DOES NOT CONSTITUTE "GOOD CAUSE" FOR A WAIVER IF ONE MAY BE GRANTED

In support of its alternative request that the Commission find that "good cause" exists to accept its untimely filed rehearing request, Entergy notes that it previously failed to file its Brief on Exceptions in this proceeding before the 4:30 PM cutoff time for filings with the Commission and that the Administrative Law Judges assigned to this case (the "ALJs") accepted that untimely filing on the ground that "no substantial unfairness or prejudice occurred here."[15] Entergy urges the Commission to follow this precedent in this case and contends that Certificate Holders will not be prejudiced because the Certificate Order is already in full force and effect.[16] In contrast, Entergy contends, failure to accept its untimely filed rehearing request will preclude consideration of Entergy's rehearing claims on the merits.[17]

Entergy's claim that waiving the filing deadline for its rehearing request will promote the "fair, orderly, and efficient conduct" of this proceeding as required by Rule

[15] Ruling on Motion to Strike Briefs on Exceptions, slip op. at 3 (issued January 30, 2013).

[16] Entergy Brief at 10.

[17] *Id*. at 11.

3.3(a) of the Commission's Procedural Rules[18] ignores the substantial difference between the circumstances in which the ALJs accepted Entergy's late-filed Brief on Exceptions and the present circumstances. At that earlier date, the Commission had not yet ruled on the issues in this case, and other parties including the Independent Power Producers of New York, Inc. ("IPPNY") were raising many of the same claims advanced in Entergy's Brief on Exceptions. Thus, excluding Entergy's late-filed Brief on Exceptions would have had little impact, if any, on the subsequent course of this proceeding. In such circumstances, the prejudice to Certificate Holders and to the public interest generally resulting from the Commission's acceptance of Entergy's late-filed Brief on Exceptions was far less than the prejudice that would result from acceptance of Entergy's late-filed rehearing request.

The prejudice that will result to Certificate Holders and to the public interest generally from any decision to extend the time for filing of Entergy's untimely rehearing request is substantial. Because no other party sought rehearing of the Certificate Order, that Order is administratively final unless the Commission can and does lawfully accept Entergy's untimely rehearing request. Entergy's claim that the Certificate Order will remain in full force and effect pending further proceedings on appeal is disingenuous at best, as Entergy is well aware that is will be difficult or impossible for a merchant project such as the Facility to raise the funding required for commencement of construction of its major project elements until the order granting its Article VII Certificate has become administratively final.

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[18] 16 N.Y.C.R.R. § 3.3(a) (2012).

Any unnecessary delay in the commencement of such construction efforts will have a number of significant adverse impacts. To begin with, such delays would cost the Facility's financial backers millions of dollars in increased financing costs. In addition, such delays could cause the contracts Certificate Holders have negotiated for the construction of the Facility to become stale, potentially resulting in even greater cost increases as Certificate Holders are forced to renegotiate those agreements. The combined effect of these cost overruns could well jeopardize financial backing and shipper support for the Facility.

Moreover, as a major supplier of electricity into markets in New York City and surrounding areas, Entergy will benefit handsomely from the higher electricity prices resulting from any delay in commercial operation of the Facility. In contrast, consumers in New York City and surrounding areas will be needlessly deprived of tens if not hundreds of millions of dollars in energy savings and substantial air emissions reductions by any such delay. The Commission should not permit Entergy to unjustly enrich itself at consumer expense in this manner.

At the same time, the prejudice to Entergy is far less now than it was the last time it missed an important filing deadline. Entergy has now had no less than four opportunities to argue the merits of its claims in opposition to construction of the Facility: in its Initial and Reply Post Hearing Briefs and in its Briefs on Exceptions and Brief Opposing Exceptions. It should therefore come as no surprise that Entergy's late-filed rehearing request contains no facts and no new arguments and simply repeats the same "uneconomic entry" and environmental impact claims made in each of those earlier

filings. The meritless nature of these claims strongly suggests that they have been raised by Entergy not for the purposes of prevailing on the merits, but rather as part of an "all-out push" to protect the markets served by its Indian Point facilities by delaying the financing of the Facility for as long as the administrative and judicial process will permit it to do so.

V. ENTERGY'S ADMISSIONS OF LAW OFFICE FAILURE PROVIDE NO BASIS FOR EXTENDING THE PERIOD FOR FILING OF ITS REHEARING REQUEST

While the precise reasons for Entergy's earlier failure to file its Brief on Exceptions in a timely manner have never been adequately explained, the affidavits and related materials provided with Entergy's Brief make clear that the lateness of Entergy's rehearing request was entirely due to failures within the exclusive control of Entergy's attorneys. Although Entergy's decision to use the RPost system to verify the filing of its rehearing request may appear to have been a laudable measure, the simple fact of the matter is that Entergy could have avoided any possible failure of service by availing itself of the Commission's electronic filing system, which permits parties to upload their filings directly into the Commission's Document and Matter Management System without having to rely on the vagaries of electronic mail. As the Commission notes on the web page explaining how to make such filings, "Electronic filing through the Department's Document and Matter Management (DMM) System is preferred."[19]

In such circumstances, Entergy's attempt to attribute its failure to timely file its rehearing request to problems with the electronic mail systems employed by its attorneys

[19] http://www3.dps.ny.gov/W/PSCWeb.nsf/0/4BDF59B70BABE01585257687006F3A57?OpenDocument.

must clearly be regarded as "law office failure" on the part of Entergy's counsel. This is particularly true in this case given the reckless manner in which Entergy's counsel employed that new system. Specifically, notwithstanding its previous failure to file its Brief on Exceptions on a timely basis and notwithstanding the crucial importance of filing its rehearing request on a timely basis to preserve its statutory rights in this proceeding, Entergy: (1) adopted a new and untested method of filing its pleadings with the Commission's Secretary; (2) failed to test that system at any time prior to using it to file its rehearing request in this proceeding; (3) failed to determine whether that system would be able to handle the large number of e-mail addresses on the service list in this proceeding without delay; (4) waited until 3:20 PM on May 20, 2013 to attempt an electronic filing using that new and untested system; and (5) made no apparent effort to verify with either RPost itself, with the Commission's Secretary, or with any other party on the service list that its rehearing request had in fact gotten through to its intended recipients.[20] In light of these errors and omissions, Entergy cannot be allowed to claim that its failure to file its rehearing request in a timely manner was the result of anything other than law office failure.

New York courts have consistently held that law office failure and prejudice to the late filing party alone do not amount to "good cause" to extend the time limits

[20] This failure to confirm receipt of its filing by any party or by the Commission's Secretary is particularly hard to understand in light of the fact that the large electronic service list in this case invariably results in a number of return e-mails stating either that certain e-mail addresses are no longer valid or that the addressee is out of the office and unable to respond. Entergy's attorneys specifically relied on such messages to support their earlier claim that their Brief on Exceptions was sent prior to 4:30 on the date it was due. *See* Exhibit C to Affirmation of William Hurst (filed January 28, 2013). If, as Entergy's failure to produce any similar e-mail messages to support its claim that its rehearing request was filed on May 20, 2013 suggests, Entergy's counsel in fact received no such messages shortly after sending its rehearing request, it clearly should have been aware that its filing did not go through to its intended recipients.

established in their rules. For example, in *Brill v. City of New York*, 2 N.Y.3d 648 (2004), the Court of Appeals rejected a motion for summary judgment filed outside the 120-day limit specified in the CPLR. In reaching this conclusion, the Court of Appeals ruled that:

> We conclude that "good cause" in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion -- a satisfactory explanation for the untimeliness -- rather than simply permitting meritorious, nonprejudicial filings, however tardy. That reading is supported by the language of the statute -- only the movant can *show* good cause -- as well as by the purpose of the amendment, to end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be "good cause."[21]

The Court of Appeals explained that strict application of timing rules was required in such circumstances if those rules were to have any meaning whatsoever:

> In *Kihl v Pfeffer* (94 N.Y.2d 118, 123, 722 N.E.2d 55, 700 N.Y.S.2d 87 [1999]), we affirmed the dismissal of a complaint for failure to respond to interrogatories within court-ordered time frames, observing that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity." The present scenario, another example of sloppy practice threatening the integrity of our judicial system, rests instead on the violation of legislative mandate.
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> If this practice is tolerated and condoned, the ameliorative statute is, for all intents and purposes, obliterated.[22]

Notwithstanding the greater informality of proceedings before the Commission in other respects, the "fair, orderly, and efficient conduct" of proceedings before the Commission

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[21] 2 N.Y.3d at 652 (emphasis in original).

[22] *Id.* at 652-53 (footnote omitted).

required by Rule 3.3(a) of the Commission's Procedural Rules also requires that parties not be allowed to ignore the deadlines established in the Commission's procedural rules with impunity. To achieve this result, parties seeking to excuse failure to comply with such Commission deadlines must also be required to demonstrate more than law office failure and prejudice to the late filing party.

Because Entergy has failed to provide any "good cause" for its failure to submit its rehearing request within the time limit prescribed in PSL § 128(1) other than law office failure, and in light of the meritless nature of Entergy's claims, the substantial prejudice to Certificate Holders needlessly continuing this proceeding, and the unjust enrichment that Entergy will receive if its actions succeed in delaying the commercial operation date of the Facility, Entergy's request for a waiver of the thirty day limit for its rehearing request must be rejected.

CONCLUSION

WHEREFORE, for the above-stated reasons, Certificate Holders Champlain Hudson Power Express, Inc. and CHPE Properties, Inc. respectfully request that the Commission:

1. Rule that Entergy's claims regarding the timeliness of its rehearing request will be addressed in its order addressing the merits of that rehearing request as requested by Certificate Holders in their Partial Rehearing Request; and

2. Establish a new date for the submission of responses to Entergy's rehearing request; and

3. Rule in that order, among other things, that:

    a. Entergy's claim that its rehearing request was timely filed on May 20, 2013 is without merit; and

b. Entergy's claim that its rehearing request was timely when filed on May 21, 2013 is without merit; and

c. That the thirty day time limit for rehearings in this proceeding is an integral part of the statute of limitations on actions to review the Commission's decision in this case which cannot be waived or extended by the Commission; and

d. In the event that the Commission finds that it may waive this filing deadline, further find that Entergy's claims of law office failure do not establish "good cause" for the waiver of that statutory requirement and that the prejudice to Certificate Holders and the public generally – as well as the unjust enrichment to Entergy – from extending that filing deadline will far outweigh any harm to Entergy from strict enforcement of that requirement.

Respectfully submitted,

/s/ George M. Pond

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