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September 15, 2008

2008 SEP 15 PM 3:15

Hon. Gerald L. Lynch
Hon. David L. Prestemon
Administrative Law Judges
Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

Re: Case 08-E-0077 – Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 2 LLC, Entergy Nuclear Indian Point LLC, Entergy Nuclear Operations, Inc., NewCo and Entergy Corporation – Petition For a Declaratory Ruling Regarding a Corporate Reorganization or, in the Alternative, an Order Approving the Transaction and an Order Approving Debt Financings.

Dear Judge Lynch and Judge Prestemon:

Enclosed please find Staff's redacted Initial Comment in this proceeding, served today on all active parties via e-mail and regular mail. The trade secret redactions will be forwarded separately. Pursuant to the Commission's Rules of Procedure, 16 NYCRR §4.3(d), Trial Staff assigned to this proceeding are: Paul Eddy, Patrick Piscitelli and John Roberts.

Very truly yours,

Leonard Van Ryn
Peter Catalano
Staff Counsel

Enclosure
cc: All Active Parties

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 08-E-0077 - Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 2 LLC, Entergy Nuclear Indian Point LLC, Entergy Nuclear Operations, Inc., NewCo and Entergy Corporation – Petition For a Declaratory Ruling Regarding a Corporate Reorganization, or, in the Alternative, an Order Approving the Transaction and an Order Approving Debt Financings.

STAFF INITIAL COMMENT

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Dated: September 15, 2008
Albany, New York

TABLE OF CONTENTS

STATE OF NEW YORK
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(REDACTED)

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

STAFF INITIAL COMMENT

PRELIMINARY STATEMENT

As discussed in the Order Establishing Further Procedures issued in this proceeding,[1] Entergy Corporation (Entergy) has requested authority for a corporate reorganization whereby a new holding company will assume indirect ownership of Entergy's nuclear generation facilities located in New York -- the James A. FitzPatrick Nuclear Power Plant (FitzPatrick), the Indian Point 2 Generating Plant (Indian Point 2) and the Indian Point Nuclear Generating Unit No. 3 (Indian Point 3), as well as the Indian Point I Nuclear Generating Plant that is no longer in operation (collectively, the "three New York nuclear plants"). The new holding company, Enexus Energy Corporation (Enexus), would also own three other nuclear generating facilities located

[1] Case 00-E-0077, Entergy Nuclear Indian Point 2, LLC, et al., Order Establishing Further Procedures, (issued May 23, 2008) (Order Establishing Further Procedures or Procedural Order).

outside of New York. Enexus intends to issue up to $4.5 billion in notes, and to enter into a senior revolving credit facility and other credit facilities in an amount not to exceed $2.0 billion, for use as working capital and to support electric wholesale price hedging activities. The spin-off from Entergy to Enexus is a transfer requiring approval under Public Service Law (PSL) §70 and the debt issuances require approval under PSL §69.

Procedural History

The Attorney General of the State of New York (AG), the County of Westchester (Westchester) and RiverKeeper, Inc. (RiverKeeper) oppose granting the approvals Entergy seeks, because, they claim, the information Entergy submitted was inadequate to support the relief requested.[2] As a result, the Commission decided that parties would be permitted to conduct additional discovery into the petitioners' filing, for a period of at least 60 days from the issuance of the Procedural Order.[3] Moreover, Administrative Law Judges (ALJs) were assigned to preside over the proceeding and resolve any discovery disputes. Discovery was subsequently conducted by the AG, RiverKeeper, Westchester, Staff of the Department of Public Service (Staff), and, after their intervention in this proceeding, Assemblyman

[2] See Procedural Order, p. 2.

[3] Id., p. 5.

Richard Brodsky (Assemblyman Brodsky) and the County of Oswego (Oswego).

The procedural course for this proceeding was set in two Rulings, the August 14, 2008 Ruling on Discovery Process Schedule and Scope of Issues (August 14 Ruling) and the August 26, 2008 Ruling Setting Schedule For Further Comments (August 26 Ruling). The August 14 Ruling established a process for arriving at dates for the filing of initial and reply comments. It also identified six issues requiring resolution in this proceeding. The August 26 Ruling implemented the August 14 Ruling's filing process by setting September 15, 2008 as the deadline for initial comments and September 29, 2008 as the date for responsive comments.

The Issues in This Proceeding

The Procedural Order notes that the scope of discovery in this proceeding is bounded by the public interest inquiry under PSL §70 and §69. Those issues included the sufficiency, adequacy and security of financial support for the decommissioning of the nuclear facilities, and arrangements for managing, operating and maintaining the nuclear facilities. The Order explicitly excluded from the scope of this proceeding questions that are properly the subject of proceedings on the re-licensing of nuclear facilities that belonged before the Nuclear Regulatory Commission (NRC).

In effectuating those principles, the August 14 Ruling identified six questions raised in this proceeding. Two of those questions were related to the Value Sharing Agreement (VSA) between the Entergy subsidiaries owning the New York nuclear facilities and the New York Power Authority (NYPA). As detailed in the Ruling, it appeared that the spin-off of the nuclear facilities into the Enexus holding company might affect payments under the VSA flowing from the Entergy subsidiaries to NYPA.

On August 25, 2008, however, Entergy filed an agreement resolving any dispute between it and NYPA over the effect of the Enexus transaction on the VSA. In that agreement, Entergy agreed that it would not treat the spin-off to Enexus as a cessation event under the VSA, and so the Entergy subsidiaries owning the New York nuclear facilities would continue to pay amounts due and owing to NYPA under the VSA. As a result, the VSA issue is removed from this proceeding.

Four issues remain. The first is the effect of the Enexus transaction on the ability of the nuclear plant owners to meet financial obligations. The second is the effect of the transaction on other management obligations, such as the ability to operate the plants and to decommission them once operations are terminated. The third issue is the standard for review under PSL §70. The fourth issue is the standard for review

under PSL §69. Staff's analyses of these issues are set forth below.

DISCUSSION

Under these circumstances, the public interest is satisfied if it is demonstrated that the proposed Entergy - Enexus transaction poses no risk of harm to the interests of captive ratepayers. That standard is not met, because, as the spin-off is currently structured, Enexus will be financially less robust than Entergy, the current indirect owner of the nuclear facilities. As a result, the nuclear plants are more exposed to financial risks, which might affect the continued successful operation of the plants. As discussed in the Procedural Order, customers are particularly reliant on these plants for meeting baseload generation requirements essential to system reliability. To address this shortcoming, the transaction should be approved only upon satisfaction of conditions that will preserve the financial strength of the ultimate owner of the three New York nuclear plants.

Other aspects of transaction do not appear to cause significant harm to customers. Day to day operations of the plants, for example, will likely be unaffected. Since Enexus is merely a holding company inserted into the upstream ownership structure, the existing entities that own the plants directly, and the employees that actually work at the plants, will remain

in place, continuing the existing reliability of service. Arrangements made for managing plant operations and shared services are also not adversely affected. As to the decommissioning of the nuclear facilities at the end of their useful lives, existing arrangements are again continued without adverse impact. As a result, no conditions need be attached to approval of the transaction for these matters.

The standard of review under PSL §70 for lightly-regulated generators such as these nuclear facilities has been set forth in numerous prior Orders, including the Procedural Order. While the operation of nuclear facilities raises issues that are not present for other types of lightly-regulated generation, the standard for review of those additional issues should nonetheless remain the same as for other lightly-regulated generators -- that the transaction poses no risk for harm to regulated ratepayers. In other words, while the scope of the proceeding is expanded because of the nature of nuclear generation, the standard for review does not change.

Similarly, the standard for review of lightly-regulated generators under PSL §69 is set forth in numerous prior Orders. Those precedents should be followed. So long as conditions for ensuring financial viability adhere and are complied with, no additional conditions are needed for §69 approval.

Financial Obligation Issues

The restructuring transaction will involve Enexus issuing up to $4.5 billion of debt maturing between eight and twelve years after issuance. Entergy states that the proceeds of the debt financing will be used to reduce, retire, or pay off its credit facilities, retire or pay off senior notes, to repurchase common stock, and to provide working capital to Enexus. In addition, Enexus intends to enter into a senior revolving and a term letter of credit facility not to exceed $2.0 billion. These credit facilities will be put in place to finance certain capital expenditures and acquisitions, for other business purposes, as a source of working capital and to provide collateral support for obligations arising from hedging contracts. These facilities would be outstanding for up to five years.

Both the notes and the revolving and term letter of credit facilities may have covenants that restrict Enexus and its subsidiaries from entering into future financial contracts. In addition, the financings may be secured by the six nuclear plants and by the pledge or assignment of the nuclear plants' contracts, including power purchase agreements and fuel contracts. The final terms and conditions will not be decided until syndication and pricing just prior to the closing of the financings.

Entergy has informed Standard and Poor's (S&P) that Enexus will distribute about $4 billion of the proceeds to Entergy and have a negative equity position of $555 million subsequent to the reorganization. Enexus is projecting a positive equity balance of about $64.5 million and total liabilities and equity of about $9,265 million by year end 2010. The resultant 2010 equity ratio is projected to be .7%. This very high level of financial risk combined with the inherent business risk results in an expected non-investment grade corporate credit rating of BB from S&P.[4] S&P defines BB securities as those that face "major ongoing uncertainties or exposure to adverse business, financial, or economic conditions which could lead to the obligor's inadequate capacity or willingness to meet its financial commitment."

This BB rating for Enexus is problematic for captive ratepayers. The interest rate of non-investment grade securities is generally considerably higher than investment grade bonds. In addition, a non-investment grade company will have a much more limited ability to issue securities than an investment grade firm. In a situation where capital must be raised to meet capital requirements, a non-investment grade firm may need to pay higher interest, if it is able to raise funds at all.

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[4] IR Response EN-23 (DPS-4).

In its required Security and Exchange Committee (SEC) filing on July 31, 2008 Enexus disclosed the risk characteristic resulting from the substantial indebtedness of the company and how it could negatively affect its financing options and liquidity position. Under the required risk characteristics disclosure, Enexus states:

> *We may not have access to capital on acceptable terms, and if we are not able to obtain sufficient financing, we may be unable to maintain or grow our business.*"
>
> Following the separation, our credit ratings are expected to be below investment grade, which is below the current ratings of Entergy. Differences in credit ratings affect the interest rate charged on financings, as well as the amounts of indebtedness and types of financing structures that may be available to us. Regulatory restrictions and the terms of our indebtedness will limit our ability to raise capital through our subsidiaries, pledge the stock of our subsidiaries, encumber the assets of our subsidiaries and cause our subsidiaries to guarantee our indebtedness. We may not be able to raise the capital we require on acceptable terms, if at all. If we are not able to obtain sufficient financing, we may be unable to maintain or grow our business. In addition, our financing costs may be higher than they were as part of Entergy as reflected in our historical financial statements. Further, issuances of equity securities will be subject to limitations imposed on us in the Tax Sharing Agreement.[5]

In addition, the petitioners have stated that the debt issuances may also contain covenants that limit Enexus or its

[5] Enexus SEC Form 10 (filed July 31, 2008), page 34.

subsidiaries from incurring additional debt or preferred stock. Again, as stated in the required Enexus SEC filings:

> *Our financing arrangements will subject us to various restrictions that could limit our operating flexibility.*
>
> We expect that our credit facilities and other financing arrangements will contain covenants and other restrictions that, among other things, will require us to satisfy certain financial tests and maintain certain financial ratios and restrict our ability to incur additional indebtedness. In addition, we expect that both our debt securities and the credit facilities might restrict our ability to incur debt, pay dividends and create liens. The restrictions and covenants in our anticipated financing arrangements, and in future financing arrangements, may limit our ability to respond to market conditions, provide for capital investment needs or take advantage of business opportunities by limiting the amount of additional borrowings we may incur.[6]

The proposed transaction also envisions Enexus entering into a cumulative $700 million Support Agreement with the owners of the six nuclear plants. The Support Agreement can be drawn upon by any of the six nuclear plants for money necessary to pay "Operating Expenses or meet NRC requirements". Operating Expenses are defined within the Support Agreement as "expenses to pay the pro rata expenses of maintaining the Facilities' safely and protecting the public health and safety," provided that the aggregate amount outstanding to all the nuclear operating plants, at any one time, shall not exceed $700

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[6] Enexus SEC Form 10 (filed July 31, 2008), page 34.

million. The $700 million support agreement is a financial assurance required by the Nuclear Regulatory Commission and replaces the following series of similar support agreements between Entergy's New York operating nuclear plants and various Entergy's subsidiaries:

1. $35 million guarantee to the NRC by Entergy International LTD LLC, on behalf of ENIP2.
2. $20 million guarantee to the NRC by Entergy Global, LLC, on behalf of ENIP2.
3. $50 million guarantee to the NRC by Entergy International LTD LLC, on behalf of ENIP3 and ENFP.
4. $20 million guarantee to the NRC by Entergy Global, LLC on behalf of ENIP 3.
5. $20 million guarantee to the NRC by Entergy Global on behalf of ENFP.

The petitioners believe that the $700 million cumulative support agreement covering all six nuclear plants is superior to the support agreements currently in place. From a financial perspective, this is incorrect. It is important to note that the Support Agreement can only be used to meet NRC requirements or for operating expenses. Therefore, the Support Agreement would not be available to remedy reliability or other non-safety related concerns.

Due to financial constraints and covenants, it is most likely that any capital needed to address other or additional concerns would have to come from cash flows or the uncommitted portion of the $2.0 billion credit facility. Beyond those

sources, additional capital would come at a very high cost or, most likely, not at all.

Under the current organizational structure, the ultimate parent, Entergy, is rated BBB, and so is an investment grade company. Consequently, Entergy would have much greater access to the financial markets than the proposed Enexus company. In addition, while the existing support agreements are with non-rated entities, Entergy stands as the ultimate parent to those entities. Under the proposed Enexus arrangement, the new $700 million support agreement is backed by Enexus -- a firm that S&P rates as exposed to "inadequate capacity or willingness to meet its financial commitment."

Therefore, the proposed transaction poses the potential for harm to ratepayers. Enexus will be more risky than Entergy, and its new Support Agreements are insufficient to offset those risks. This increases the likelihood that the New York nuclear plants will not be able to adequately perform their baseload function if financial difficulties are encountered. To protect captive ratepayers, Staff proposes the following remedies.

In response to IR Response EN-18S (AG-18), Entergy has submitted various sensitivity analysis illustrating the estimated financial impacts of alternatives to its base case estimates. Each scenario estimates the financial impact of

altering an individual assumption from the base case. The scenarios **[begin trade secret]** [redacted] **[end trade secret]** because the proposed bond covenant would preclude additional financings. Unless the credit holders of the facilities agree to re-negotiate the covenant, Enexus would be precluded from raising the necessary capital.

In order to provide adequate assurance that Enexus can meet its financial obligations Staff seeks either of the following two alternatives in the reorganization:

1. Enexus capitalizes itself in a manner that achieves an investment grade bond rating, which is a minimum rating of BBB- from S&P and Baa3 from Moody's, and the financing documents entered into by Enexus do not contain any covenants that limit the future financing flexibility of Enexus. If Enexus's bond rating falls below BBB- from S&P or Baa3 from Moody's, Enexus will not pay dividends or repurchase common equity until the bond ratings return to at least minimum investment grade.

[7] A 60% capacity factor would be the equivalent of a shutdown of two of the six nuclear plants Enexus will own.

2. If an investment grade bond rating is not achieved and maintained, Enexus must maintain $1.0 billion in a trust fund set aside to remedy any reliability or other non-safety related concerns at the nuclear plants. These funds would be set aside to satisfy capital needs not covered by the Support Agreement.

The transaction may be approved using the alternative Entergy selects, or, if it declines to choose, the Commission should require that one or other of the conditions be satisfied to obtain approval.

Operational Obligation Issues

Under PSL §70, approval of a transfer requires a showing that a new owner could successfully operate the generation facility it is acquiring. When these nuclear facilities are transferred, it must also be demonstrated that arrangements for decommissioning the plants at the end of their useful lives will not be adversely affected. Entergy and Enexus have made the requisite showings.

A. Ownership and Operation Arrangements

In this spin-off transaction, Enexus will replace Entergy as the upstream holding company for the New York nuclear plants. This spin-off does not affect the composition of the entities that actually own those plants directly, or the personnel currently assigned to them, which will remain in place. Since these entities and personnel have successfully operated these plants since Entergy acquired them in 2001, there

is no reason to believe that they will not continue to successfully operate them in the future.

The primary responsibility for operating the plants currently resides in Entergy Nuclear Operations, Inc. (ENO), which contracts with the various entities that own the three New York nuclear plants to provide operational services. In its petition, Entergy states that ENO will continue its existing operations, without change to its technical qualifications, but will be converted from a corporate form of organization into a limited liability company form, and be renamed as ENOI LLC (ENOI). ENOI would be owned 50% by Entergy and 50% by Enexus, both indirectly.[8] Subsequently, Entergy decided another entity, EquaGen Nuclear LLC (EquaGen), will be created as the holding company for ENOI; EquaGen will be 50% owned by Entergy and 50% by Enexus.[9]

EquaGen will continue to operate, maintain and make capital improvements at the nuclear plants in accordance with existing operating agreements and the NRC licenses for the facilities.[10] Joint ownership of EquaGen equally by Entergy and Enexus appears a reasonable means for managing that entity, which will provide services equally to the nuclear plants that

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[8] Petition, p. 8.

[9] IR Responses EN-52&52S (AG-33).

[10] Petition, p. 16.

will remain with Entergy, because owned by its fully-regulated electric utility subsidiaries, and the six nuclear plants that operate in competitive markets (including the three New York nuclear plants), which Enexus will own.

Both the regulated and competitive nuclear plants should benefit from the economies of scale and the level of expertise a larger entity like EquaGen can provide. Equal ownership of EquaGen restricts the risk that one fleet of plants will be benefited over the other. The contractual arrangements between EquaGen and the various operating entities also constrain that risk. Under those contracts, EquaGen will continue existing procedures for assessing costs among the various plants in the Entergy and Enexus nuclear fleets, which ensures that the expenditure amounts and accounting distributions are reasonable and appropriate.[11]

B. Decommissioning Arrangements

Entergy and Enexus have also demonstrated that the transaction will not adversely affect arrangements made for decommissioning the New York nuclear facilities at the end of their useful lives. When traditional utilities like Con Edison owned the nuclear facilities, expenses for decommissioning were funded in advance. While the NRC has exclusive jurisdiction over the decommissioning of radioactive plant components, the

[11] IR Response EN-48 (DPS-17).

Commission retains PSL jurisdiction over the decommissioning of non-radioactive components. Under that jurisdiction, nuclear plant owners were required to restore nuclear sites beyond merely dismantling and removing radioactive components.

The existing arrangements for decommissioning are those specified in the Entergy Transfer Order, where Entergy's acquisition of Indian Point 2 (and the shuttered Indian Point 1 site) from Consolidated Edison Company of New York, Inc. (Con Edison) was approved.[12] In the Entergy Transfer Order, conditions arrived at through a Joint Proposal (JP) were adopted by the Commission. The JP, in turn, depended heavily upon an Asset Purchase and Sale Agreement (APSA) between Con Edison and Entergy.

Under the JP and APSA, Con Edison transferred to Entergy the amount of $430 million in funding for decommissioning Indian Point 2, which would reside in trust agreements supervised by the NRC. That funding would support both the decommissioning of radioactive components and structures and the restoration of the site after radioactive materials were removed. If Entergy does not immediately decommission Indian Point 2 upon expiration of its NRC license by dismantling and removing the generating facilities, and

[12] Case 01-E-0040, Consolidated Edison Company of New York, Inc., Order Authorizing Asset Transfer (issued August 31, 2001).

instead, in conformance with NRC decisions, entombs or stores facilities on-site, 50% of the funds remaining in the decommissioning trust upon completion of such an alternate decommissioning method would be returned to ratepayers.[13] In assuming these obligations, Entergy agreed to decommission Indian Point in accordance with NRC regulations, any contractual obligations, and commitments made in a March 16, 2001 letter it supplied to Westchester County during the course of Case 01-E-0040.[14]

Except for the treatment of the $430 million in funding, the conditions adopted in the Entergy Transfer Order there would also apply, through the Entergy Light Regulation Order,[15] to Entergy's decommissioning of the Indian Point 3 facility and the FitzPatrick facility, if NYPA, which sold those plants to Entergy, decides to assign decommissioning responsibility to Entergy.[16] To date, NYPA retains the

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[13] Entergy Transfer Order, p. 9; APSA, pp. 64-65.

[14] IR Response EN-98 (WC-13). As memorialized in the letter provided there, Entergy committed to, among other things, restoring the Indian Point site to a "Greenfield" condition, and to extend that commitment to Indian Point 3 if NYPA relinquished decommissioning responsibility for that facility to Entergy.

[15] Case 01-E-0113, Entergy Nuclear Operations, Inc., Order Providing For Lightened Regulation of Nuclear Generating Facilities (issued August 31, 2001), p. 11.

[16] IR Response EN-88 (WC-3). NYPA is beyond PSL jurisdiction and PSL-imposed decommissioning responsibilities.

decommissioning liability and the NRC-regulated decommissioning trusts for those plants.

Entergy's decommissioning obligations will be continued in Enexus' hands, and it will assume Entergy's decommissioning responsibilities and duties under the APSA and the March 16, 2001 letter. Consequently, Enexus will take responsibility for the decommissioning trust for Indian Point 2 that was initially funded at $430 million, and will maintain and manage that trust in conformance with NRC regulations. It is expected the trust will fund both radioactive component and structure decommissioning, and, after radioactive components are removed, additional non-radiological decommissioning and site restoration. The arrangement for returning 50% of excess funds to ratepayers, required upon alternate methods of decommissioning, will also remain in place.

Site restoration means that Enexus must return the nuclear plant sites that it decommissions to an unrestricted and natural state, under PSL jurisdiction, after it dismantles and removes radioactive and non-radioactive components and structures. Entergy accepted that obligation under the Entergy Transfer Order, where it promised that site restoration to that state would be accomplished,[17] and the obligation extends to Indian Point 3 and Fitzpatrick under the Entergy Light

[17] Case 01-E-0040, Petition, Affidavit of Edward Rasmussen, p. 4.

Regulation Order, if NYPA relinquishes decommissioning responsibility. Enexus assumes the obligation upon consummation of the spin-off transaction.[18]

Entergy submitted in this proceeding detailed decommissioning plans for each of the three New York nuclear facility sites, establishing the decommissioning activities Enexus must perform to accomplish radioactive component removal and site restoration.[19] Other decommissioning issues, such as soil contamination from leaking spent fuel pools, have been addressed.[20] Given these submittals, there is no reason to believe that Enexus will perform more poorly than Entergy in performing these decommissioning activities or that any remedy which would have been available against Entergy would not also be available against Enexus if it were to fall short in performing its obligations.

As a result, Entergy and Enexus have demonstrated that prior decommissioning arrangements have not been disturbed by the transaction, and that prior conditions and requirements will remain in place. While conditions are not necessary to reinforce these understandings, the Commission should provide

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[18] IR Response EN-91 (WC-6).

[19] IR Response EN-13 (AG-13); IR Response EN-14 (AG-14).

[20] IR Response EN-49 (DPS-18) (EN-"49" is mistakenly and duplicatively numbered EN-"48").

that approval of the transaction here is premised upon Enexus' compliance with all representations made in this proceeding, and all understandings, promises and requirements made or adopted in Case 01-E-0040 and Case 01-E-0113. A failure by Enexus to accept any representation or obligation provided for or required in those proceedings should render any approval granted here voidable.

The PSL §70 Standard of Review

In its petition, Entergy sought review of its transfer to Enexus through a Declaratory Ruling issued under the Wallkill presumption.[21] Under that presumption, PSL §70 regulation does not adhere to a transfer of ownership interest in parent entities upstream from the affiliates owning and operating New York competitive electric generation facilities unless there is a potential for harm to the interests of captive utility ratepayers sufficient to overcome the presumption.

In the Procedural Order, it was decided that Entergy could not avail itself of the presumption under these circumstances, because, as decided in the Entergy Regulation Order, "nuclear facilities have a greater impact on the public interest than hydro and fossil facilities" and "nuclear generators will be subject to more requirements under [the PSL]

[21] Case 91-E-0350, Wallkill Generating Company L.P., Order Establishing Regulatory Regime (issued April 11, 1994).

than other forms of generation."[22] As a result, the more attenuated review that would occur in a request for a declaratory ruling was eschewed, in favor of applying a full §70 review to the transaction.

While the Procedural Order denied Entergy use of the Wallkill presumption, and expanded the scope of the issues that would be considered beyond those typical of a proceeding involving lightly-regulated generation facilities, it did not change the standard of review under §70 applicable to lightly-regulated entities. As established in the AES and Carr Street Orders, under lightened regulation, less stringent filing requirements are imposed upon competitive generators, and scrutiny when reviewing those filings is reduced.[23] That these standards apply to Entergy is confirmed by the Entergy Light Regulation Order, which cites the AES and Carr Street Orders and reiterates the principles stated in those Orders as applicable to Entergy.

As discussed in those Orders, it is neither necessary nor appropriate to apply provisions of the PSL to plants operating in competitive markets in the same fashion as those

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[22] Procedural Order, p. 4, quoting Entergy Regulation Order, p. 9.

[23] Case 99-E-0148, AES Eastern Energy, L.P., Order Providing For Lightened Regulation (issued April 23, 1999); Case 98-E-1670, Carr Street Generating Station, L.P., Order Providing For Lightened Regulation (issued April 23, 1999).

provisions are applied to monopoly utility service providers. Since those competitive generators are subject to market forces, and the wholesale prices they obtain are beyond PSL jurisdiction, stringent regulatory requirements need not adhere. Moreover, excessive regulation could interfere with the fluid operation of wholesale generation markets, to the actual detriment of ratepayers.[24]

As the Commission has stated many times, "in conducting a review under §70 that pertains to an electric corporation operating in wholesale electric markets, we examine...the potential for...transactions detrimental to captive ratepayer interests."[25] That standard applies here, because the nuclear plants operate in wholesale electric markets. To apply different, more stringent tests would upset the fluid operation of wholesale markets. Participants in those markets, even if they own nuclear facilities, must be able to operate within a competitive environment. If they cannot, then the advantages of competitive markets could be lost.

Therefore, the distinction between this proceeding and others involving lightly-regulated generators is that the scope

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[24] See, e.g., Case 08-M-0659, Regulation of Owners of Stock Interests, Order Instituting Proceeding and Notice Soliciting Comments (issued June 23, 2008).

[25] Case 08-M-0436, KeySpan-Ravenswood LLC, Order Approving Transfers and Making Other Findings (issued August 21, 2008), p. 17.

of issues subject to examination when a nuclear facility is involved is broader than for other types of facilities. Areas like decommissioning and the financial stability needed to support the safe and adequate operation of the nuclear facility may require inquiry, where those matters would not be raised if other types of generators participating in wholesale markets were at issue. The standard of review, however, should be consistent with that applicable to wholesale generators generally -- that the transaction does not pose the potential for harm.

This no-harm test is different from the positive benefits test the Commission has applied when the transfers of interests in fully-regulated utilities are at issue. Those cases address regulated monopoly service to captive ratepayers at the just and reasonable rates set in administrative proceedings. Applying a stricter and more demanding standard in those cases is appropriate, because the entity is not subject to competitive market pressures and must be more closely supervised through regulatory means.[26] Such fully-regulated entities, however, are distinguishable from the lightly-regulated entities

[26] See, e.g., Case 06-M-0878, National Grid plc and KeySpan Corporation, Order Authorizing Acquisition Subject to Conditions and Making Some Revenue Requirement Determinations For KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island (issued September 17, 2007).

that operate in competitive markets, such as Enexus when it owns the three New York nuclear facilities.

As discussed above, Staff has examined the additional issues raised by a transfer of nuclear generation facilities, to ensure that captive customer interests are not harmed by this transaction. Staff has identified those potential harms that the transaction poses and has developed conditions to alleviate those harms. Subject to those conditions, the transaction should be approved, because, as conditioned, it does not pose the potential for harm to captive ratepayers.

The PSL §69 Standard of Review

To accomplish the spin-off transaction, Enexus will issue up to the $4.5 billion of debt and the senior revolving and term letter of credit facilities in an amount not to exceed $2.0 billion, which are discussed above. Both the notes and the credit facilities could be subject to covenants that restrict Enexus and its subsidiaries from entering into future financial debt arrangements. In addition, the financings may be secured by the six nuclear plants Enexus will own and by the pledge or assignment of nuclear plant contracts, including power purchase agreements. The final terms and conditions will not be decided until the syndication and pricing of the debt, just prior to the closing of the financings.

The approval of the financings should be subject to the financial conditions and covenant restriction Staff proposes above. As with PSL §70, the scope of the issues under review here is greater than the scope that is typical of PSL §69, as it has been applied to lightly-regulated generators participating in wholesale markets. As discussed in the AES and Carr Street Orders, PSL §69, like other PSL Article 4 provisions, pertains to wholesale generators, but is implemented in a fashion that limits its impact in a competitive market, with the extent of scrutiny afforded to a particular transaction reduced to the level the public interest requires. Wholesale generators are also afforded flexibility to change, without prior approval, the identity of the entities providing the financing, payment terms, and the amount financed, up to the maximum amount they have specified.[27]

Under this standard of review, however, the Commission must still determine that a proposed financing appears to be for a statutory purpose and is in the public interest. As PSL §69 provides, the purpose of a financing must be reasonably "necessary" for the "construction, completion, extension or

[27] Case 07-E-1390, Empire Generating Co., LLC, Order Granting Lightened and Incidental Regulation, Approving Financing and Ruling on Review of an Acquisition Transaction (issued February 19, 2008); Case 07-E-1003, Canandagua Power Partners 2, LLC, Order Providing For Lightened Regulation and Approving Financing (issued September 17, 2008).

improvement of [electric] plant...or for the improvement or maintenance of [electric] service, or for the discharge or lawful refunding of [electric] obligations or for the reimbursement of monies actually expended from income," and are not "in whole or in part reasonably chargeable to operating expenses or to income."

When reviewed with the reduced scrutiny applicable to wholesale generators, Enexus and Entergy have met this standard for the purposes of the debt, if not for the amount. The funds obtained from the financings for matters related to Enexus' operation of the nuclear generating facilities, and for refunding Entergy debt. Such a refunding is a purpose typical of a spin-off transaction such as this, where assets devolve into a new corporation. Therefore, the statutory purpose provision of PSL §69 has been met.

The public interest standard under PSL §69, however, is another matter. As with PSL §70, the public interest inquiry here is broader in scope than for other lightly-regulated wholesale generators, because Enexus will own the nuclear plants that raise broader public interest concerns. The amount of debt Enexus plans, and its debt covenants, are therefore matters which may be considered here.

Normally, the amount of the debt a wholesale generator decides to incur is not a matter of concern to captive

ratepayers, because if the owner of the generation facility suffers financially as a result, its financial distress is resolved through competitive market mechanisms. Because of the importance of nuclear facilities to captive ratepayers, as described in the Procedural Order, financial distress at a nuclear operator has a greater impact. Moreover, the total amount of the debt Enexus would assume affects the financial resources available to support nuclear operations and decommissioning. The amount of the debt is therefore an issue that should be addressed and resolved in this proceeding as a condition of approving the transaction.

As discussed above, the conditions that Staff proposes should result in an Enexus that is supported at a level of financial resources adequate to meet its responsibilities. The debt Enexus plans to incur under PSL §69 should be tailored to those conditions. Once Enexus has done so, the amount of the debt can be approved within the framework of those conditions, without the undue interference of determining the exact amount of the debt administratively.

Also as discussed above, one debt covenant should be specified if obtaining an investment grade bond rating for Enexus is selected as the means for avoiding harm to captive regulated ratepayers. That specification is a prohibition against a covenant that would restrict future financings.

The conditions discussed above should prevent harms to the interests of captive ratepayers, meeting the PSL §69 public interest requirement. Once these conditions have been adopted, however, no further review of the arrangements Enexus will make for its financings is necessary. Like other lightly-regulated generators, it may be afforded the financing flexibility needed to participate most efficiently and effectively in competitive markets, because it does not appear that any harm to regulated ratepayers will arise from affording it that flexibility. Therefore, the financings Entergy proposes may be approved, subject, however, to the conditions discussed above.

CONCLUSION

For the reasons discussed above, the spin-off transaction proposed by Entergy Corporation and Enexus Energy Corporation should be approved, subject to the conditions proposed above.

Respectfully submitted,

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