BEFORE THE
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the Petition Filed by Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear Operations, Inc., NewCo and Entergy Corporation for a Declaratory Ruling Regarding a Corporate Reorganization or, in the Alternative, an Order Approving the Transaction And an Order Approving Debt Financings	Case 08-E-0077

PETITIONERS' VERIFIED SUPPLEMENTAL COMMENTS

Pursuant to the Presiding Administrative Law Judges' ("ALJs") email ruling issued December 14, 2009, Petitioners hereby submit Supplemental Comments addressing whether their position on the financial capabilities issue has changed since the last round of comments concluded on November 12, 2009. The financial capabilities issue has been defined by the ALJs as "whether Enexus' capabilities will be at least as good as Entergy's under current and future circumstances" that "have a reasonable probability of materializing, and that would not render continued operation of the plants uneconomical for Entergy."[1] As Petitioners will explain in these Supplemental Comments, Petitioners' position has not changed; indeed, Petitioners submit that the enhanced record now demonstrates even more conclusively than before that Enexus meets this standard.

Three important points in support of Petitioners' position are worth emphasizing at the outset:

First, while Entergy has a strong financing capability related to its ownership of Southern regulated utility operating companies, Entergy cannot depend on this strength to supply financial support to the non-utility subsidiaries that own the New York Facilities. Thus, the relevant test of

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1 Ruling Concerning Scope, Process, and Schedule (Aug. 22, 2009) at 2, 3.

Enexus' and Entergy's relative financing capabilities is their relative capabilities for mobilizing resources for the non-utility nuclear facilities, not the relative size of Enexus and Entergy, not their current or likely parent-company bond ratings, and not any other attributes unrelated to their ability to finance the needs of the New York Facilities. In addition, as demonstrated exhaustively by Petitioners, Entergy faces a number of constraints that could make it unwilling or unable in certain circumstances to supply funds to the New York Facilities. Thus, despite the current size and credit rating of Entergy, a continuation of the status quo ownership of the New York Facilities by Entergy does not provide a guarantee of future reliability or other types of investments in those facilities. In contrast, as demonstrated in the analyses of a wide range of extreme scenarios, Enexus will have sufficient financial resources and contractual agreements in place that will ensure its capability to meet the financial requirements of the New York Facilities in all such scenarios. And, as a company focused solely on non-utility power production, Enexus will have every incentive for meeting all the economically-viable investment needs of its nuclear facilities.

Second, it must be kept in mind in evaluating the proposed reorganization and the relative strengths of Entergy and Enexus that, if the New York Facilities face major operational difficulties and/or require substantial additional capital investment for their continued safe, secure and reliable operation, these are the types of circumstances when it is most likely that Enexus will be in a better position than Entergy to support these facilities. Specifically, it is in these remote circumstances that Entergy would be most likely to be affected by the important constraints on its ability to support the New York Facilities. As Petitioners have explained in earlier submissions, these constraints include the risk of credit rating downgrades, the restrictions imposed by its Southern regulators and the fiduciary obligation of Entergy's management and Board of Directors to protect the interests of the company as a whole. As a consequence of these constraints, Entergy would in some circumstances not be able to provide support to the New York Facilities.[2] In contrast, Enexus would not face these constraints, and given the importance of these facilities to its overall financial success, would have a much stronger incentive to do whatever is necessary to maintain the safe, secure and reliable operation of the facilities.

Third, as is discussed more completely below, even in a very extreme circumstance — the highly unlikely situation where financial challenges for the New York Facilities are so great that a reorganization in bankruptcy would be required — it is not reasonable to conclude that captive New York ratepayers would be harmed by the proposed spin-off of Enexus. Whether a reorganization is of Enexus, or of an Enexus or Entergy subsidiary owner of the New York Facilities, the priority and corresponding availability of debtor-in-possession bankruptcy financing assures that economically-viable generating facilities will have access to the funding necessary to operate without disruption. This availability has been demonstrated in cases of bankruptcies of the owners both of nuclear utility facilities and of other non-utility power generation facilities. Petitioners note that, to the extent that reorganization under bankruptcy law might possibly have negative implications for New York ratepayers, Entergy's need to protect the credit ratings and access to capital of its regulated utility subsidiaries would make it more likely to make a bankruptcy filing relating to the New York Facilities than Enexus.

I. The Record Demonstrates the Sufficiency of Enexus' Financial Capabilities Even More Conclusively Than Before

An extensive and complete record has been established in this case. Petitioners' submissions prior to the November 12, 2009 last closing date for comments demonstrated that Enexus will have the capability to meet all reasonably-probable and economically-viable financing needs of the New York Facilities at least as well as Entergy. The record has been substantially augmented since then, further

[2] See Petitioners' Verified Initial Comments (Nov. 2, 2009) at 19-23; Petitioners' Verified Reply Comments (Nov. 12, 2009) at 13-18.

buttressing Petitioners' earlier conclusion. Since the last round of comments, the record with respect to the relative financial capabilities of Enexus and Entergy to support the New York Facilities has been supplemented with comprehensive responses to 11 information requests posed by the ALJs on behalf of Advisory Staff, copies of 11 Vermont filings requested by the ALJs, 17 follow-up information requests posed by Trial Staff, and 3 follow-up information requests posed by Riverkeeper and the Office of the Attorney General. The ALJs' information requests sought additional information relating to Entergy's and Enexus' financial capabilities that the New York Public Service Commission's ("Commission") Advisory Staff considered important for a decision by the Commission. Petitioners answered each of the ALJs' questions in detail and likewise responded thoroughly to each of the clarifying questions posed by Trial Staff or another party.

The responses to information requests ALJ-4 through ALJ-7 in particular asked for direct comparisons of Enexus and Entergy under a variety of challenging hypothetical scenarios, including an extreme stress situation involving a $2.4 billion capital investment (above and beyond normally budgeted capital investments) over 12 years. The responses show conclusively that Enexus' financial capabilities are at least as strong as, and in some circumstances even stronger than, those of Entergy. Many of the scenarios analyzed by Petitioners are highly unlikely to occur. Nonetheless, Petitioners' responses show that, in all of the stress scenarios posited by the Commission's Trial Staff and Advisory Staff, Enexus will have access to the liquidity and will have the secured borrowing authority required to support the New York Facilities at least as well as Entergy.

The scenario analyses submitted in response to an information request by the Vermont Public Service Board (VY PSB-2), and supplied in this proceeding in response to ALJ-11, confirm the foregoing conclusions.

In fact, Enexus may in certain circumstances be more capable of supporting the New York Facilities than Entergy due to the financial and regulatory constraints that could preclude Entergy from providing financial support beyond the $145 million required by the support agreements between two of its subsidiaries and the New York Facilities. These constraints include:

- Regulatory constraints: These comprise existing regulatory agreements on the first priority of Entergy's utilities in the allocation of capital and existing prohibitions on the cross subsidization of non-utility operations. Future constraints could include ring fencing.
- Rating agency constraints: Entergy runs the risk of credit rating downgrades if its credit metrics decline or even if it simply increases its commitment to the non-utility nuclear business.
- Financial constraints: Entergy has to comply with its existing debt covenant ratios (in particular, the 65% debt test).
- Fiduciary constraints: Entergy's officers and directors have a fiduciary duty to manage the company in the best interests of its shareholders and the corporation as a whole. These overriding Entergy interests may in some circumstances constrain the provision of support to Entergy's non-utility subsidiaries.[3]

In summary, the record compiled in this proceeding clearly meets the standard imposed by the Commission in its May 23, 2008 Order, namely, whether there is a "potential for harm to captive New York utility ratepayers" as a result of the transfer of ownership of the New York nuclear facilities to Enexus.[4] Petitioners have clearly met their burden of showing that Enexus is at least as capable as Entergy to provide the financial support required to continue the safe, secure and reliable operation of the New York Facilities and, accordingly, no harm to New York ratepayers will occur as a result of the proposed reorganization. It is important to recognize that the main objective of the proposed transaction is to create Enexus as a business entity that has more financial strength and flexibility than

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[3] Note 2, *supra*.

[4] The *no harm* standard means *no net harm*, rather than *no harm under any conceivable circumstances*. The Commission has approved ownership transfers as in the public interest even though it recognized that the potential for harm existed under some circumstances. See Case 07-E-1385, Calpine Corp. *et al.*, Declaratory Ruling on Review of Stock Transfer and Acquisition Transactions (Jan. 22, 2008) (potential horizontal market power); Case 96-E-0897, Consolidated Edison Company of New York, Inc., Comprehensive Order Approving Transfers of Generating Facilities and Making Other Findings (June 17, 1999) (transfer to non-investment grade owner). Moreover, a *no harm under any conceivable circumstances* standard would be even more restrictive than the "*net* positive benefit" standard that the Commission applies to ownership transfers of fully regulated distribution utilities. See note 5, *infra*.

is possible under Entergy. This objective benefits New York captive ratepayers by enabling Enexus to support the New York Facilities in circumstances where Entergy could not.

II. The Benefits to New York from Approving the Transaction and the Risks to New York from Not Approving It

Although not required by the Commission in its May 23rd Order or in any other order approving the ownership transfer of non-utility generation facilities, Petitioners have shown not only that the transaction will not harm captive New York utility ratepayers, but also that it will provide a net positive benefit for New York.[5] As Petitioners have explained, because Enexus will not be encumbered with the same financial constraints as Entergy and because Enexus will have substantial financial reserves and contractual access to further liquidity in place as of the date of the reorganization, there is a net benefit to New York from Enexus' greater capability than Entergy under some circumstances to provide financial support to the New York Facilities, particularly those circumstances where substantial amounts of such support is most likely to be needed. Moreover, if the transaction is approved, Enexus has committed to fund a Site Restoration Trust to provide greater assurance of adequate funding for the greenfield restoration of the Indian Point site than Entergy is committed to provide. This is a further benefit for New York.

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[5] The Commission has applied the "net positive benefit" standard to mergers "involving the transfer of ownership of fully-regulated utilities providing distributions service to captive customers." Ruling on Discovery, Process, Schedule and Scope of Issues (Aug. 14, 2008), pp. 28-29. The Commission previously has approved ownership transfers of wholesale generating facilities, including nuclear generators, without requiring any showing of positive benefits as would be needed under the "net positive benefit" standard. E.g., Case 01-E-0040, Joint Petition of Consolidated Edison Company of New York, Inc. and Entergy Nuclear Indian Point 2, LLC for Authority to Transfer Certain Generating and Related Assets, Order Authorizing Asset Transfer (Aug. 31, 2001) at. 8-9; Case 03-E-1231, Petition of Rochester Gas and Electric Corp., et al. for Authority Under Public Service Law Section 70 to Transfer by Auction Sale the R.E. Ginna Nuclear Generating Plant, Order Approving Transfer Subject to Modification (May 20, 2004) at 20. Such approvals reflect the Commission's determination that "[a]s competitive wholesale providers of electricity that do not make retail sales," merchant nuclear generators should be treated like "other owners of wholesale generators that have been afforded lightened regulation." Case 00-E-1225, Entergy Nuclear FitzPatrick, LLC, et al. Declaratory Ruling on Lightened Regulation, Declaratory Ruling on Lightened Regulation (Aug. 23, 2000) at 5.

In contrast to the proposed reorganization's positive benefits for New York captive ratepayers, there are risks associated with a failure to approve it. In particular, the Commission cannot be assured that Entergy's continued ownership of the New York Facilities would provide a safe harbor against all possible risks. As mentioned briefly earlier, companies like Entergy that own both utility and non-utility operations face constraints imposed by both credit rating agencies and regulators that will not be concerns for Enexus.

With respect to credit ratings risk, Standard & Poor's in its evaluation of Entergy explicitly warns that: "If the contribution of the merchant nuclear generation assets increases, or if credit metrics weaken below those mentioned earlier, *[Entergy's] outlook will be revised to negative and ratings could be lowered* [emphasis added]."[6] The warning about the credit ratings risk inherent in an increase in the importance of non-utility assets, even if that increase might be accompanied by improved credit metrics, was foreshadowed by Standard & Poor's warning to Edison International in late 2008: "a renewed interest by EIX to provide meaningful support to the merchant energy operation would likely result in the parent's CCR [corporate credit rating] being lowered to non-investment grade."[7] The criteria employed by Standard & Poor's mean that the Commission cannot assume that Entergy will be able in the future to provide the financial support to the New York Facilities that may be needed in the types of stress scenarios that Enexus has been shown to be capable of handling, or that Entergy's credit rating will always be better than that of Enexus. Indeed, these constraints will continue to have a negative effect on Entergy's desire to provide support to the non-utility nuclear business. Enexus, in contrast, will not face these constraints in supporting the New York Facilities.

Petitioners have noted above that Entergy faces existing prohibitions on the cross-subsidization of its non-utility businesses and requirements relating to the priority of utility claims on corporate

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6 Research Update (Jun. 10, 2009), Attachment 13 to the response to DPS-35, at 5.

7 See www.firstenercast.com/e_news.php?cont=32044

finances, but Entergy's regulators have it in their power to promulgate further constraints.[8] In particular, regulators concerned about the risk to the credit ratings of Entergy's retail operations may initiate preemptive regulatory action to isolate these utility operations from Entergy's non-utility operations. The New York Commission itself was one of the leaders in ring fencing regulated utility operations to protect them from the financial risks associated with non-utility corporate affiliates,[9] and the Maryland Public Service Commission recently required Constellation Energy Group, Inc. ("CEG") to implement stringent ring fencing measures to protect Baltimore Gas & Electric Company, its regulated retail subsidiary, in connection with CEG's sale of half of its non-utility nuclear business to Électricité de France.[10]

Measures to protect Entergy's regulated utility operations, whether actions by Entergy's management to protect their credit ratings or regulatory ring-fencing mandates like those imposed by New York and Maryland, are considerations that cannot be ignored in assessing the risk that captive New York ratepayers would face under Entergy's continued ownership of these facilities. Enexus, having no utility operations, will not be confronted with any requirements for such measures.

III. The Transaction Does Not Pose Any Incremental Risk to Captive New York Ratepayers Even in a Worst Case Scenario

Even in a worst case scenario — an extraordinarily unlikely scenario where financial challenges for the New York Facilities are so great that reorganization in bankruptcy of the

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8 Entergy's Arkansas regulator has explicitly stated that, if needed to protect against the consequences of a bond ratings downgrade, it would take measures to insulate utility customers from any such consequences. See Response to ALJ-4 and ALJ-5, Appendix 2, Summary of Regulatory Commission Orders, at 52-53.

9 Case 07-M-0906, Joint Petition of Iberdrola, S.A., Energy East Corp., RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corp. and Rochester Gas and Electric Corp. for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A., Order Authorizing Acquisition Subject to Conditions (January 6, 2009) at 43-46 and Appendix 1; Case 06-M-0878, National Grid PLC and KeySpan Corp., Order Authorizing Acquisition Subject to Conditions and Making Some Revenue Requirement Determinations for KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island (September 17, 2007) at 126-127.

10 Order No. 82986, In the Matter of the Current and Future Financial Condition of Baltimore Gas and Electric Co. (Maryland Public Service Commission (Oct. 30, 2009) at 41-42.

subsidiaries owning them would be required — it is not reasonable to conclude that captive New York ratepayers would be harmed by the proposed spin-off of Enexus given the protections inherent in the Bankruptcy Code. If Enexus, or an Enexus or Entergy subsidiary owner of the New York Facilities, sought to resolve pressing financial problems by means of a restructuring in bankruptcy, they would do so pursuant to Chapter 11 of the Bankruptcy Code, which provides for the "reorganization" of business entities in order to maximize enterprise value for all stakeholders. Importantly, under Chapter 11, a reorganizing company can restructure its balance sheet pursuant to a plan that, among other things, reduces debt and provides for an infusion of new money, in the form of either debt or equity financing. This ensures that the reorganizing entity has access to the capital necessary to preserve the value of its economically viable businesses.

During a Chapter 11 process, a company continues to operate its business as a so-called "debtor-in-possession." This means that the board and management stay in place and that the business is free to operate as it did prior to bankruptcy. The one key exception is that a debtor-in-possession must obtain court approval for proposed transactions outside the ordinary course of business. Interested parties, including state regulatory authorities, have standing to appear and be heard on any such proposals.

Bankruptcy courts customarily enter orders on the very first day of every large Chapter 11 case that allow the debtor-in-possession to obtain so-called debtor-in-possession, or "DIP," financing. The DIP financing process is well-developed. DIP financing is attractive to DIP lenders, in part because DIP financing typically is afforded extraordinary protections, including, in many cases, a senior priming lien on virtually all existing and future assets of the debtor. DIP financing is attractive for debtors in that it demonstrates to the market that the debtor has the wherewithal to ensure the uninterrupted operation of its business.

The efficacy of the bankruptcy process in minimizing harm to various stakeholders has been clearly demonstrated in the electric power sector, among many other sectors. As shown by the Diablo Canyon 1 and 2 nuclear units during PG&E's bankruptcy from 2001 to 2004 and by the Palo Verde 1, 2 and 3 nuclear units during El Paso Electric's bankruptcy from 1992 to 1996, nuclear facilities can maintain normal operation even while an owner is reorganizing in bankruptcy. In addition, as shown in the cases of three non-utility generating companies — NRG Energy, Mirant and Calpine, the companies each continued to operate its plants during bankruptcy reorganization and each has emerged as a viable corporate entity, despite entering the bankruptcy process with significantly higher leverage than Enexus.[11]

In summary, the proposed spin-off of Enexus does not pose any incremental risk to captive New York ratepayers even in the worst case scenario that the owner(s) of the New York Facilities sought to restructure their affairs in bankruptcy. Whether a reorganization is of Enexus or of an Enexus or Entergy subsidiary owner of the New York Facilities, the priority and consequent availability of debtor-in-possession bankruptcy financing assures that economically-viable generating facilities will have access to the funding necessary to operate without disruption. Petitioners, moreover, observe that, to the extent that reorganization under bankruptcy law might possibly have potential negative implications for New York ratepayers, Entergy's need to protect the credit ratings and access to capital of its regulated utility subsidiaries would make it more likely to make a bankruptcy filing relating to the New York Facilities than Enexus.

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[11] New York helped to facilitate the continuing operation of some of these companies' facilities by promptly approving their bankruptcy-related financings. Case 03-E-1298, Joint Petition of NRG Energy, Inc. *et al.* for Approval of the Issuance of Corporate Debt, Order Approving Financing (Nov. 25, 2003); Case No. 03-M-1551 Joint Petition of Mirant Bowline, L.L.C., *et al.* for Approval to Enter into an Agreement for Debtor in Possession Financing, Order Approving Financing (issued Nov. 6, 2003); Confirming Order (Nov. 28, 2003) and Order Approving Exit Financing (June 27, 2006).

IV. Conclusion

Petitioners' position on the financial capabilities issue has not changed since the last round of comments concluded on November 12, 2009. Based on still further analyses since that time, Petitioners continue to believe that the record more than adequately demonstrates that Enexus will be at least as capable as Entergy of continuing the safe, secure and reliable operation of the New York Facilities and, in certain circumstances, will be even more capable than Entergy of doing so. Given that in some circumstances Entergy may be less capable than Enexus to support the New York Facilities, Entergy's status quo ownership of those facilities is not without risks for captive New York ratepayers. Petitioners therefore respectfully submit that captive New York ratepayers will not be harmed by the transaction and that, in some circumstances, will indeed gain positive benefits from the formation of Enexus. Accordingly, Petitioners request that the transaction be approved by the Commission.

Dated: January 7, 2010

Respectfully submitted,

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VERIFICATION

STATE OF MISSISSIPPI)
)ss:.
COUNTY OF MADISON)

Dean Keller being duly sworn, deposes and states as follows:

1. I am Executive Vice President - Finance for Entergy Services, Inc. and Executive Vice President and Chief Financial Officer Designate for Enexus Energy Corporation.

2. I am authorized to sign this verification on behalf of Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear Operations, Inc., Entergy Corporation and Enexus Energy Corporation.

3. I have reviewed the foregoing Verified Reply Comments and the statements of fact contained therein are true and correct to the best of my knowledge, information and belief.

Dean Keller, EVP, CFO Designate

Sworn to and subscribed before me this 7 day of January, 2010.

Elizabeth Lee Giglio
Notary Public

STATE OF MISSISSIPPI
ELIZABETH LEE GIGLIO
NOTARY PUBLIC
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Commission Expires
October 21, 2013
MADISON COUNTY