

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 10-T-0139 - Application of Champlain Hudson Power Express, 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 STRIKE

(Issued June 22, 2012)

KEVIN J. CASUTTO,
Administrative Law Judge:

By motion filed June 8, 2012, Champlain Hudson Power Express, Inc. (CHPEI) and CHPE Properties, Inc. (CHPE Properties and, collectively with CHPEI, the Applicants) request that Judge Phillips and I strike the prefiled direct testimony of Entergy Nuclear Power Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC (collectively, Entergy) witness Michael M. Schnitzer. By motion dated June 11, 2012, the Applicants request that we strike a portion of the prefiled direct testimony of Independent Power Producers of New York, Inc. (IPPNY) witness Mark Younger, from page 9, line 6 through page 13, line 16.

In both motions, the Applicants contend that the contested testimony pertains to legal and policy matters, beyond the scope of the factual issues identified for evidentiary hearing in the May 8, 2012 Ruling on Issues. Specifically, Applicants assert that the Schnitzer direct testimony consists of: (1) a discussion of prior Commission precedents regarding the issuance of certificates of environmental compatibility and public need to merchant and non-merchant projects; (2) a summary

of the pre-filed direct testimony of the IPPNY's witness Mark Younger; (3) policy arguments concerning the conditions that should be applied to the Facility to protect consumers from a potential change in Applicants' business model; (4) legal and policy arguments with respect to the adequacy of the certificate conditions proposed by Applicants to protect customers from such risks; and (5) alternative certificate conditions to apply to the Facility to address those concerns. Applicants contend that contested portions of the Younger testimony, beginning on page 9, line 6 and ending on page 13, line 16, provide a discussion of legal and policy issues concerning the conditions that IPPNY believes are required to be included in a certificate to ensure that the Facility will be operated on a merchant basis and not under cost-based rates.

Responses to the motions were filed by Staff, Entergy,¹ and IPPNY. Staff supports the Applicants' motion to strike entirely the testimony and exhibits of Entergy witness Schnitzer. Regarding IPPNY's testimony of Mr. Younger, Staff asserts Applicants' motion did not go far enough, and seeks to have us strike the Younger testimony from page 6, line 5 through page 13, line 16. In Staff's view, this testimony either reiterates what is in the record or addresses issues not set for hearing.

Both Entergy and IPPNY oppose Applicants' motions to strike, stating that their testimony is responsive to the factual issues identified for hearing in the May 8, 2012 Ruling on Issues. In support of their position, they cite the May 25, 2012 Ruling in which we said,

¹ Entergy filed separate responses to each of Applicants' motions to strike.

One of the pivotal and most hotly contested issues in this proceeding is whether the proposed Facility's costs will be recovered solely on a merchant-basis (i.e., exclusively through rates set by the competitive market) or whether, as a result of a change in business model requested by Applicants at some future date, or due to future contractual arrangements that Applicants may yet finalize, the costs of the Facility, in whole or in part, will be recovered in rates that are cost-based.

Entergy and IPPNY conflate important legal and policy issues in this proceeding with the contested factual issues for hearing that have been identified in the May 8th Ruling on Issues. They mistakenly assume that the above-cited issue in the May 25th Ruling must be a factual issue to be addressed during evidentiary hearings. In the May 8, 2012 Ruling on Issues, we identified three contested factual issues to be addressed at the evidentiary hearings, summarized as follows: 1) deliverability, 2) the proposed Luyster Creek converter station site, and 3) cost/benefit analyses and facility costs.² In that ruling, after identifying the three factual issues, we stated that the parties' other proposed issues are legal or policy issues (or mixed issues of law and policy), to be addressed in briefs. In providing examples of legal or policy issues, we specifically identified the issue of whether

ratepayers [are] adequately protected if the Applicants change their business model? E.g., will FERC preempt the State and/or applicable State agencies? Will a possible request for reconsideration of findings, as described in the JP, render this Article VII proceeding (and any Certificate that may issue) ineffective?

² The reader is referred to the May 8, 2012 Ruling on Issues for a full description of these issues.

I agree with the Applicants and Staff that the contested testimony addresses this, and related, legal (and policy) issues.

Therefore, I grant the Applicants' motion to strike the prefiled direct testimony (and exhibits) of Entergy witness Michael M. Schnitzer in its entirety. Further, as modified by Staff's request, I grant the Applicants' motion to strike a portion of the prefiled direct testimony of IPPNY witness Mark Younger, from page 6, line 5 through page 13, line 16.

(SIGNED)

KEVIN J. CASUTTO