

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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:
Case No. 08-T-0034 of Hudson Transmission :
Partners, LLC for a Certificate of Environmental :
Compatibility and Public Need for a 345 :
Kilovolt Submarine/Underground Electric :
Transmission Link Between Manhattan and :
New Jersey :
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REPLY BRIEF OF HUDSON TRANSMISSION PARTNERS, LLC

Dated: July 8, 2010

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I. PRELIMINARY STATEMENT

This proceeding concerns an application filed with the Commission on January 15, 2008 (Application) for a Certificate of Environmental Compatibility and Public Need (Article VII Certificate)¹ by Hudson Transmission Partners, LLC. The Application was deemed complete on February 22, 2008. By ruling dated May 10, 2010 Judge Bouteiller directed the parties to file initial briefs by June 17, 2010.

The following parties submitted Initial Briefs (IB): Hudson Transmission Partners, LLC (HTP or Applicant); New York State Department of Public Service (DPS); New York State Department of Environmental Conservation (DEC); New York Power Authority (NYPA); City of New York (City); New York City Economic Development Corporation (EDC); Independent Power Producers of New York (IPPNY); and Cross Hudson Corporation (CHC).

¹ Capitalized terms not defined herein shall have meaning given them in HTP's Initial Brief.

HTP responds in this Reply Brief to the arguments and assertions made by DPS, DEC, IPPNY and CHC either in opposition to the grant of a Certificate or in favor of conditions that, if adopted, would be either fatal to the Project or unnecessarily problematic.

II. SUMMARY OF INITIAL BRIEFS

The City supports the Transmission Facility and the grant of an Article VII Certificate based on HTP's stated commitment to seek local permits and revocable consents and to otherwise coordinate construction activities with relevant municipal agencies (City IB at 2).

EDC urges the Commission to grant HTP an Article VII Certificate because the Transmission Facility will provide a wide range of benefits to the electric system and to the City and its ratepayers (EDC at 2). NYPA advocates granting the Article VII Certificate because the Project

would enable NYPA to acquire competitively priced electricity in an environmentally compatible manner to assist in meeting its obligations to provide electric service in a cost-effective manner to NYPA's governmental customers located in the New York City area ... [and to] provide other potential benefits to its Customers.¹

¹ The NYC Governmental Customers consist of the City of New York ("City"), Metropolitan Transportation Authority ("MTA"), The Port Authority of New York and New Jersey ("Port Authority"), New York City Housing Authority and numerous other smaller governmental agencies.

(NYPA IB at 1.)

DEC urges the Commission to deny HTP's Application for reasons concerning the possibility of increased regional air emissions. IPPNY and CHC urge the Commission to deny HTP's Application for reasons related to need and protection from interregional competition.

DPS states that "it supports the issuance of a Certificate ... with certain modifications and conditions" (DPS IB at 3). However, DPS's proposed modifications include two aspects of the

Transmission Facility's Manhattan route the adoption of which would be fatal to the Project: (i) locating the HDD and transition pit within DeWitt Clinton Park and trenching through the Park to route the cable into West 52nd Street and (ii) within 12th Avenue, locating the cable trench in the western most of the northbound traffic lanes. The DPS modifications would effectively terminate the Project. "Any Certificate that would be granted [on that basis] would be useless" (Case 05-T-0089, *Notice of Intent by Fortuna Energy, Inc.*, Order Requiring a Hearing and Extending the Time Required to Render a Decision Pursuant to Public Service Law Section 121-a[7], March 23, 2005, at 4-5). As explained *infra*, the fatal effect of the DPS route modifications is not merely an assertion by a petulant applicant; nor is HTP's concern merely a complaint that financing would be made more difficult or costly.² In the case of DeWitt Clinton Park, the DPS alternative is simply unavailable as a matter of law and fact; it will not and cannot become available through the expenditure of more time or funds. The City could not be clearer in expressing itself on this point: "NYDPR [New York Department of Parks and Recreation] would not authorize the construction of the project within the park. Absent such authorization, the cable cannot be constructed..." (City IB at 4).

The DPS proposal for locating the cable within 12th Avenue ignores that the location HTP proposes – the east sidewalk – is the product of extensive consultation with the City and State Departments of Transportation (City DOT and NYS DOT, respectively) and other City infrastructure agencies. Although when HTP filed the route amendment in March 2009 HTP proposed the 12th Avenue location now proposed by DPS, HTP's proposal pre-dated HTP's

² DPS's assertion that HTP has raised the financing issue posed by the DPS alternate "[f]rom the initiation of DPS Staff's exploration into alternate routes for this project" (DPS IB at 98) suggests that DPS made HTP aware that it was exploring alternates. In fact, HTP was totally unaware that DPS would propose an alternate route until HTP read DPS's pre-filed testimony on March 18, 2010 (Hocker, Tr. at 532) and was unaware of DPS's proposed 12th Avenue alternate until DPS filed its Initial Brief on June 17, 2010.

extensive consultation with NYS DOT, City DOT and other City agencies and the extensive subsurface testing, utility locating activities and detailed design work that followed.³ (See letter dated July 7, 2010 from Donna Hintz, Esq., Division of Legal Affairs, NYS DOT attached hereto as Appendix J.) It is highly unlikely that NYS DOT would agree to change the proposed location to DPS's preference, and it is equally unlikely that City DOT, which has jurisdiction over traffic movement on 12th Avenue, would do so. As a result, adoption of the DPS alternate 12th Avenue route would put the Commission in the position of issuing a Certificate that has no practical utility. Even if both City DOT and NYS DOT granted approvals for the DPS alternate, HTP would require many months to physically perform utility surveys (which require a separate NYS DOT permit), analyze and re-engineer the route, prepare detailed drawings and resubmit them for review by City agencies and NYS DOT. This assumes that no insurmountable obstacles would be discovered in the process of vetting the DPS alternate location. Following those delays, construction within 12th Avenue would require more time and be more disruptive of vehicular traffic than HTP's proposed route. These unwarranted delays would not serve the interests of NYPA, its governmental customers or the City. In this Reply Brief, HTP will demonstrate why the Commission should grant the Application based on the route HTP has developed in conjunction with the City and with NYS DOT.

DPS acknowledges concerns raised by DEC regarding increased air emissions that could result from the HTP Project's operation and includes a recommendation that the Commission "consider encouraging NYPA to identify what mitigation measures or conditions it would be agreeable to including the Certificate" (DPS IB at 4). HTP opposes any such conditions for all

³ DPS's preference was announced for the first time in its Initial Brief even though HTP's proposed location on the east side of 12th Avenue has been known to DPS since January 8, 2010.

the reasons explained in its Initial Brief at pages 60-74. In addition, HTP notes that NYPA is a part of New York State government and has committed to the State's goals for reducing carbon consumption and increasing the use of renewables. NYPA witness Khalil Shalabi testified about the significant efforts NYPA is undertaking to promote those objectives (Shalabi, Tr. at 1176 [including an RFP for off-shore wind, an RFP for 100 MW of solar, and aggressive energy efficiency programs]). Even apart from the legal issues HTP explained in its Initial Brief, HTP strongly believes that NYPA's use of the HTP Project should not be "managed" by the Commission in this regard. NYPA can be trusted to use its resources to meet its various objectives, which include securing competitively priced power from reliable and diverse sources while also promoting the State's climate change goals.

Finally, DPS included with its Initial Brief, a proposed Water Quality Certificate (WQC) to be issued by the Commission pursuant to Section 404 of the Clean Water Act. HTP has conferred with DPS and proposes several minor modifications to the WQC and conforming modifications to the draft Certificate Conditions. The resulting WQC is included as Appendix A, hereto, and HTP's updated draft Certificate Conditions are included as Appendix B, hereto.

III. AN OBSERVATION ABOUT THIS PROCEEDING'S UNUSUAL PROCEDURAL HISTORY

The procedural history of this proceeding plays a more important role in how the issues developed than in most siting proceedings before the Commission. For over a year the

proceeding was in complete limbo as DPS and DEC held private discussions, from which HTP was excluded, concerning air emission issues.⁴ During that time HTP was far from idle.

As described in HTP's Initial Brief, since filing the Application HTP has completed its state and local permitting in New Jersey, advanced the United States Army Corps of Engineers permit proceeding as far as practicable in the absence of a New York State Water Quality Certificate, and completed and filed with the New York State Office of General Services (NYS OGS) its application for an easement in New York State lands underwater (HTP IB at 4). As reported to the Commission by letter dated June 16, 2010, HTP has also obtained a Concurrence with Consistency Determination, dated June 11, 2010, from New York State Department of State concerning the Facility's consistency with the New York Coastal Management Program (copy appended hereto as Appendix C).

Most importantly, in terms of how the suspension of the proceeding has had an impact on the contested issues, during that interval HTP moved ahead with applying for the consents required to work in and locate the electrical conduits in public property, namely the waterfront property and streets controlled by the City and the bed of State Highway Route 9A (12th Avenue), controlled by NYS DOT.

Using the route proposed in HTP's March 17, 2009 Application amendment (Exhibit 9) as the focus of discussion, HTP met with officials from City DOT starting in March of 2009 and with officials from NYS DOT in May of 2009 to initiate the processes for securing the required

⁴ In HTP's Initial Brief, HTP reported that DPS suspended settlement negotiations on or about December 1, 2008. DEC reports that negotiations continued through the summer of 2009 (DEC IB at 3). Whatever was transpiring between DEC and DPS after December 1, 2008 did not constitute proper settlement negotiations, which under the Commission's rules must be open, and on notice, to all parties (16 NYCRR Section 3.9[a][iii], *see also* Case 90-M-0255 and 92-M-0138, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines, March 24, 1992 at 13).

approvals. Following extensive subsurface utility surveys and detailed design work, in November 2009, HTP's engineering subcontractor formally applied to City DOT for a revocable consent to locate the cable in City-owned waterfront and public streets pursuant to Title 7, Chapter 34 of the Rules of the City of New York. The November 2009 revocable consent application was premised on a cable location substantially similar to the route HTP continues to propose, including a hairpin turn in the western end of West 52nd Street and use of the sidewalk on the eastside of 12th Avenue. Copies of the drawings filed with the Application to City DOT were supplied to DPS on January 8, 2010 in response to DPS IR-31 (*see* Exhibit 25 at 42) and are included in the record as Exhibit 31.⁵ Through a consultative dialogue with the City's stakeholder agencies that has continued to the present, HTP's preferred route was refined into its near-final iteration as reflected in drawings now included in the record as Exhibit 32.

While HTP knowingly took these steps at its own risk – *i.e.*, if the Commission ultimately denied the Application the effort would have been wasted – HTP had no choice but to move forward if it wanted to meet the scheduling needs of its customer, because the processes for obtaining the City's revocable consent and NYS DOT's work permit are lengthy and complex. Given longstanding Article VII practice and its own personnel's experience in Case 02-T-0036 *NeptuneRTS*, HTP was justifiably confident that the Article VII Certificate, if granted, would require HTP to go through the permitting processes used by the "landlord" agencies.⁶ (*See* Case

⁵ Throughout its Initial Brief, DPS describes Exhibit 31 as having 31 pages. Exhibit 31, which is dated November 16, 2009, consists of 25 pages (*see* Tr. at 577-578 where counsel for DPS introduces the drawing set marked as Exhibit 31 and describes it as consisting of 25 pages). Subsequent iterations of the drawings have 31 pages, including drawing sets provided to DPS in March and the set produced after the hearings that are now Exhibit 32 (*see* Hocker, Tr. at 525-526).

⁶ By "landlord agencies", HTP refers to those state and municipal bodies primarily responsible for the use of public property. In this case they are NYS OGS, for State-owned lands underwater; NYC EDC, for City-owned lands underwater and waterfront property; NYS DOT, for Route 9A (12th Avenue); and City DOT, for West 52nd Street.

00-T-1831, *Cross Sound Cable Company*, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need, issued June 27, 2001; Case 01-T-1474, *PSEG Power Cross Hudson Corporation*, Opinion and Order Adopting Joint Proposal and Granting of Certificate of Environmental Compatibility and Public Need, issued April 17, 2003; Case 02-T-0036, *Neptune Regional Transmission System, LLC*, Opinion and Order Adopting Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need For a Transmission Facility From New Jersey to Long Island, issued January 23, 2004; Case 06-T-0710, *Consolidated Edison Company of New York, Inc.*, Order Granting Certificate of Environmental Compatibility and Public Need Also Approving, in Part the Environmental Management and Construction Plan, issued August 23, 2007; Case 08-T-1245 - *Bayonne Energy Center*, Order Adopting the Terms of a Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need, with Conditions, and Clean Water Act §401 Water Quality Certification, issued November 12, 2009.) While Article VII Applicants do not typically take the risk implicit in advancing the local permitting process prior to securing an Article VII Certificate, HTP had reason to be confident that the risk was a simple go-no-go type of risk; in other words, HTP was confident that if the Application were granted, the Commission would defer to the City and to NYS DOT on the precise location of the cable within the public streets. Until March of 2010, HTP had no reason to believe that in recommending the grant of a Certificate DPS would also decide that it knows better than the City and NYS DOT about how best to locate the Facility in City roads, streets and sidewalks.

In a similar context involving now-expired Public Service Law Article X, the Board on Electric Generation and the Environment (Siting Board) expressed the contrary view:

Given our view that PSL Section 172(1) did not supplant the City's exercise of its property rights, we see no inconsistency with the

City's laws and Article X. Only the City, and certainly not the Siting Board, knows what the best use of the City's property would be. In deciding whether to grant revocable consents, it appears to be perfectly reasonable for the City to apply a standard of the "best interests" of the City in considering the impact of competing infrastructure demands for such property or the other interests of the City in leaving some properties undisturbed.

(Case 01-F-1276, *TransGas Energy Systems LLC*, Opinion and Order Dismissing and Denying Application, March 21, 2008 at 22.)

HTP's comfort in advancing its preferred route was enhanced by DPS' relative silence on the March 17, 2009 Amendment (Exhibit 9). Prior to Judge Bouteiller's November 10, 2009 Ruling Setting Litigation Schedule, DPS had served four information requests on HTP concerning the March 17, 2009 amended route. They are:

DPS-22 - requesting information comparing the original and modified routes concerning *inter alia* traffic, underground utilities and vault location. HTP's response dated May 21, 2009 reported, among other things, that HTP had begun consultations with the landlord agencies on March 12 and May 11, 2009; that construction impacts on 12th Avenue would be mitigated by locating the cable conduit in untraveled portions of 12th Avenue and by doing any work in travel lanes at night; and that alternative locations within 12th Avenue were under review with those agencies (*see* Exhibit 25 at 34).

DPS-23 - requesting an electromagnetic field (EMF) analysis of the modified route.

DPS-24 - requesting an engineering drawing of the hairpin turn of the cable in West 52nd Street. The response dated June 2, 2009 reported that the only available drawing was already out-of-date because the cable route details were evolving, particularly in response to input from the City DOT and NYS DOT (*see* Exhibit 25 at 37).

DPS-25 - requesting a description of how the hairpin cable bend would be executed. Note that HTP's response, dated June 3, 2009, is no longer accurate. As explained by Mr. Hocker at the hearing, the cable will be pulled through previously installed conduit, which will enable HTP's contractor to keep at least one lane open at all times on West 52nd Street, a design evolution that was the direct result of consultation with City DOT (Hocker, Tr. at 639-641).

Following HTP's June 3, 2009 response to DPS-25, DPS asked no further questions about the modified route until after litigation resumed and, according to its recent testimony, not until after it had begun to explore proposing its own alternative (QMS Panel, Tr. at 250-251). DPS did not request to be invited to participate in any meetings or communications ongoing between HTP and the City or NYS DOT. Accordingly, HTP had no reason (i) to believe that DPS would recommend that the Commission not follow its accepted practice of deferring to the agencies that "know best" about where and how to locate infrastructure in the congested New York City streets and roadways or (ii) to worry that, in the words of DPS's Initial Brief, HTP was "[going] perhaps too far in developing detailed plans for facility location (*e.g.*, the essentially final design detail implicit in upland routing and proposed traffic control plans provided in Exhibit 31 as revised March 8, 2010, where final facility location has not been approved by the Commission)" (DPS IB at 45).⁷

The Commission has been very clear in its policy of deference to landlord agencies. Such deference is a corollary to the conclusion reached by its sister agency, the Siting Board, that its siting authority is not an authority to grant interests in property (*see TransGas*, March 21, 2008 Opinion and Order at 22). Just as the Siting Board in *TransGas* could not force the City to

⁷ See Footnote 2 *supra*.

give TransGas consents to use its streets and waterfront property, the Commission has no authority to require the City or NYS DOT to give HTP its consent to use a particular portion of 12th Avenue, let alone DeWitt Clinton Park, over the landlord agency's objection.

DPS's criticism of HTP for developing detailed plans under the oversight of the landlord agencies suggests also that DPS believes that HTP was operating out of DPS's view (DPS IB at 45 ["HTP has gone perhaps too far in developing detailed plans for facility location..."]). But HTP's activity was not hidden from DPS. HTP disclosed to DPS that it was working with the relevant agencies in its May 21, 2009 response to DPS IR-22. A year later DPS now expresses the view that HTP has gone "too far."

Likewise, in its January 15, 2010 response to DPS IR-33, HTP made it clear to DPS that the original plan for locating the cable in a northbound travel lane of 12th Avenue was no longer in play but had been replaced by the plan to locate the cable in the east sidewalk as shown in the drawings provided to DPS on January 8, 2010 and now in Exhibit 31 (*see* Exhibit 25 at 45). DPS had every opportunity to make further inquiries, to participate in consultation with fellow government agencies and to make its views known to HTP much earlier in the process. It chose not to.

HTP took the risk of advancing its Project plans without a Certificate at considerable expense and effort. In doing so, HTP did precisely what the Commission expects of Article VII Applicants who propose using public property: coordinate with the local agencies that control the use of such property. HTP should not be penalized by a Commission decision to reverse course and dictate to those agencies where to locate new infrastructure.

Having criticized HTP for doing too much to advance its routing plans, DPS does an about-face in the context of State Historic Preservation Office (SHPO) review, claiming that for

two years HTP has failed to advance “to even the next logical step of communicating details or even an outline of the type of studies and approach that it proposes to undertake to advance the evaluation of underwater sites, identify strategies for resource documentation and plans for mitigation measures to be employed” (DPS IB at 45). As discussed *infra*, at pp. 33-36, DPS fails to grasp that “the next logical step” in HTP’s archeological resource strategy will be to precisely layout the submarine cable route to avoid the previously identified potential submerged archeological targets and to use divers to identify those resources that cannot be avoided, all as described in Section 4.10 of Exhibit 4 to the Application.

IV. REPLY TO DPS INITIAL BRIEF

A. HTP’S PROPOSED UPLAND CABLE ROUTE MINIMIZES ADVERSE IMPACTS CONSIDERING AVAILABLE ALTERNATIVES.

1. INTRODUCTION

As described in HTP’s Initial Brief, HTP’s proposed upland cable route, depicted generally in Exhibit 26 and in great detail in the engineering drawings included in Exhibit 32, minimizes construction-related impacts to an acceptable degree and has the distinct advantage of having been vetted by the jurisdictional “landlord”⁸ agencies, NYS DOT, City DOT and EDC.

The DPS mitigation panel agreed that by employing the conditions agreed-upon by DPS and HTP, the impacts associated with HTP’s proposed route will be mitigated to an acceptable level (PFD Panel, Tr. at 696-698). Nevertheless, in its Initial Brief DPS returns to criticizing the HTP proposal and recommending that the Commission adopt an alternative. The DPS alternative has two components: (i) relocating the HDD rig in DeWitt Clinton Park and routing the cable through the southern half of the Park into the bed of West 52nd Street; and (ii)

⁸ See Footnote 6, *supra*.

relocating the cable path in 12th Avenue from the east sidewalk to the westernmost northbound travel lane (DPS IB at 26).

In this Section IV. A. HTP will demonstrate that DPS's criticisms of HTP's proposed route are based on speculation and exaggeration. The flaws in DPS' alternative, to the extent not already addressed in HTP's Initial Brief, will be separately discussed in Section IV. B. *infra*. Because DPS only proposed the 12th Avenue portion of its alternative for the first time in its Initial Brief, HTP will address its flaws and provide additional descriptions of HTP's own proposal for 12th Avenue in this Reply Brief.

2. AREAS OF POTENTIAL IMPACT ARE NOT UNIQUE TO HTP'S PLAN

DPS identifies the following areas of potential impacts associated with the HTP's proposed route:

- i. disruption to local businesses on West 52nd Street and 12th Avenue;
- ii. disruption to pedestrians on West 52nd Street and 12th Avenue;
- iii. interference with access to DeWitt Clinton and Clinton Cove Parks;
- iv. disruption to vehicle traffic on West 52nd Street and 12th Avenue;
- v. potential interference with underground infrastructure;
- vi. potential risk to building foundations on the south side of West 52nd Street and the east side of 12th Avenue; and
- vii. potential conflicts with supporting structures required for the planned expansion / reconstruction of Pier 94.

With one exception – the potential risk to building foundations – those areas of potential impact are not unique to HTP’s proposal. Those impacts or impacts of a similar nature would be common to any route imaginable for a new electrical connection to Con Edison’s West 49th Street Substation (including DPS’s favored alternative). HTP concurs with DPS’s recommendation that HTP offer to conduct foundation evaluations prior to, during and following construction as proposed in DPS’s revised Certificate Condition 24(b) provided on pages 36-37 of the DPS Initial Brief. The modified draft Certificate Conditions included as Appendix B hereto incorporate the DPS proposal.

DPS’s comments concerning Pier 94 (DPS IB at 28-29) apply equally to the DPS alternate and the HTP proposed routes. HTP concurs with DPS’s recommendations for including in the EM&CP the information and certification listed as items (a)-(c) on page 29 of the DPS Initial Brief and the draft Certificate Conditions included as Appendix B have been modified accordingly.

None of the remaining areas of possible impacts are unique to HTP’s proposed route. Any plan to route an underground cable from the riverbed to West 49th Street entails choosing a route that minimizes, and achieves an appropriate balance among, the likely impacts on vehicle traffic, pedestrians, local businesses, access to area parks and subsurface structures. HTP has chosen to reach that appropriate balance by minimizing overall cable length and most importantly by working closely with the landlord agencies that have primary responsibility for protecting the public and the resources at issue.

3. HTP'S PLAN TO LOCATE THE CABLE IN THE EASTERNMOST PART OF 12TH AVENUE WAS THE PRODUCT OF CONSULTATION WITH THE DEPARTMENTS OF TRANSPORTATION AND OTHER AGENCIES.

HTP met with NYS DOT officials on May 11, 2009 to specifically discuss its amended routing plans and in particular the use of 12th Avenue. Although the March 17, 2009 Application amendment (Exhibit 9) depicts the line being buried in the western northbound lane, HTP learned at the May 11 meeting that NYS DOT strongly discouraged using the western northbound travel lane and that HTP's choices were to use the center median or the eastern sidewalk. Installing cable in a travel lane of 12th Avenue would require the removal and replacement of the top surface of the entire lane, rather than simply excavating and repaving a trench; this would add greatly to the time, complication, and physical space needed for the work, with correspondingly greater impacts on traffic and public and worker safety. The median was subsequently rejected for several reasons: moving equipment and workers onto the median, and working from and within the median would necessitate providing more worker safety measures, adding to cost and delay, and it would involve greater time and complexity than working from the east side where access from the cross-town streets would make the entire construction effort relatively easier. These factors are cited in NYS DOT's recent letter to Secretary Brillinger endorsing HTP's preferred location (*see* Appendix J hereto). Based on communications with Hudson River Park Trust (HRPT) officials, HTP was also skeptical that HRPT would consent to having the newly planted and landscaped median a project controlled by HRPT, torn up. In later consultations with City DOT, which has jurisdiction over traffic movements on 12th Avenue, City DOT also expressed its preference for routing the line in the eastern sidewalk.

Accordingly, following the filing of the amended route with DPS, HTP focused on the east side of 12th Avenue. By the time it submitted its application to City DOT for a revocable

consent in November of 2009, HTP had firmed up its plan to locate the cable beneath the eastern sidewalk and to do the work from within the sidewalk and the easternmost taxi lane, with only limited use of any of the 12th Avenue travel lanes. A utility survey of this proposed route to physically locate all existing underground utilities through the drilling of test pits was authorized by NYS DOT and conducted during the late summer of 2009. Detailed drawings reflecting the proposed location in relation to existing utilities were submitted to City DOT in November 2009 and provided to DPS on January 8, 2010 in response to DPS IR 31.⁹

DPS claims that because it was not provided full-sized scaled drawings of these plans, it was unaware of how close the trench would be to buildings (*see* DPS IB at 35 n 18). DPS uses this as an explanation of why it waited until its Initial Brief to propose relocating the cable to the middle of 12th Avenue. In fact, full-size scaled drawings were supplied to DPS on March 8, 2010, in response to an email request dated March 4, 2010.¹⁰ Those drawings, dated February 26, 2010, were an update to those originally supplied on January 8, 2010.

4. POTENTIAL IMPACTS IN THE REMAINING AREAS IDENTIFIED BY DPS WILL BE MINIMIZED AND MITIGATED TO AN ACCEPTABLE LEVEL.

a. Impacts on Businesses

The discussion on page 27 of the DPS Initial Brief concerning the distance between the cable and the entrances to buildings on West 52nd Street and 12th Avenue is potentially

⁹ As the City's review of HTP's revocable consent application progressed, a series of detailed drawings was produced, starting with the initial drawings consisting of 25 sheets, dated November 16, 2009, and progressing through the most recent set consisting of 7 pages dealing with the HDD dated March 26, 2010 and 31 pages addressing the trench work and traffic control plans dated March 8, 2010, and including an interim set. DPS was supplied copies of the drawing sets as a continuing response to DPS IR 31 under protection of the Commission's trade secret and critical infrastructure rules by Judge Bouteiller's ruling dated January 11, 2010. At the hearing DPS counsel introduced the November 16, 2009 drawings as Exhibit 31 (Tr. at 577), and following the hearings HTP produced the March 8 and March 26, 2010 drawings as Exhibit 32.

¹⁰ Copies of the cover letter and email request are attached as Appendix D, hereto.

misleading because it conveys the impression that HTP had purposefully hidden some critical fact from DPS. DPS cites answers provided by Mr. Natale under cross examination to suggest that HTP was less than forthcoming about the distance between the cable trench and adjoining buildings even though Mr. Natale explicitly testified that he was neither involved in the development of the March 2009 amended route, nor knowledgeable about the detailed engineering drawings that are now a part of the record. DPS had been provided with full-size, scaled drawings showing the trench location on March 8, 2010. DPS does not explain why it chose to cite in its brief the cross-examination testimony of a witness who was not involved in the preparation of those detailed drawings.

The record provides information on the few businesses located along the proposed route that might be adversely impacted during construction. In HTP's Initial Brief, HTP explained that impacts from the most disruptive construction activities will be restricted to the three westernmost buildings on the south side of West 52nd Street (HTP IB at 51). The 12th Avenue portion of the cable route hosts the following: between 52nd and 51st Streets, Larry Flynt's Hustler Club, the entrance to which is on West 51st Street; (ii) between 51st and 50th Street, a parking lot occupies nearly one-half the block and a one story commercial building and a two story commercial building occupy the remainder, one housing a check-cashing store and a variety store and one apparently vacant; and (iii) between 50th and 49th Streets, Con Edison's substation. Photographs of the described buildings from Exhibit 34 are included as Appendix E, hereto. The Commission should take into account the limited nature of the business activity in this stretch of 12th Avenue in evaluating the actual impacts arising from construction activities in the 12th Avenue sidewalk and taxi lane proposed by HTP.

In any event, the City’s street excavation regulations require that access to businesses and residences adjoining the trenched cable route be maintained (*see* Exhibit 32, Sheet 2 of 31, General Note 6; Sheet 26 of 31, Note 2 and Special Note 1). Uncovered trench may not be left unattended (Rules of the City of New York Department of Transportation [34 RCNY] § 2-11[e][4][ii]). Trenching will proceed in a manner that minimizes the amount exposed at any given time, in the manner described by DPS witness Macks as “stovepiping” (Macks, Tr. at 270). The access requirement will be met regardless of whether the trench edge is a few feet or one foot away from the buildings. DPS’s criticism is premised on the sheer speculation that HTP will not comply with this requirement.

b. Impacts on Pedestrians – 12th Avenue.

On page 30 of its Initial Brief DPS uses carefully selected words to suggest that HTP has been “misleading” about how pedestrian traffic will be maintained on the east side of 12th Avenue.

However, the Applicant has not *previously* shown how it can maintain pedestrian traffic *within the sidewalk* at the west [sic; should be “east”] side of 12th Avenue, while it is simultaneously occupying that sidewalk for excavation of a four-foot wide by five-to 12-foot deep trench for conduit and cable installation with heavy construction equipment. With the submission of confidential revised plans in Exhibit 31 [sic; should refer to Exhibit 32], dated March 8, 2010, HTP has indicated that pedestrian traffic along 12th Avenue from 50th St. to 52nd St. can only be maintained by erecting a barricaded pedestrian walkway within the eastern-most lane of 12th Avenue, *thus requiring a traffic lane closure for the period of construction* [Ex. 31, pages 28 and 29 of 31].

(DPS IB at 30, emphasis added.) DPS does not explain what it intends by the use of the word “previously.” The wording suggests that prior to submitting the March 8 drawing set included in Exhibit 32, HTP was failing to disclose some key fact. Because the March 8, 2010 drawing set

is substantially the same in this regard as the updated November 16, 2009 set supplied to DPS on February 26, 2009 (with a full size version provided on March 8, 2010), this suggestion is incorrect. It is indisputable that the record demonstrates how pedestrian traffic will be maintained during construction.

DPS's use of the phrase "within the sidewalk" appears to be an attempt to create a performance standard for achieving pedestrian convenience, *i.e.*, that pedestrian traffic must be maintained "within the sidewalk," a heretofore undisclosed standard that HTP will be unable to meet. The objective of maintaining pedestrian access "within the sidewalk" is a DPS creation, not a NYS DOT or City DOT requirement.

DPS's depiction of what westbound pedestrians on West 49th and West 50th Streets will encounter during Stage 7 construction creates a flawed sense of drama:

Close review of the traffic plans in Exhibit 31 [sic; should be Exhibit 32] indicate that west-bound pedestrians at both 49th Street and 50th Street would face opposing signs indicating "Sidewalk Closed Ahead! Use Other Side" either way they turn [Ex. 31, page 30 of 31; (See attached annotated excerpt, Figure #1)].

(DPS IB at 31.) To the contrary, pedestrians will not see a "sidewalk closed" sign "either way they turn." The simple fact is that the east sidewalk on 12th Avenue, between 49th and 50th Streets, and the 50th Street crossing of 12th Avenue will be closed during Stage 7, and signs chosen from a list of pre-approved signs furnished by City DOT (rather than created by the Applicant) will direct pedestrians coming from the east, north or south to cross 12th Avenue at 48th or 52nd Street.

c. Impacts on Traffic – 12th Avenue.

DPS's assertion that HTP's plan will require "a traffic lane closure for the period of construction," is not accurate. Construction within HTP's planned route on 12th Avenue will

only occupy about ten weeks, a fraction of the Project's entire "period of construction" and will proceed a block at a time. Each block between 50th and 52nd Streets will require about four weeks to complete. Work in the block between 48th and 49th Streets will require two weeks, for a total of ten weeks. During that time, one travel lane will be closed in the block under construction and in the two blocks to the south to accommodate the pedestrian walkway (*see* Exhibit 32, Sheets 28 and 29). Thus, over this ten-week period one travel lane will be blocked for four-week intervals in a two-and-a-half block stretch. When each block is completed, the travel lane will be reopened in the southernmost affected block and the same procedure will be repeated in the next block.

DPS's criticism of Mr. Hocker's recollection of lane closure plans for Stage 7, the work between 49th and 50th Street, for gaining entrance to the substation is misplaced. All of the proposed upland routes confront the same issue in this area: the route, wherever located within 12th Avenue, proceeds due south from West 52nd Street and, south of 50th Street, must turn to enter the substation at a right angle, midway between 50th and 49th Streets. As a result, disruption to the two eastern northbound travel lanes, which HTP's proposal will avoid in the rest of the 12th Avenue route, cannot be avoided in Stage 7. DPS counsel's question to Mr. Hocker was "Is HTP proposing to use the auxiliary lane for taxis for construction?" Mr. Hocker answered accurately, that construction would take place in the taxi lane only in front of the substation (Hocker, Tr. at 563). DPS now argues that his answer was inaccurate because the taxi lane will be "blocked in stages from West 52nd Street south to the entrance into the Con Edison facility near West 49th Street" (DPS IB at 32). Only by blurring the distinction between using the taxi lane for actual "construction" (DPS's question) and simply closing it to vehicles (as indicated on Exhibit 32) can DPS create a "veracity" issue where none exists.

DPS also makes an issue of construction duration. Construction duration will be driven by the work hour limits imposed by NYS DOT and by the City's time-of-day construction rules. One of the reasons for choosing the east sidewalk of 12th Avenue is that less time will be consumed setting up worker protection devices and coordinating equipment deliveries compared to the DPS proposal to work in the middle of 12th Avenue. NYS DOT limits daytime construction work in travel lanes in 12th Avenue to non-rush hour periods, which, again, means that the DPS location would significantly extend the construction schedule compared to the sidewalk location. For the two full blocks between West 50th and West 52nd Streets, HTP conservatively estimates construction duration to be eight weeks, four weeks per block, with portions of the trench within each block to be plated over and the sidewalk progressively restored as the work advances.

d. Impacts on Traffic – West 52nd Street.

DPS exaggerates the potential impacts on vehicular traffic on West 52nd Street associated with HTP's planned route by mischaracterizing West 52nd Street as "a very narrow one-way city street" (DPS IB at 68). DPS then speculates about what *might* happen on this "very narrow street" to impede traffic. In fact, like the majority of cross town streets in Manhattan north of 14th Street, 52nd Street is one-way and of standard width. As shown clearly in the photograph at page 6 of Exhibit 34, (included as Appendix F to this Reply Brief), West 52nd Street includes two parking lanes and an ample travel lane in between. DPS appears to be mischaracterizing West 52nd Street in order to lend credence to its purely speculative assertion that "[a]ll construction activities would have to be carried out *without a hitch* on this street in order to maintain the [required] clearances at all times" (*id.*, emphasis added). DPS speculates further by claiming that a "city inspector would *likely* not be at the job site at all times, and if the clearances are not

achieved, it would go unmitigated resulting in traffic disruptions and pedestrians inconveniences” (*id.*, emphasis added).

In addition to being based on sheer speculation, DPS’s fears overlook that the agreed-upon Certificate Conditions require that an independent inspector be retained by HTP and empowered to enforce construction requirements (Exhibit 83 at 8-9; 16-17).

More importantly, the record includes well-defined engineering drawings and Work Zone Traffic Control Plans showing how HTP will maintain the required 12 foot and five foot vehicle pedestrian ways at all times (Exhibit 32). Brian Dorwart testified that the plans for the HDD rig were prepared conservatively by assuming that the equipment used would be larger than the job requires (Dorwart, Tr. at 293-295). The record shows that the process for making the hairpin turn, as described in response to DPS IR-25 and quoted on page 68 of the DPS Initial Brief, has been revised for the very purpose of meeting the City’s requirement that West 52nd Street be kept open. HTP will install conduit in pieces in the hairpin and backfill the trench before pulling the cable, thereby allowing the trench to be excavated, plated and backfilled in stages and vehicle access maintained (Hocker, Tr. at 640-641). DPS’s suggestion that Mr. Hocker himself has reservations about accomplishing HTP’s planned hairpin turn is pure sophistry. In the testimony quoted by DPS at page 69 and cited for the assertion that Mr. Hocker has reservations, Mr. Hocker clearly drew a distinction between HTP’s confidence level in January 2008 when the Application was filed and March 2009 when the Application was amended. Contrary to DPS’s conclusions, there is nothing in his testimony to suggest that (i) as of March 2009, HTP was less than certain and confident that HTP could construct the hairpin turn, or (ii) as of the present, HTP cannot meet all of the City’s traffic control and other requirements. In short, Staff’s dire prediction: “in order to maintain the required clearances, each phase of construction would need

to be carried out without encountering *any* difficulties,” (DPS IB at 68, emphasis added; a restatement of its “without a hitch” comment) is without any record basis. With no concrete evidence, DPS is left to rely upon what HTP described in its Initial Brief as a generalized concern that things might go wrong. Without any concrete reasons for concluding that “unforeseen circumstances” (DPS IB at 70) will more than likely result in the closure of West 52nd Street, DPS is inviting the Commission to create a new precedent under which applicants must prove a negative – a standard of proof that is extremely difficult, if not impossible, to meet.

e. Impacts on Access to Parks.

DPS reports that its witnesses identified “areas with potential adverse effects on parkland and access to parkland due to facility location and construction related activities” (DPS IP at 29). The sum total of those adverse effects is interference with one of six entrances to DeWitt Clinton Park during the HDD operation, noise related to HDD in close proximity to portions of the Park, and the temporary closure of one crosswalk across 12th Avenue at a time during construction (*id.* at 29-30).

HTP assumes that DPS is pointing out these impacts to ensure the Commission has a complete record of the Transmission Facility’s potential impacts and not as a reason for rejecting HTP’s routing plans. The HDD operation at worst will block one of six park entrances; when compared to DPS’s proposal to locate the HDD rig *inside the Park*, it must be seen as not even remotely comparable to DPS’s alternative in its degree of impact on Park users.

The DPS similarly exaggerates impacts on pedestrian access to the parkland west of 12th Avenue. At its worst the impact will be to require pedestrians, for brief periods of time depending on the portion of the block affected, to walk two additional blocks north or south on

12th Avenue to access an open crosswalk.¹¹ Signage will alert pedestrians to these temporary closures, so that they can minimize the inconvenience.

f. Impacts on Underground Infrastructure.

DPS acknowledges that HTP has identified a “clear route” for the cable but suggests that its preference for use of the westernmost northbound lane might be even clearer of underground congestion (DPS IB at 82-83). HTP believes this issue has been fully resolved by the test borings HTP conducted in conjunction with the evaluation of existing as-built drawings that went into the preparation of the plan drawings included in Exhibit 32. Those drawings account for the actual location of all utilities along the route and show that HTP’s planned cable location will work. A separate test boring program and physical utility survey of the western lane of northbound 12th Avenue would be required to prove out DPS’s assertion that its preferred route might be clearer.

B. DPS HAS NOT SHOWN ITS ALTERNATIVE ROUTE TO BE AVAILABLE OR PREFERABLE

HTP has thoroughly briefed the reasons why the DPS proposed alternative employing DeWitt Clinton Park is neither an available alternative, nor preferable even if available (HTP IB at 38-43; 46-47; *see also* City IB). HTP will address DPS’s argument that the Commission can authorize the use of DeWitt Clinton Park, *infra*.

1. DPS’s 12th Avenue Alternate Is Not Available.

As discussed herein although less starkly drawn, the availability factor also bars consideration from being given to DPS’s 12th Avenue alternative since NYS DOT, the landlord

¹¹ As shown on Exhibit 32, crosswalks crossing 12th Avenue in the Project’s vicinity are at West 46th, 48th, 50th and 52nd Streets.

agency, has expressed a preference for HTP's proposed location beneath 12th Avenue's eastern sidewalk. As previously explained, both City DOT and NYS DOT have strong preferences for HTP's plan to locate the cable under the east sidewalk on 12th Avenue. It is unlikely that NYS DOT would agree to DPS's proposal. DPS's statement on page 33 that "HTP testified that neither DOT ... expressed preferences for routing the facility within 12th Avenue" (citing Tr. 524-525) is incorrect. The actual dialogue at the cited reference is:

Q. Has either of the Departments of Transportation raised objections to the drilling location on West 52nd Street, the "hairpin" bend of the cable, or the routing of the cable south on 12th Avenue, or expressed a preference for an alternative route?

A. No such objections or preferences have been expressed.

(Tr. at 524-525.) By substituting the word "within" for "on," the actual word used, DPS has created the impression that NYS DOT and City DOT are indifferent as to where within 12th Avenue the cable is installed, which could not be further from the truth.

2. DPS's 12th Avenue Alternate Location Is Not Superior Even Assuming Its Availability.

As explained in HTP's Initial Brief, with respect to DeWitt Clinton Park, and as explained *infra* with respect to DPS's 12th Avenue preference, neither alternative location offers anything superior to HTP's proposed route. By avoiding the disruption and dislocation within the Park and by avoiding the delays and disruption to the middle of 12th Avenue entailed by DPS's alternative, HTP's route achieves a superior balance among the competing interests.

The alleged superiority, in terms of pedestrian impacts, of DPS's proposal to locate the cable in the western northbound travel lane does not survive a review of the Exhibit 32 drawings. First, pedestrians crossing 12th Avenue will encounter the same temporary crosswalk closings

regardless of whether the construction activity is occurring in the middle of the avenue (DPS's proposal) or the east side (HTP's proposal). Second, during Stage 7 – the entrance into the substation – the east sidewalk and the 50th Street crosswalk would be closed under both proposals. HTP's proposed route along 12th Avenue requires a shorter construction schedule and less disruption of actual travel lanes than does the DPS route, while the DPS location increases the risk to construction workers required to cross over into the western travel lane.

HTP asked its contractor to review the use of the western northbound travel lane proposed by DPS in its Initial Brief. Although the results of this review are not part of the hearing record, the Commission should have the benefit of that review.

The DPS proposal to locate the cable beneath the western northbound travel lane would add several weeks to the construction schedule, would require the closure of two travel lanes during all construction activity rather than one (limited to nighttime, but nonetheless disruptive), would require temporary traffic stoppage to move and remove equipment into the middle of the avenue and, due to concrete curing time, unavoidably would require the complete closure of one travel lane for several days. The added time would be the result of having to move equipment on and off the work site and to remove and replace full lane size plates each and every evening and morning, respectively. When the work is completed, the entire westernmost travel lane would be re-poured with concrete that will require several days to cure, unavoidably requiring the complete closure of that lane to traffic. In contrast, HTP's proposal will not require any excavation within a travel lane, except for Stage 7 when the cable turns to enter the substation, will require the complete occupation of only one travel lane (for the pedestrian walkway) and will require only periodic use of a second travel lane for positioning dump trucks used to remove excavation spoils, an operation that will be limited to non-rush hour times.

The only advantage DPS's proposal offers is its greater distance from building foundations and utility service lines, but by agreeing to DPS's recommendation regarding foundation assessments and by using standard urban utility construction techniques, HTP can avoid or mitigate all impacts related to those conditions. Accordingly, even if this location were available to HTP by agreement of NYS DOT, the mid-avenue location offers no advantages.

3. DPS Has Failed to Demonstrate That DeWitt Clinton Park Is Available.

HTP first alerted DPS to the parkland alienation issue in its response to DPS IR-34 on January 22, 2010 (Exhibit 25 at 46-47) and on April 8, 2010, filed a pre-trial memorandum briefing the law concerning municipal parkland alienation and the limitations on Commission authority concerning the grant of rights to use and occupy public property. Nevertheless, the DPS Initial Brief does not address those legal arguments except to declare, with no citation to authority, that:

- (i) DPS Staff has provided numerous examples on the record wherein the Commission has authorized construction of underground electric facilities in State and local parks [Tr. 159, 280, 281]

(DPS IB at 95); and

- (ii) there is nothing within the PSL, including PSL Article VII, which prevents the Commission from routing a facility within the confines of the City park

(*id.* at 96). The “numerous examples” DPS has provided are five State parks listed in DPS's pre-filed testimony (QMS Panel, Tr. at 159) and one municipal park involved in Case 70365, *New York Power Authority - Cable Sound Crossing Project*, an Article VII case in which NYPA was the applicant. In its April 8, 2010 Pre-Trial Memorandum of Law HTP distinguished the use of State parks based on the express delegation of authority to the Commissioner of Parks,

Recreation and Historic Preservation to grant easements in State parks for utility purposes provided in Section 13.06 of the Parks, Recreation and Historic Preservation Law. DPS has failed to address that point and should have conceded that prior Commission cases routing underground lines in State parks provide no precedent for the DPS proposal here. Similarly, DPS continues to rely on Case 70365 even though HTP reported on the record that in that proceeding former Administrative Law Judge Frank Robinson disposed of objections to the use of a county park by observing that the rules against parkland alienation do not apply to “a taking by the State as would be the case here,” since the applicant was NYPA (*see* discussion, Tr. at 1466-68). Again DPS has not dealt with this obvious distinction.

DPS’s assertion that nothing in Article VII bars the Commission from routing a line in a City park ignores the recently litigated results in *Matter of TransGas Energy Systems, LLC v New York State Bd. on Elec. Generation Siting & Env’t.* (65 AD3d 1247 [2d Dept 2009], *lv denied* 13 NY3d 715, 2010 NY Slip Op 60611 [2010]), which is surprising, since DPS argued the case for the Siting Board and the decisions of the Siting Board and the Appellate Division were briefed in HTP’s April 8, 2010 Pre-Trial Memorandum of Law. The position DPS adopted there, which prevailed, was the opposite: nothing in the language of Article X, which is identical to PSL Section 130, authorized the Siting Board to grant rights to use City property, even non-parkland property.

Here, the City has made it starkly clear that it will not grant its consent to use DeWitt Clinton Park. DPS engages in an unfortunate attack on New York City Department of Parks and Recreation Assistant Commissioner Joshua Laird, who made this point, claiming that as “an anthropologist by education, who is not an expert on trees ... [he] has no true idea as to Staff’s proposals [sic] potential impact on park patrons...” (DPS IB at 98). Besides being an uncalled

for attack on a public official's integrity, DPS has missed the point of Mr. Laird's testimony. HTP understands that Mr. Laird's testimony was of a policy nature, setting forth for the Commission's benefit the official position of the City's Department of Parks and Recreation that it opposes and will not authorize the use of DeWitt Clinton Park for DPS's alternative.

DPS compounds its failure to deal with the law by misstating HTP's position and misstating the law in the process:

Despite ample precedent to the contrary and acknowledging that the Commission has routed electric lines in and through municipal parks in the past, HTP attempts to distinguish that precedent by arguing those cases involved either investor-owned utilities (IOUs) or public authorities. HTP implicitly suggests that it should not be held to the same statutory requirement to minimize environmental impacts because, since it is neither an IOU nor an authority, an act of the legislature might be required to use the park [Tr. 1466, 1467].

(DPS IB at 96.) There is no "ample precedent;" indeed there is *no* precedent that would authorize either HTP to acquire, or the Commission to grant HTP, the right to use DeWitt Clinton Park. Nor has HTP asserted that investor-owned utilities stand in a different position on this issue. Except for a taking by the State itself, only the Legislature, acting on a request from the City, can authorize such a use (*see* HTP IB at 39-40). DPS's attempt to find in the cited transcript pages an implicit suggestion by HTP that it is seeking to be held to a different standard fails.

4. DPS Has Misstated the Law Concerning the Examination of Alternatives in Article VII.

In HTP's rebuttal testimony Mr. Hocker observed that a decision requiring HTP to route the facility in DeWitt Clinton Park would be an effective end to the Project (Hocker, Tr. at 536-

537).¹² DPS addresses this practical reality by arguing that neither DPS nor the Commission is compelled by Article VII to consider the practical realities concerning, for example, whether a particular condition renders a Project unfinanceable (DPS IB at 99). Commission precedent and related precedent are to the contrary. In the *Fortuna Energy* and *TransGas* decisions, the Commission and the Siting Board based their decisions to go no further in processing the applications based on the practical reality that the applicants would be unable to secure the property rights needed to complete their projects as planned.

DPS expresses its rather naïve view of Article VII in this way:

Were to [sic] Commission to limit the scope of DPS Staff's investigation or base its routing determinations upon how it might affect an applicant's financing, then the entire premise of Article VII of the PSL would be moot. No longer could the citizens of the State assume that the decision the Commission rendered in a case involving the siting of utilities was based upon the merits of the case as opposed to the desires of bankers. This is not the way the law was written, and it is not the way the law should be applied.

(DPS IB at 100.) This construction if adopted would turn Article VII into an academic exercise rather than a practical method for addressing energy needs. It would be of little use to the public were the Commission to concern itself with selecting the "best" alternative with no regard for whether the alternative was feasible or, in this case, lawful.¹³

Fortunately the law does not support the DPS position. In requiring applicants and permitting agencies to consider alternatives as a means of minimizing environmental impacts,

¹² DPS misleadingly states that HTP has made this observation, "[f]rom the initiation of DPS Staff's exploration into alternate routes for this project" (DPS IB at 98). In fact, HTP was totally unaware of any such exploration until March 18, 2010, when HTP read the DPS pre-filed testimony. HTP made its position known for the first time in its response to DPS IR-34, without regard to any DPS exploration.

¹³ Notably, DPS has proposed, and HTP has accepted, Certificate Condition 4, requiring that "the Transmission Facility is to be developed, financed, constructed and operated *on an entrepreneurial basis ...*" (emphasis added). To first require such a condition, and then to dismiss the practical realities required to meet such a condition, is inconsistent.

whether the context is Article VII, former Article X or the State Environmental Quality Review Act (SEQRA), the alternatives that need to be addressed must be practically available. In the context of reviewing applications by private parties without the power of eminent domain, this rule recognizes the limitations of the applicant's ability to acquire property. Thus, although DPS is wrong in stating that, in distinguishing Case 70365, *New York Power Authority - Cable Sound Crossing Project*, counsel for HTP argued for HTP to be held to a different minimization standard (DPS IB at 96, citing Tr. 1466-67), the law does recognize differences among applicants in their capabilities to secure alternatives. Compared to an entity with eminent domain power or to the State itself, HTP does not have the same range of available alternatives. But, the State, and this Commission in particular, long ago decided that energy infrastructure would no longer be the sole domain of the franchised utilities or the State itself, and HTP doubts that the Commission will take DPS's invitation to turn back the clock on that choice.

Section 122 of the PSL provides that an applicant for a Certificate must present, together with its preferred route, "a description of any *reasonable alternate* locations for the proposed facility" (PSL § 122; 16 NYCRR Part 85-2.8[e]). Nothing in Article VII suggests that other parties – including DPS – are held to a lesser standard when proposing alternate locations. The Commission must consider whether the proposed route through DeWitt Clinton Park and in the middle of 12th Avenue is a "reasonable alternate" to HTP's preferred route. Such an evaluation must include considerations of whether the DPS alternative is "available" to HTP.

Additional support for limiting the consideration of alternatives to those that are reasonable is found in SEQRA jurisprudence. The Legislature in passing SEQRA specifically declared that that "the policies, statutes, regulations, and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth in

[SEQRA]” (ECL 8-0103 [6]). The Commission has adopted implementing regulations for SEQRA (16 NYCRR Part 7). Because Article VII takes the place of SEQRA (ECL 8-0111[5] [b]), the Commission should evaluate Article VII applications using SEQRA’s standards for evaluating alternatives. Pursuant to the DEC rules implementing SEQRA, adopted generally by the Commission at 16 NYCRR Part 7, the Commission should evaluate only those “reasonable alternatives ... that are feasible, considering the objectives and capabilities of the project sponsor” (6 NYCRR § 617.9 [b] [5] [v]; *see also*, The *SEQR Handbook* [3d Ed 2010] at 5; *accord* 16 NYCRR § 7.1). The regulations specifically recognize that “[s]ite alternatives may be limited to parcels owned by, or under option to [the] private project sponsor” and that an applicant may satisfy its obligations by presenting a viable “alternative for which no discretionary approvals are needed” (*see* 6 NYCRR § 617.9 [b] [5] [v]). When reviewing cases governed by SEQRA and by former Article X,¹⁴ New York courts have recognized that both access to a proposed site and the economic feasibility of developing it are central criteria for determining whether a proposed alternative is reasonable (*Matter of Citizens for Hudson Val. v New York State Bd. on Elec. Generation Siting & Env’t.*, 281 AD2d 89, 97 [3d Dept 2001] [“(a) private applicant ...cannot be required to present alternative sites that it neither owns nor has an option to purchase.”]; *Horn v International Bus. Machs. Corp.*, 110 AD2d 87, 95-96 [1985] [“(i)t would be an unwarranted and illogical extension of SEQRA to require every private developer to address the possible development of other sites over which it has no control...or which are not economically feasible”]).

¹⁴ Former Article X included an express reference to SEQRA as providing the rule governing the extent to which an applicant had to describe alternative locations and power supply sources (*see* former PSL § 164[1][b]).

Accordingly, the Commission must consider whether DPS's proposed route will be available for development and whether its use will be economically feasible in light of the objectives and capabilities of HTP. The proposed route through DeWitt Clinton Park is not a "reasonable alternate" location because, in the absence of City support and legislative approval, HTP does not have access to the required land, nor can it successfully finance construction based on the hope and expectation that alienation legislation will be enacted. Similarly the proposed route in the middle of 12th Avenue is not a "reasonable alternate" location because NYS DOT has not consented to its use. To require HTP to use the route proposed by DPS Staff would "contravene the 'rule of reason' governing SEQRA's substantive requirements" and impose a stricter obligation on HTP than that intended by the Legislature. (110 AD2d at 96; *see also Tyminski v Public Serv. Commn. of State of N.Y.*, 38 NY2d 156, 160 [1975].)

C. ARCHEOLOGICAL RESOURCES

DPS faults HTP for not communicating "any further plans to evaluate, avoid or recover [submerged and buried] resources in over two years" and "contends that this lack of response by HTP is highly unusual in major facilities siting cases" (DPS IB at 43-44). DPS alleges that "HTP has confused the distinction between developing sufficient information to address the required statutory findings for purposes of facility certification versus development of final construction and impact mitigation details for a certified facility location" (DPS IB at 44-45). DPS continues that the "next logical step" is to communicate "an outline of the type of studies and approach to advance the evaluation of underwater sites" (*id.*).

In making these claims DPS has lost sight of Section 4.10 of the Application and Appendix 4-11 thereto, and DPS has overlooked the purpose of proposed Certificate Condition 28(v), which has been agreed-upon between DPS and HTP and which directs HTP to include in

the Environmental Management and Construction Plan (EM&CP) “plans for avoidance of impacts to potential underwater archeological resources” (see Exhibit 83 at 8 and Exhibit 35 at 8).

HTP presented in the Application a detailed report prepared by Dolan Research, Inc., entitled, “Submerged Cultural Resources Review of Geophysical Data for the Hudson Transmission Project New York County, New York and Bergen and Hudson Counties, New Jersey” (*Submerged Cultural Resources Review*) (Application, Appendix 4-11). The *Submerged Cultural Resources Review* describes the efforts undertaken as follows:

In conjunction with the Project, Ocean Surveys, Inc. (OSI) conducted a geophysical survey along the Project route within a 3.6-mile reach of the Hudson River (OSI 2007). The survey collected bathymetric, acoustic, seismic, and magnetic data to document hydrography and evaluate riverbed conditions and underlying stratigraphy along the river. Dolan Research, Inc. (DR) completed an analysis of the OSI data to assess the number, locations, cultural affiliations, components, spatial distribution, data potential, and other salient characteristics of potential submerged cultural resources within the underwater portion of the survey corridor.

The goal of the analysis was to determine the presence or absence of remote sensing targets that might be associated with significant cultural resources and might be affected by the Project. A brief maritime historic context was developed to identify potential submerged cultural resource types in the Hudson River. Additionally, available historic documentation on local shipwrecks was reviewed and the Automated Wreck and Obstruction Information System (AWOIS) were [sic] consulted for listings within the overall Hudson River study area. Sources reviewed are listed in Section 4.2 and in the References Section 7.0.

(Application, Appendix 4-11 at 1.)

As the report describes, a 200-foot corridor was surveyed on five track lines spaced 50 feet apart using a magnetometer and side scan sonar. A total of 17 targets were identified as

potential cultural resources out of the 175 sonar features and 57 magnetic anomalies (Appendix 4-11, p. 11). The Report concludes:

While none of the target locations appear to be an intact shipwreck site, the targets may represent cultural material from shipwreck sites, such as anchors, machinery, or sections of hull. Diving at the location targets directly in the area that will actually be disturbed by cable installation would be required to identify the source of the remote sensing signatures.

(Appendix 4-11, p. 11). DPS's argument that HTP has been idle simply ignores that HTP commissioned the *Submerged Cultural Resources Review* and that the "next logical step" is to avoid those targets in laying out a precise and final route for the submarine cable, as described in the Application (*see* Exhibit 4, Section 4.10.2.2: "If the targets cannot be avoided, then diving inspection by a marine archeologist of these targets that will be physically disturbed by cable installation is recommended to identify the source of the remote sensing signatures.").

What is truly unusual about this proceeding is not that HTP has not communicated in over two years with SHPO, but rather that DPS suspended the proceeding for over a year and now criticizes HTP for not advancing its plans regarding submarine archeology during the suspension when the standard practice is to advance those plans at the EM&CP stage. Like other applicants planning submarine cable projects, HTP took the steps required at this stage and has no reason to communicate further with SHPO until it prepares the EM&CP for the submarine route. The EM&CP will include (i) a detailed route that avoids the seventeen targets to the extent feasible; (ii) a plan for further evaluation if any of the seventeen cannot be avoided; and (iii) a contingency plan for dealing with any previously unknown targets or any of the seventeen targets previously thought to be avoidable that turn out to be larger than anticipated and unavoidable.

DPS points to no other precedents in which Article VII Applicants took any of these additional steps prior to the EM&CP phase. DPS's citation to the *NeptuneRTS* record is not to the contrary.¹⁵ The text from *NeptuneRTS* cited by DPS in its entirety is:

The literature research for shipwrecks near the proposed cable route ("PCR") yielded a number of shipwrecks that are, or could be, within two miles of the route. *See Underwater Prehistoric and Historic Archaeological Study* at 64. Remote sensing data were collected and analyzed along the planned route and the archaeology team identified 39 possible cultural resources, 16 of which are in New York waters. *See Underwater Prehistoric and Historic Archaeological Study* at 64. Archaeological inspections of any PCR within 50 meters of the final planned cable routes will be conducted and will include diving to do a systematic search and recording of the target. *See Underwater Prehistoric and Historic Archaeological Study* at 70.

(Case 02-T-0036, *Neptune Regional Transmission System LLC*, Joint Proposal appended to Opinion and Order Adopting Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need for a Transmission Facility from New Jersey to Long Island, issued January 23, 2004, at 19.) It is clear from the phrase, "within 50 meters of the final planned cable routes" that the same procedure HTP will employ was employed in *NeptuneRTS*, namely that the next logical step is to finalize the submarine cable route. DPS exaggerates what was done in *NeptuneRTS*, by characterizing the agreement there as constituting "specific terms for a study protocol" (DPS IB at 47). The cited text merely reports that NeptuneRTS had agreed to perform diving inspections of any possible cultural resources within 50 meters of the final cable route.

¹⁵ DPS also refers to Office of Parks, Recreation and Historic Preservation (OPRHP) as "a signatory party to" the NeptuneRTS joint proposal (*id.* at 46), failing to mention that OPRHP's participation as a party in that proceeding was solely because it was the landlord of nearly 100 percent of the upland cable route in New York State, not because of SHPO's consultative role (Case 02-T-0036, *Neptune Regional Transmission System, LLC*, Opinion and Order Adopting Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need For a Transmission Facility From New Jersey to Long Island, issued January 23, 2004, at 12; Joint Proposal at 23). OPRHP has not requested party status in this proceeding.

DPS has overlooked the text of HTP's application, which reports the very same approach as taken in *NeptuneRTS* that DPS holds up as the standard for HTP to meet:

The 17 submerged targets that generated signatures with both magnetic and acoustic components were recommended for avoidance by the marine archeologist. Three are located along the periphery of the 200-foot-wide survey corridor. While none of the target locations appear to be an intact shipwreck sites, these types of targets are typically the most likely to be associated with submerged cultural resources, and may represent cultural material from shipwreck sites, such as anchors, machinery or sections of hull. If the targets cannot be avoided, then diving inspection by a marine archeologist of those targets that will be physically disturbed by cable installation is recommended to identify the source of the remote sensing signatures.

(Application [Exhibit 1] Exhibit 4, Section 4.10.2.2, at 4-74).

D. CONSTRUCTION NOISE WILL BE MITIGATED USING ACCEPTED TECHNIQUES AND WILL COMPLY WITH THE CITY'S NOISE CODE.

A construction noise analysis conducted by Peter Guldberg of Tech Environmental is included in Section 4.12 of Exhibit 4 to the Application. The noise analysis describes the existing conditions, including the results of noise measurements taken at the east and west sides of DeWitt Clinton Park and Mr. Guldberg's conclusion, unrefuted by any party, that the existing ambient noise falls "within the range described by US EPA for 'Very Noisy Urban Residential' areas" (Application [Exhibit 1] at 4-79). The noise analysis includes a discussion of the construction activities that will create noise, lists the equipment that will be used and their noise profiles, describes the City's noise regulations and concludes, again without contradiction by any party, that with the use of the proper equipment and noise barriers where needed, the construction of the Transmission Facility will comply with the City's noise regulations (*id.* at 4-80 to 4-82). Mr. Guldberg testified that compliance with the City's construction noise regulations will "minimize noise impacts to a reasonable extent given the urban nature of this

project” (Guldborg, Tr. at 98). Mr. Guldborg also testified that the City’s requirements include the preparation of a Construction Noise Mitigation Plan, using the form included as Appendix 4-12 to the Application.

DPS devoted ten pages of its Initial Brief to its conclusion that HTP has “underestimated” the construction noise impacts.¹⁶ DPS submitted no information requests to HTP concerning the topic of noise impacts or the noise impact analysis (*see* Exhibit 25) and undertook no noise analysis of its own. DPS waited until the hearings to ask discovery-styled questions concerning whether Mr. Guldborg had examined the soil borings and detailed construction plans, had determined the type of subsurface materials likely to be encountered and had determined the duration of noise-producing construction activity.

Mr. Guldborg’s noise report was prepared for use in the Application. He was not retained to update the report based on detailed construction plans nor had he been asked to develop a construction duration estimate.

DPS’s conclusion that the record is inadequate because HTP failed to establish the duration of various construction activities, to identify the types of subsurface materials that will be encountered during excavation activities, or to update the noise analysis with respect to the proximity of HTP’s proposed route to nearby buildings, is in error. DPS does not point to any authority for the proposition that the record on noise impacts must include such information. Nor has DPS suggested what noise standards it would apply in lieu of the City’s noise code in regard to construction duration or proximity.

¹⁶ On page 78 of its Initial Brief, DPS for the first time speculates that there will be adverse noise impacts on recreational users of Clinton Cove, which is located three blocks north of, and across a busy state highway from, the northernmost point of HTP’s proposed route.

The conclusions of the noise study HTP produced are straightforward: HTP construction activities will produce noise, but the noise will comply with the City Construction Noise regulations, which includes several requirements:

- construction is limited to weekdays between 7:00 a.m. and 6:00 p.m.;
- noise must not exceed an Lmax of 85 dBA at 50 feet;
- quieter models of equipment are prescribed;
- noise barriers are prescribed under certain circumstances; and
- a Construction Noise Mitigation Plan must be prepared prior to construction.

The City regulations do not address construction duration, nor do they prescribe different standards for construction activity located in greater or lesser proximity to occupied buildings.

DPS cites no precedent or authority for describing noise impacts by reference to the duration of noise producing activity or the proximity to buildings. Given recent Article VII decisions granting certificates, HTP concludes that DPS is holding HTP to a different standard regarding record completeness. For example, in Case 01-T-1474, *PSEG Power Cross Hudson*, neither the Order Adopting Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need, April 17, 2003 nor the Joint Proposal has *any* discussion of noise impacts even though the construction activity proposed by the applicant was substantially identical to HTP's plans and would have taken place in the same vicinity. In Case 08-T-1245, *Bayonne Energy Center, LLC*, the applicant's noise analysis was substantially the same as HTP's (a copy is attached as Appendix G, hereto), and the Joint Proposal adopted by the Commission concludes with the following paragraph:

The HDD operations during construction will comply with the new NYC Noise Code and the Citywide Construction Noise Mitigation rules. Quieter models of construction equipment and noise barriers will be used where possible to minimize noise impacts on nearby receptors. A Construction Noise Mitigation Plan will be developed in conformance with the requirements of 15 RCNY § 28-100 and will be followed for the excavation and HDD phases of construction for the Project.

(Case 08-T-1245, *Bayonne Energy Center, LLC*, Joint Proposal appended to Order at 22.) The relevant excerpt of the Joint Proposal in Case 08-T-1245 is included as Appendix H. There is nothing in the *Bayonne* record addressing construction duration, a topic DPS now appears to believe needs to be addressed to complete the record on noise impacts. The relevant Commission finding in *Bayonne* in its entirety is:

Second, the BEC Project will comply with the substantive requirements of the New York City Administrative Code, including applicable noise mitigation and construction regulations

(Case 08-T-1245, *Bayonne Energy Center, LLC*, Order at 22).

DPS's recommendation for noise mitigation generally track the City's regulations with two exceptions: DPS recommends its alternate location as a way to mitigate noise impacts and "waiver of local requirement to limit construction to daytime hours" (DPS IB at 90). HTP has explained why DPS's proposed location for the cable route is not available or otherwise justified. DPS has made no case for the Commission to waive the City's daytime work requirement under the standard set forth in PSL Section 126(1)(f).

E. THE REMAINING ISSUES CONTESTED BY HTP AND DPS ARE ADDRESSED IN HTP’S INITIAL BRIEF.

HTP’s Initial Brief identified and addressed the issues contested between HTP and DPS numbered 2-6 (HTP IB at 10-11, 51-59). DPS’s Initial Brief raises no new arguments unanticipated by HTP in its Initial Brief. Briefly these issues are:

Voiding Certificate If HTP Seeks Cost-of-Service Rates (HTP IB at 51-56).

DPS merely reiterates that “cost-based rates could raise significant economic concerns for DPS Staff” (DPS IB at 3). As HTP discussed, DPS’s economic concerns, and any other concerns, could be aired in reviewing any cost-based rate request.

Control Authority (HTP IB at 56).

DPS reiterates that Con Edison and the NYISO should have control authority because Con Edison knows its system best (DPS IB at 87). The same statement could be made about the Long Island Power Authority with respect to NeptuneRTS facility, which is under PJM control. The control authority for the HTP Project will be PJM or NYISO, not Con Edison. Although it is a party to this proceeding, Con Edison has not joined in advocating DPS’s position.

Scope of Commission Authority Over Entire HTP Project (HTP IB at 59-60).

DPS continues to urge that the facility that is subject to Commission oversight be defined to include that portion within New Jersey so that the Commission has the “ability to review the construction and maintenance over the entire facility rather than just the certified portion” (DPS IB at 86). DPS’s statement in its Initial Brief, “[a]s re-written by HTP, the [Certificate] condition would not allow DPS staff to inspect portions of the facility in New Jersey” (DPS IB at 87) is simply incorrect. As HTP has explained, HTP will provide DPS with copies of designs, manuals, procedures and all other documents relating to the entire Project for its review and will

make the converter station in New Jersey available for inspections by DPS. There is nothing more to be gained of a practical nature by expanding the reach of the Commission's regulatory authority into New Jersey.

Con Edison Design Approval (HTP IB at 56-58).

DPS blurs together its rewriting of Certificate Conditions 55 and 56 and defends them with the statement that "there are operating issues that are unique to Con Edison" (DPS IB at 86). The review of the HTP Transmission Facility designs and Con Edison upgrades is governed by NYISO tariff. As HTP has described, DPS's proposed Certificate Conditions 55 and 56 would be an attempt to graft new terms onto the NYISO process. As with the issue of Control Authority, discussed above, Con Edison has not joined with DPS in advocating this position.

V. REPLY TO DEPARTMENT OF ENVIRONMENTAL CONSERVATION INITIAL BRIEF.

DEC urges the Commission to deny HTP a Certificate based on claims of increased air emissions affecting New York and HTP's alleged incompatibility with State energy policies. HTP has anticipated DEC's arguments and refers to its Initial Brief at pages 60-75.

Several arguments made by DEC merit specific reply. As briefed by HTP, DEC's lead air witness, the State's chief air quality planner, disavowed the computer modeling results produced by DPS and asserted that they were not reliable. Mr. Sliwinski testified merely to his conclusion that a net increase in regional air emissions was likely (HTP IB at 60-61). Nevertheless, in its Initial Brief DEC relies on the very results disavowed by its expert to argue, to the ton, what amount of increased air emissions will result from operation of the HTP Project. DEC fails to reconcile this inconsistency in its position. DEC also fails to acknowledge that,

even assuming DEC's expert was wrong about the reliability of the DPS modeling results, those results represented a prediction for the year 2013 only.

Testimony by DPS witnesses that predicts a steady improvement in air emissions from electric generators in PJM is borne out by the table prepared by PJM showing annual average CO₂ emissions and cited by DEC on page 4 of its Initial Brief. (A copy of the table found at www.pjm.com/documents/~//media/documents/reports/co2-emissions-report.ashx is included as Appendix I, hereto.) From 2005 to 2009 PJM's system annual average CO₂ emissions decreased by 12 percent, and the average CO₂ emissions has decreased in each of those years.

DEC also makes the inherently unbelievable claim that all increased emissions resulting from HTP's operation will affect New York air quality even though DEC reports that some of the increased emissions will come from plants located in New Castle, Delaware (Exhibit 76 at 4). DEC provided no regional transport modeling to demonstrate the validity of its claim that 100 percent of the time, 100 percent of the increased emissions would affect New York's air quality (DEC IB at 10, citing Exhibit 76).

DEC's claim that the Transmission Facility is antithetical to the State's energy policies ignores that the State Energy Plan (Plan) specifically promotes the pursuit of interregional economic opportunities in the electric sector and that the Plan identifies the HTP Project as producing consumer benefits for City customers (2009 SEP Infrastructure Brief at 12, 24, discussed by Krapels, Tr. at 400-401). The claim that "HTP does not promote end-use energy efficiency" and therefore "runs contrary to the goal of stimulating New York's clean energy economy" is one-dimensional and calls into question DEC's apparent endorsement of Bayonne Energy Center and repowering in-City generators since they, too, do not "promote end use energy efficiency" (*Compare* DEC IB at 17 with 14 and 24).

DEC's attempt to "soft sell" its denial of a Water Quality Certificate for Indian Point Nuclear Facility is disingenuous. DEC did not merely "ask" or "request" cooling towers; DEC *denied* a Water Quality Certificate to Entergy. It is not "total speculation" to suggest that, combined with local concerns about evacuation planning, the DEC decision could lead to Indian Point not being relicensed (DEC IB at 17).

Finally, DEC has woefully mischaracterized NYPA's testimony and position in this proceeding. DEC cites "NYPA's focus on importing coal dependent energy from PJM" (DEC IB at 16) when NYPA's witness Khalil Shalabi testified that NYPA would not enter into any contracts to purchase power from coal resources (Shalabi, Tr. at 1136). DEC failed to refute Mr. Shalabi's testimony that a PJM study revealed that system upgrades being undertaken in PJM would not result in large changes in coal-fired generation in PJM-west (Shalabi, Tr. at 1175). Nor did Mr. Shalabi state that repowering an in-City generator would be an alternative *to the HTP Project* as DEC claims (DEC IB at 24). Mr. Shalabi testified that repowering could be an alternative *to supply capacity* (Shalabi, Tr. at 1185-1186). He went on to state that NYPA uses RFP's to acquire new supplies (*id.*). Mr. Shalabi explained that the RFP to which HTP responded sought resources from other markets, because NYPA is seeking to diversify "both in terms of physical locations and fuel supply" (*id.*, Tr. at 1116). Obviously, in that regard, repowering an in-City resource could not be an alternative to the HTP Project.

VI. REPLY TO INDEPENDENT POWER PRODUCERS OF NEW YORK AND CROSS HUDSON, LLC.

IPPNY argues that the HTP Transmission Facility (i) does not meet an economic test the Commission has never previously used to evaluate non-utility projects; (ii) does not meet

IPPNY's narrow reliability test; and (iii) would harm competition if built. Cross Hudson repeats many of the same arguments.¹⁷

IPPNY's arguments should be rejected for each of several reasons:

(i) IPPNY's challenge is a collateral attack on NYPA's decision to enter into a contract with HTP, a matter outside the scope of Article VII and beyond the reach of the Commission's jurisdiction;

(ii) IPPNY's economic argument relies on the kind of cost-benefit analysis in which the Commission does not engage in Article VII proceedings involving applications by competitive market participants, in contrast to franchised retail service utilities;

(iii) IPPNY ignores the reliability benefits the Transmission Facility will offer; and

(iv) IPPNY is simply using the Article VII process to protect the market position of its Zone J members.

IPPNY's arguments have been effectively countered in HTP's Initial Brief. To summarize:

– HTP responded to a competitive RFP issued by NYPA, which sought access to new markets from which to secure power to meet the needs of its governmental customers.

– NYPA's governmental customers work collectively through EDC with NYPA to decide how best to meet their future power needs. These customers, acting in concert with NYPA, are sophisticated buyers with choices; they are not captive ratepayers as IPPNY suggests.

¹⁷ Point I. A. of Cross Hudson's Initial Brief is substantially identical to Point I of IPPNY's Initial Brief. Point I. B. is an attack against NYPA's contractual decisions. Point I. C. is an attempt to promote Cross Hudson's long-defunct generator-lead project. Both Point I. B. and I. C. are outside the scope of this proceeding.

– The HTP Project will facilitate increased competition from PJM generators in the Zone J market.

– The HTP Project will produce net savings for NYPA’s customers regardless of whether or when the HTP Project will produce total production cost savings for the entire State.

– Article VII does not restrict the Commission to granting Certificates only to Projects that produce net, statewide production cost savings.

– The use of contracts to secure a revenue stream adequate to support financing is not anticompetitive.

Nothing in IPPNY’s Initial Brief refutes those points.

There are several additional observations made by IPPNY that warrant specific response. IPPNY characterizes the study done by Charles River Associates International (CRA and CRA Study) for EDC as the “*principal* analysis of the costs and benefits of the HTP line” (IPPNY IB at 2 [emphasis added]; *see also* Cross Hudson IB at 3, describing the CRA Study as the “main analysis”). The CRA Study was one of several studies but has never been designated as the “principal analysis.” As discussed by the DPS witnesses Paynter and Wheat (Tr. at 757), several studies were performed and they are all sensitive to the assumptions made in conducting them.

IPPNY labels “glaringly absent” any study performed by HTP. As the recipient of NYPA’s competitive procurement award, HTP had no need to publicly demonstrate cost-benefit results for a Project that will not be supported by captive ratepayers without separate Commission approval.

IPPNY’s position on reliability mirrors the CRA Study assumption that there would be few plant retirements, even though it is now clear that the retirement of Indian Point is a real

possibility and that greenhouse gas regulation and other carbon control policies will put increasing pressure on older fossil fuel plants.

IPPNY defends CRA's assumption that the price differential between northern New Jersey and Zone J will flip by referring to CRA's testimony that CRA made numerous assumptions, including "increased transmission capabilities into Zone J" (IPPNY IB at 7). However, if IPPNY has its way, there will be no increased transmission capabilities into Zone J.

IPPNY's attack on HTP's witness Krapels' discussion of the NYISO's market power mitigation rules appears premised on the assumption that the CRA witnesses have accurately predicted how NYISO will rule (IPPNY IB at 8). The CRA panel's prediction is just that; NYISO alone will make the decision about whether HTP will receive capacity payments.

IPPNY repeats its anticompetitive argument that boils down to treating long-term contracts as *per se* anticompetitive, even though IPPNY's Zone J members enjoy revenues from long-term contracts with both NYPA and Con Edison. IPPNY does not like HTP's contract simply because it exposes IPPNY members to interregional competition, hardly a principled basis for a decision (IPPNY IB at 11-12). IPPNY's position is that energy projects must survive on the revenues from the NYISO-administered energy and capacity markets. But IPPNY itself has advocated for years for the development of a forward capacity market, for the very reason that the NYISO capacity markets are inadequate to promote long-term investments.

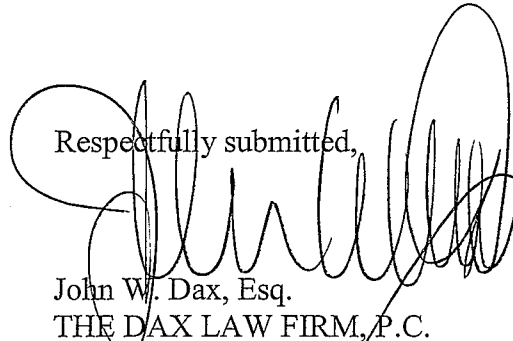
IPPNY's arguments that the Transmission Facility is uneconomic comes down to the notion that IPPNY's Zone J should be kept isolated from interregional competition – that the NYISO market power mitigation rules are intended to lock Zone J into long-term isolation for the benefit of IPPNY's Zone J members – a result clearly not intended by the NYISO or the Commission.

VI. CONCLUSION

For the reasons explained in this Reply Brief and in HTP's Initial Brief, the Commission should issue a Certificate for the Transmission Facility employing the Applicant's proposed route and its proposed Certificate Conditions included as Appendix B, hereto, and the Water Quality Certificate included as Appendix A, hereto.

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Respectfully submitted,



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