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OFFICE OF THE ATTORNEY GENERAL

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September 29, 2008

Honorable Jaclyn A. Brilling  
Secretary  
New York State Public Service Commission  
3 Empire State Plaza  
Albany, NY 12223

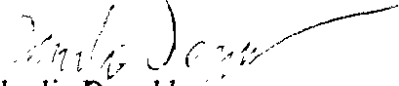
Re: PSC Case No. 08-E-0077 - Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 2 LLC, Entergy Nuclear Indian Point 3 LLC, Entergy Nuclear Operations, Inc., NewCo, and Entergy Corporation - Joint Petition for a Declaratory Ruling Regarding a Corporate Reorganization, or, in the Alternative, an Order Approving the Transaction and an Order Approving Debt Financing

Dear Secretary Brilling:

Enclosed please find for filing an original of the Attorney General's September 29, 2008 reply comments in the Entergy reorganization proceeding. As the Administrative Law Judges directed, we are serving the ALJs and parties electronically.

Thank you for your attention and consideration. If there are any questions, please call me.

Very truly yours,

  
Charlie Donaldson  
Assistant Attorney General

cc: Hon. Gerald L. Lynch (electronically)  
Hon. David L. Prestemon (electronically)

Service list (electronically)



NEW YORK STATE  
PUBLIC SERVICE COMMISSION

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Proposed Corporate Reorganization  
of Entergy Corporation, et al.  
and Related Debt Financing

PSC Case No. 08-E-0077

ALJ Gerald L. Lynch

ALJ David L. Prestemon

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REPLY COMMENTS SUBMITTED BY  
THE NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL  
PURSUANT TO  
THE JULY 23, 2008 RULING CONCERNING DISCOVERY  
AND SEEKING COMMENTS ON A PROPOSED PROCESS AND SCHEDULE,  
AND THE AUGUST 14, 2008 RULING ON  
DISCOVERY, PROCESS, SCHEDULE, AND SCOPE OF ISSUES

Charlie Donaldson  
Assistant Attorney General  
Environmental Protection Bureau  
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120 Broadway  
New York, NY 10271

September 29, 2008

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## **PRELIMINARY STATEMENT**

The Office of the Attorney General of the State of New York (“OAG”) respectfully urges the New York State Public Service Commission (“PSC” or “Commission”) to reject the Entergy Corporation’s (“Entergy”) January 28, 2008 petition requesting approval to: transfer of ownership of its four New York and four out-of-state nuclear power plants to a separate, new corporation; authorize the new corporation to borrow up to \$6.5 billion “secured” with junk bonds; and allow the that corporation to enter into numerous hedging agreements.

Nothing submitted by Entergy or any other party in the September 15, 2008 initial briefs changes the fact that the new corporation would have inadequate capital to meet many obligations that accompany the operation and decommissioning of aging nuclear power plants. Indeed, OAG, the County of Westchester (“Westchester”), Riverkeeper, Inc. (“Riverkeeper”), and the Department of Public Service staff (“DPS Staff”) oppose the proposed Enexus Energy Corporation (“Enexus”) spinoff on the grounds that Enexus would not have adequate resources to ensure the safe and reliable operation of the Indian Point reactors and facilities. OAG, Westchester, and Riverkeeper oppose the reorganization for additional reasons, including that the proposal would reduce the resources available to decontaminate Indian Point and return that site for unrestricted use by the public. Additionally, nothing submitted by Entergy changes the fact that the governance of a critical subsidiary could easily become confused or deadlocked. And nothing submitted by Entergy establishes that the accompanying massive debt is necessary and prudent. In short, the PSC should reject the proposal because it would make it more difficult for New York to reach \$25 billion of the \$35 billion in resources currently supporting Indian Point, lead to ineffective corporate governance of the proposed EquaGen LLC subsidiary, and shackle Enexus with risky financing and risk an incomplete cleanup of the site when the Indian Point plants close.

## ADDITIONAL BACKGROUND

Since the filing of the initial comments, a serious financial crisis has enveloped Wall Street and the Nation's capital markets. One salient feature of the crisis is the lock up of the lending markets that has made it difficult even for corporations and individuals with established credit to borrow capital. See Michael M. Grynbaum, *Credit Markets Remain Tight Amid Uncertainty*, New York Times (September 25, 2008).<sup>1</sup> According to Treasury Secretary Henry Paulson, "bad loans have created a chain reaction and ... our credit markets froze up – even some Main Street non-financial companies had trouble financing their normal business operations. If that situation were to persist, it would threaten all parts of our economy."<sup>2</sup> The Federal Reserve Board and the Department of Treasury have attempted to address this financial crisis and have proposed that taxpayers cover the losses incurred by investment banks through a series of poorly secured loans for collateral having inflated appraisals. At this time, it is not clear what the finance markets will look like after order is restored. Entergy, however, has not updated its proposal to reflect the tectonic shift in the finance markets since its filing with the PSC nine months ago, and it is no longer clear that Entergy/Enexus/ EquaGen/Entergy Nuclear Operations now could obtain the capital it sought back in January. What's more, Entergy continues to pursue PSC approval of a transaction that echoes many of the questionable practices of the financial sector over the last decade: diffuse or opaque corporate and individual responsibility, locking in the profits early while attempting to arrange away or postpone long-term costs and expenses, and below-grade investment paper, *i.e.*, junk bonds.

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<sup>1</sup> Available at <http://www.nytimes.com/2008/09/25/business/25markets.html?hp> (last visited September 25, 2008).

<sup>2</sup> *Turmoil in U.S. Credit Markets: Recent Actions regarding Government Sponsored Entities, Investment Banks and other Financial Institutions: Hearing before the House Committee on Financial Services*, 110th Cong. (September 24, 2008) (testimony of Treasury Secretary Henry M. Paulson, Jr.), available at <http://www.treas.gov/press/releases/hp1154.htm>.

Also noteworthy is that in its September 15, 2008 comments the DPS Staff opposes Entergy's proposal unless Enexus either (1) begins operation with an investment grade bond rating, agrees not to accept restrictions on its ability to borrow, and suspends dividends and stock repurchases if it falls below investment grade, or (2) maintain a trust fund containing \$ 1 billion in cash that is dedicated for capital needs not supplied by the highly-conditional Enexus Support Agreement proposed by Entergy.<sup>3</sup> While OAG submits that these conditions are inadequate, Entergy opposes even these half measures. Given Entergy's opposition, the Commission should summarily deny Entergy's petition.

## DISCUSSION

### **I. PSL § 70 REQUIRES THAT THE COMMISSION DETERMINE WHETHER THE PROPOSED REORGANIZATION AND DEBT WOULD SUPPORT RETAIL ELECTRIC POWER SERVICE THAT IS SAFE AND RELIABLE, AS WELL AS RATES THAT ARE JUST AND REASONABLE.**

Contrary to Entergy's self-interested view, OAG submits that PSL § 70 requires that any acquisition of an interest in an electric corporation subject to Commission jurisdiction must *benefit* New York ratepayers, taxpayers, and citizens. As previously recognized by the PSC's Acting General Counsel:

in the final analysis, the judgment has to be made and a rational basis has to be set forth that the transaction overall will produce benefits for the State of New York.

*See* Commission Session, August 15, 2007, Transcript at 19. Stated differently, the focus must be on whether or not a proposal benefits the State and its citizens, not on whether the proposal simply advances a corporation's short-term interests.

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<sup>3</sup> DPS Staff Initial Comments, at 13 - 14.



**A. Court Decisions Applying Similar Sections of the Public Service Law  
Indicate that PSL § 70 Requires That a Proposed Corporate Change Support  
Safe and Reliable Service As Well As Just and Reasonable Rates.**

Other sections of the Public Service Law provide the Commission with essentially the same authority over the organization of steam companies (PSL § 83), water companies (PSL § 89-h), communications companies (PSL § 100), and regulated holding companies and affiliates (PSL § 110) that PSL § 70 provides the Commission with respect to electric and gas corporations. *See also* PSL § 65. Similar regulatory authority previously existed over buses (PSL § 63); and railroads and common carriers (PSL § 54).<sup>4</sup> The language of these Public Service Law sections is similar to the language of PSL § 70; each provision requires the Commission to determine whether a proposed corporate organizational change is “in the public interest.”<sup>5</sup>

Among the decisions applying the cognates to PSL §70, the most instructive is *Digital Paging Systems, Inc. v. Public Service Commission*, 46 A.D.2d 92 (3d Dep’t 1974), where the Appellate Division upheld the PSC determination under PSL § 100 that an insurgent acquisition of stock in a paging service company would not advance the public interest because the acquisition would disrupt the management of the paging service and threaten the service’s operation. *Digital Paging*, 46 A.D.2d at 97. In turn, *Digital Paging* cited with approval *Matter of International Railway Co. v. Public Service Commission*, 264 A.D. 506 (3d Dep’t 1942), which dealt with PSL §110 and examined the Public Service Law’s “public interest” standard. Although the language of PSL § 110 does not track that of PSL § 70, PSL § 110 requires all entities subject to Commission jurisdiction to satisfy the “public interest” standard. In pertinent

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<sup>4</sup> Both of these PSL provisions were repealed in 1970.

<sup>5</sup> The courts have recognized the similarity of PSL §§70, 83, 89-h, 54 (repealed 1970) and 63 (repealed 1970). *See, e.g., Spring Brook Water Co. v. Village of Hudson Falls*, 269 A.D. 515, 519 (3d Dep’t), *motion for leave to appeal denied*, 269 A.D. 913 (3d Dep’t 1945).

part, the *International Railway* court held that the term “public interest” in §110 took on meaning from the general purposes of the Public Service Law. Quoting Laws of 1929, chap. 673, § 3, the Court found that the general purposes of the Public Service Law are:

to guarantee

1. to the public safe and adequate service at just and reasonable rates,
2. to the stockholders of public service corporations a fair return on their investments, and
3. to bondholders and other creditors, protection against impairment of the security of their loans<sup>6</sup>

*International Railway*, 264 A.D. at 510. *International Railway* and *Digital Paging* reflect a broad understanding of the public interest and the objectives of the Public Service Law that plainly includes an inquiry into whether the proposal will benefit the ratepayers and the State. That understanding dovetails with PSL § 65(1), which directs the Commission to ensure that retail electric service customers receive service that is “safe and adequate and in all respects just

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<sup>6</sup> The full quotation from the relevant clause in Laws of 1929, Chapter 673 - *An ACT to create a temporary commission to make a thorough survey, examination and study of the public service commission law, in relation to the operation and the effect thereof and to propose remedial or other legislation in relation thereto, and making an appropriation for the expense of such commission*, §3, is:

The duty of such commission shall be to make a thorough survey, examination and study of the public service commission laws of this and other states, for the purpose of ascertaining whether the public service commission law of this state accomplishes the objectives for which the system of state regulation was established, and for determining what amendment or revision of the public service commission law is essential to guarantee to the public safe and adequate service at just and reasonable rates, to the stockholders of public service corporations a fair return on their investments, and to bondholders and other creditors, protection against impairment of the security of their loans

The Legislature’s language here is a clear and concise description of the Commission’s fundamental duty.

and reasonable.”

Together, PSL §§ 65(1) and 70 establish that the “public interest” test in PSL § 70 requires the Commission to look at more than the rate consequences of a proposed change in corporate ownership; the Commission must also look at the effect of the corporate change on the provision of safe and adequate service in New York. A reorganization proposal, like Entergy’s, that does not guarantee clean up of despoiled, contaminated sites, compliance with environmental regulations, replacement of crucial equipment and components, effective corporate management and unambiguous corporate responsibility, and, evacuation of citizens in a Three Mile Island-like situation, does not guarantee safe and adequate service and, therefore, cannot be in the public interest.

**B. Entergy and the DPS Staff Mischaracterize PSL § 70’s Public Interest Standard As Predominantly Concerned with Rate Impacts.**

In their initial comments both Entergy and the DPS Staff assert that entities that own electric generation facilities in New York but have no retail electric service customers and are not affiliated with entities that have provide electric service are subject to a lower PSL § 70 standard than are jurisdictional entities that do.<sup>7</sup> In effect, both Entergy and the DPS Staff argue that PSL § 70 is primarily intended only to prevent unjust and unreasonable retail electric service rates. Both are wrong.

As shown above, PSL § 70 requires a showing that a proposed electric corporate reorganization supports safe and reliable retail electric service as well as just and reasonable rates. Whatever the theoretical arguments that an owner of fossil-fueled, hydroelectric or wind-powered generation facility, or an upstream owner of such generation, is not required to comply

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<sup>7</sup> Entergy Initial Comments, at 5 - 7; September 15, 2008 Staff Initial Comments (“DPS Staff Initial Comments”), at 6. OAG understands Entergy to argue for a standard that is even ore diluted than that advocated by DPS staff.

fully with both the service and rate standards under PSL § 70, Entergy has no such exemption. Indeed, one of the Commission orders that Entergy relies upon for the proposition that it has a lower standard of proof specifically states that Entergy must submit timely and extensive reports concerning the operation of its New York plants, must continue funding for removal of non-radioactive contaminants when a plant is decommissioned, and must provide the Commission prior notice of any plans to shut down any of its New York plants for economic reasons.<sup>8</sup> Moreover, in the May 23, 2008 Order Establishing Further Proceedings (“Order Establishing Further Proceedings”) in this proceeding the Commission directed Entergy show that Enexus would have long-term access to financial resources adequate to support the decommissioning of Indian Point, would have or could obtain the capital needed to continue operating Indian Point if either or both plants has an unexpected contingency, and would have the capability of maintaining, managing and operating the plants.<sup>9</sup> See Order Establishing Further Proceedings, at 5.

**C. The DPS Staff Mischaracterize Entergy’s PSL § 70 Burden As Limited to Showing That the Proposed Reorganization Poses No Risk of Harm to Retail Electric Service Ratepayers.**

In its initial comments the DPS Staff asserts that to meet its PSL § 70 public interest burden Entergy need show only that the proposed reorganization “poses no risk to the interests of captive [electric service retail] ratepayers.”<sup>10</sup> That is, Enexus can have less resources to

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<sup>8</sup> PSC Case 01-E-0113 - *Entergy Nuclear Indian Point 2, LLC et al.* and Case 00-E-1225 - *Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 2, LLC et al.*, Order Providing for Lightened Regulation of Nuclear Generating Facilities (issued and effective August 31, 2001).

<sup>9</sup> In its April 7, 2008 Objections and Motion, at p. 29, OAG formally requested that the Commission either reject Entergy’s petition or direct Entergy to submit the information required by PSL § 70 and its implementing regulations. OAG emphasizes that it has not withdrawn this motion; the extent necessary, OAG hereby renews that motion.

<sup>10</sup> DPS Initial Comments, at 5.

support Indian Point than Entergy currently provides,<sup>11</sup> can implement a more complicated and problematic management structure than Entergy currently uses,<sup>12</sup> need not improve reserves for decommissioning and decontaminating Indian Point,<sup>13</sup> can dispense with the existing \$145 million of dedicated financial guarantees for New York plants,<sup>14</sup> can divest itself of capital necessary to comply with a proposed NYS Department of Environmental Conservation water intake and discharge permit, can divest itself of capital needed to secure and protect the facility and ensure the evacuation of the nearby residents, can renege on binding commitments made to Westchester County and other local governments, and can borrow up to \$6.5 billion and enter into an unspecified amount of hedges,<sup>15</sup> as long as these actions pose “no risk to the interests of captive [electric service retail] ratepayers.” This skewed interpretation of the public interest is arbitrary and unsupported by the PSL. And in any event, the proposed reorganization and debt would risk the interests of ratepayers.

As set forth here and in its initial comments, OAG submits that any electric corporate reorganization approved under PSL § 70 must provide positive benefits to the State, its citizens, and its ratepayers in order to meet the statutory “public interest” standard. Entergy sees billions of dollars of benefits for its shareholders if the reorganization is approved.<sup>16</sup> To be sure, Entergy touts benefits for New York and New York ratepayers,<sup>17</sup> but even without depositions and cross-

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<sup>11</sup> *Id.* at 13 - 14.

<sup>12</sup> *Id.* at 14 - 16.

<sup>13</sup> *Id.* at 16 - 20.

<sup>14</sup> *Id.* at 10 - 12.

<sup>15</sup> *Id.* at 25 - 28.

<sup>16</sup> *See, e.g.*, 2007 Entergy Report to Shareholders, at 25.

<sup>17</sup> Entergy Initial Comments, at 32 - 34.

examination it is clear that Entergy's sales points are either illusory or, worse, actually undermine the public interest.

**D. Entergy Cannot Comply the Conditions Set Forth by the DPS Staff and, Moreover, Those Conditions do not Adequately Protect the Public Interest.**

As noted, OAG disagrees with the diluted public interest standard proposed by DPS Staff to evaluate Entergy's proposal. However, as currently structured, Entergy's proposal fails even DPS's diluted standard. In its initial comments, DPS Staff make crystal clear it does not accept or agree with Entergy's current proposal.

DPS Staff states that only significant modifications would satisfy the diluted standard. Staff asserts that the reorganization Entergy proposes would pose no threat to New York retail electric service ratepayers *but only if* Enexus either:

- (1) capitalizes with an investment grade bond rating, does not limit its future financing flexibility, and agrees to suspend paying dividends or repurchasing stock if its bond rating falls below investment grade, or
- (2) creates and maintains \$1 billion trust fund dedicated only to supplementing the so-called Support Agreement funds Entergy told the NRC that it would provide its plants for reliability and other non-safety purposes.

So far, Entergy has firmly rejected both of these conditions. Entergy has already eliminated the first condition by stating unequivocally that the perception of bond rating agencies that the generation of nuclear power entail substantial risk precludes Enexus' obtaining an investment grade bond rating. *See* Entergy Initial Comments, at 14 - 15. And setting aside \$1 billion in cash in a lock-box trust fund is inconsistent with Entergy's stated goal of "unlocking value."<sup>18</sup>

Apart from Entergy's rejection of these conditions, DPS Staff's position falls far short of

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<sup>18</sup> *See* 2007 Annual Report, *Unlocking Value*, at inside cover ("In our 2007 annual report, we present the ongoing stories of our efforts to create, capture and unlock value in our utility and nuclear businesses. Against this backdrop, we also present the greatest value realization story we've ever told, the story of the spin transaction and the three entities it creates – Entergy Classic, SpinCo and the Nuclear Services Joint Venture.").

what is required even under the standard proffered by Staff. Even if Entergy claimed that Enexus could obtain an initial investment grade bond rating, DPS Staff's first condition for Entergy is lacking because there is no objective quantification of Entergy's total potential capital needs for: maintaining and operating the four New York plants and the four plants in Massachusetts, Vermont, and Michigan; surviving a credible maximum extended outage; paying for major plant repairs; paying for decommissioning and decontamination of non-radioactive contaminants; compliance with SPDES and other environmental standards; and compensating injuries and property loss after a significant radiation release. Entergy has provided some secret numbers for some of these categories, *e.g.*, decommissioning cost estimates,<sup>19</sup> but others Entergy has specifically declined to develop, *e.g.*, the estimated cost of an outage equal to Davis-Besse's 26 months,<sup>20</sup> or ignored, *e.g.*, the potential cost of injury and property damage from a major radiation release at Indian Point. In sum, DPS staff has no number for the amount of capital that Enexus should be prepared to secure if the proposed reorganization goes through.

DPS Staff's second condition shares with the first the lack of any objective estimate of Enexus' potential capital needs. In addition, the second option has two factual defects of its own. One factual defect specific to DPS Staff's second condition is that it relies on the proposed Enexus \$700 million Support Agreement to have meaning. As conclusively demonstrated in its *initial comments* OAG, the much touted Support Agreement is an illusion; there would be no funds set aside, any funds labeled as from the Support Agreement would have to come from Enexus' earnings or borrowing, the agreement would not apply to many anticipated expenses, and Enexus would be free to ignore requests for "Support Agreement" help. Testimony in the

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<sup>19</sup> See, *e.g.*, Entergy Response EN - 13 to Information Request AG - 13 (dated June 2, 2008)

<sup>20</sup> See, *e.g.*, Entergy Response EN - 119 to Information Request AG - 61 (dated June 2, 2008).

recent public evidentiary hearing before the State of Vermont Public Service Board further confirmed that Entergy's proposal is not a bankable "agreement" and would not provide "support" for many obligations that are certain to arise in the future (*e.g.*, the removal of all radionuclide contamination at or around the Indian Point site) or likely to arise in the future (*e.g.*, new reactor pressure vessel heads, proposed closed-cycle cooling system, replacement of emergency air emission detection systems, development and deployment of an effective evacuation system and training system).

A second factual defect specific to DPS Staff's second condition is that the proposed \$1.0 billion Enexus escrow for supplemental reliability or other non-safety capital needs is not dedicated to New York's needs. That is, nothing the DPS Staff has proposed would prevent Enexus from refusing to supply New York plants any funds under the "Support Agreement" label and then spending the entire \$1.0 billion escrow on Palisades, Pilgrim, Vermont Yankee, Big Rock, or some a combination of those out-of-state plants.

A third factual defect in DPS Staff's second optional PSL § 70 public interest standard for Entergy is Entergy's expressed concern that Enexus not be overcapitalized. Entergy stated in its Initial Comments (at 35 - 36), that it would not be "appropriate" for Enexus to keep too much of the proceeds of its initial borrowing because it would have no incremental investment alternatives for the additional funds. Depositing \$1.0 billion in an escrow to cover anticipated future expenses likely does not meet Entergy's view of an investment alternative.



## **II. THE PROPOSED REORGANIZATION WOULD CONFUSE, OBFUSCATE, AND DEADLOCK THE MANAGEMENT OF ENTERGY'S NEW YORK NUCLEAR POWER PLANTS.**

Today, Entergy controls its New York merchant nuclear power plants through a holding company structure that interposes various intermediaries between Entergy and the plants, and that divides the line of authority by lumping Indian Point Unit 2 and Unit 1 with Vermont Yankee and Palisades in one group and placing Indian Point 3 and FitzPatrick in a separate group with Pilgrim.<sup>21</sup> Complicated as the current management structure is, it has the virtue of unity of command.

Entergy misleadingly asserts that the proposed reorganization would “isolate and simplify” the corporate structure.<sup>22</sup> To the contrary, the proposed “reorganization” would complicate corporate governance and decision making. Entergy proposes to divide control of Indian Point and its merchant plants in a way that risks deadlock and delay. The proposal before the PSC would split plant control equally between Enexus and Entergy itself through joint ownership of Equagen LLC. This control would be split exactly in half: Enexus would have 50% control of Equagen, and Entergy would have 50% control of Equagen. In turn, Equagen would operate the plants through its ENOI, LLC subsidiary. As previously discussed, ENOI's officers are also the officers of each Entergy merchant nuclear power plant and ENOI personnel operate the plants.<sup>23</sup>

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<sup>21</sup> See, e.g., Entergy Response EN - 52 to Information Request AG - 33 (dated June 20, 2008).

<sup>22</sup> See Entergy September 15, 2008 Initial Comments, at 2.

<sup>23</sup> For example, ENOI Chief Executive Officer Michael R. Kansler is also the CEO of Indian Point 2, Indian Point 3, FitzPatrick, Palisades, Pilgrim and Vermont Yankee.

Entergy proposes that it and Enexus each elect half of Equagen's board of directors.<sup>24</sup> In numerical terms, that means that Enexus would appoint 3 of the 6 directors and Entergy would appoint 3 of the 6 directors. If the Equagen board cannot agree, Entergy and Enexus executives would negotiate.<sup>25</sup> If these executive negotiations fail, the intra-Equagen board dispute would then proceed to arbitration.<sup>26</sup> Contrary to Entergy's assertion that the reorganization would isolate and simplify the corporate structure, the proposed merchant plant management mechanism is thus subject to potential confusion, obfuscation, deadlock, and delay if either Entergy or Enexus is dissatisfied with how ENOI is operating a plant and the other disagrees with the concern.

Under the "divided house" proposed by Entergy, it is easy to imagine how significant and necessary capital projects at Indian Point would be postponed. There can be no dispute that this proposal, which clearly has the potential for deadlocks and decision avoidance, is materially worse than the present situation. Therefore, the PSC must deny the proposal under PSL § 70 as it does not promote the public interest in the provision of safe and adequate electric service.

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<sup>24</sup> Enexus Form 10, Exh. 10.5, Form of Limited Liability Company Agreement, Article VII - Management.

<sup>25</sup> Enexus Form 10, Exh. 10.4, Form of Joint Venture Formation Agreement, § 9.12 *Dispute Resolution* (incorporating by reference Article IX - Dispute Resolution of Exh. 2.1, Form of Separation and Distribution Agreement).

<sup>26</sup> *Id.*

### **III. ENEXUS WOULD BE AT RISK OF MAINTENANCE, EQUIPMENT, OUTAGE, AND DECOMMISSIONING COSTS FAR BEYOND ANYTHING ENTERGY HAS CONSIDERED IN MAKING ITS PROPOSAL.**

Nuclear power plants contain large interrelated systems that operate at high temperatures and pressures and consume and store radioactive material and vast quantities of water. A number of events can deliver financial surprises to a nuclear plant owner at almost any time. In its proposal Entergy fails to take give adequate consideration to these contingencies.

#### **A. Permanent Shutdown or Extremely Long Plant Outages.**

Entergy says that it has evaluated the consequences of having one of the two operable Indian Point plants off line for one year. According to Entergy, Enexus would be able to weather such an outage.<sup>27</sup> Perhaps, but one plant out of commission for one year is by no means the most serious risk financial that Enexus could face. Accidents have shut one U.S. nuclear plant - Three Mile Island 2 - permanently and put another - Browns Ferry 1 - out of service for 22 years. Both accidents imposed massive costs on the plant owner.

1. Three Mile Island 2. On March 28, 1979, a combination of equipment malfunctions and human errors turned a \$700 million power plant into a financial black hole that eventually cost General Public Utilities ("GPU") approximately \$1.0 billion to clean up.<sup>28</sup> In addition to its direct cost (construction plus clean-up costs) approaching \$ 1.7 billion, the Three Mile Island 2 accident caused the NRC to shut the neighboring unharmed Three Mile Island 1

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<sup>27</sup> Entergy Response EN-70 to OAG Information Request AG-45 (dated July 14, 2008).

<sup>28</sup> See, e.g., U.S. General Accounting Office ("GAO"), "Three Mile Island: the Financial Fall Out" (EMD-80-89)(July 7, 1980), *available at* <http://archive.gao.gov/f0102/113012.pdf>; GAO, "Response to Questions Raised Concerning TMI-2 Cleanup Schedule and Cost," (EMD-82-90)(July 20, 1982), *available at* <http://archive.gao.gov/f0102/119253.pdf> April 24, 1990 *New York Times*, "After the Meltdown, Lessons From a Cleanup," *available at* <http://query.nytimes.com/gst/fullpage.html?res=9C0CE3D6153BF937A15757C0A966958260&partner=rssnyt&emc=rss>; August 15, 1993 *New York Times*, "14-Year Cleanup at Three Mile Island Concludes," *available at* <http://query.nytimes.com/gst/fullpage.html?res=9F0CE0D8123DF936A2575BC0A965958260>.

plant down for six and a half years while GPU and the NRC worked on plant modifications and GPU's management capabilities.<sup>29</sup> Entergy has not evaluated what would happen to Enexus if an accident shuts any of its proposed plants permanently, much less the consequences of losing both Indian Point plants for an extended period.

2. Browns Ferry 1. In 1985, the NRC shut down all three Browns Ferry reactors because of pervasive equipment problems and mismanagement. Browns Ferry 1 remained out of service for over 22 years until the NRC permitted it to restart on May 22, 2007.<sup>30</sup> Refurbishing Browns Ferry 1 cost its owner, the Tennessee Valley Authority, over \$1.8 billion.<sup>31</sup> Entergy has provided no indication that Enexus could maintain a shut down plant for two decades, much less have the financial resources to return such a plant to operation.

**B. Extended But Less Than Historic Unplanned Plant Outages.**

Unplanned nuclear power plant outages well short of the Browns Ferry 1 record but much longer than the one year scenario that Entergy examined have happened repeatedly. The most recent such outages were at Davis-Besse and Cook Unit 1 and 2. For balance, OAG has also identified significant unplanned extended outages at New York nuclear plants and at other Entergy merchant plants.

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<sup>29</sup> See, e.g., NRC Docket No. 50-289, Three Mile Island Station, Unit 1, Monthly Operating Report for February 1979, *available at* NRC Microfiche 04377:240 - 04377:243; and NRC Docket No. 50-289, Three Mile Island Station, Unit 1, Monthly Operating Report for November 1985, *available at* NRC Microfiche 34026:022 - 34026:027.

<sup>30</sup> See, e.g., Tennessee Valley Authority, Press Release, "TVA Restarts Browns Ferry Unit" (May 22, 2007), *available at* <http://www.tva.gov/news/releases/aprjun07/restart.htm>.

<sup>31</sup> *Id.*

1. Davis-Besse. Davis-Besse's two-year outage began in March 2002 after an employee uncovered evidence of corrosion that had almost eaten through the reactor head.<sup>32</sup> In addition to the lost revenue, repairs cost at least \$ 293 million.<sup>33</sup>

2. Cook Unit 1 and 2. NRC dissatisfaction with numerous problems at both Cook plants forced Indiana Michigan Power to shut down both plants in September 1997 for over three years.<sup>34</sup> Correcting mechanical, management and operating problems cost at least \$ 574 million while the plants were producing no income.<sup>35</sup>

3. Indian Point 3. Among New York nuclear power plants, Indian Point 3 shares with Nine Mile Point 1 the dubious distinction of experiencing two unplanned outages of over a year. Indian Point 3's two such outages were for 27 months between February 1993 and July 1995, and for 14 months between March 1982 and June 1983.<sup>36</sup>

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<sup>32</sup> See, e.g., Preliminary Notification of Event or Unusual Occurrence - PNO-III-02-006 (March 8, 2002), *available at* NRC ADAMS Accession No. ML020670776; April 5, 2004 Morning Report, "Davis-Bessie Synchronized with the Grid," *available at* NRC ADAMS Accession No. ML040960501; GAO, "NRC Needs to More Aggressively and Comprehensively Resolve Issues Related to the Davis-Bessie Nuclear Power Plant's Shutdown" (GAO-04-415)(May 17, 2004), *available at* <http://www.gao.gov/new.items/d04415.pdf>.

<sup>33</sup> GAO, "NRC Needs to More Aggressively and Comprehensively Resolve Issues Related to the Davis-Bessie Nuclear Power Plant's Shutdown," at p. 20, n19.

<sup>34</sup> See, e.g., American Electric Power Company, December 22, 2000 Press Release, "AEP's Cook Nuclear Unit 1 Returns to Service: Both Units On-Line for First Time Since September 1997," *available at* <http://www.aep.com/newsroom/newsreleases/?id=774>.

<sup>35</sup> See, e.g., American Electric Power Company, December 22, 2000 Press Release, "AEP Announces Plan to Restart Cook Nuclear Plant: Units Scheduled to Return to Service in April and September 2000," *available at* <http://www.aep.com/newsroom/newsreleases/?id=588>.

<sup>36</sup> See, e.g., Monthly Operating Report for February 1993, *available at* NRC Microfiche 74327:349- 74347:353; Monthly Operating Report for March 1993, *available at* NRC Microfiche 74714:356-74714:360; "Requests Approval of Encl Restart Action Plan," *available at* NRC Microfiche 76282:138-76282:142; Monthly Operating Report for July 1995, *available at* NRC Microfiche 85136:261-85136:267; Reportable Occurrence Report: On 820324 Small Primary to Secondary Leak Developed in Steam Generator 33, *available at* NRC Microfiche 12477:247 - 12477:247; Preliminary Notification of Event or Unusual Occurrence -

4. Indian Point 2. Indian Point 2 had an 11-month unplanned outage that began February 15, 2000 with a release of a small amount of radioactive gas from a cracked heat exchanger tube.<sup>37</sup> This outage continued until January 29, 2001. Replacing all of Indian Point 2's heat exchangers cost Con Edison at least \$ 150 million in direct charges.<sup>38</sup>

5. Nine Mile Point 1. Nine Mile Point 1 holds the New York record for longest unplanned outage, two and a half years between December 1987 and August 1990.<sup>39</sup> The direct cost of this outage to Niagara Mohawk was at least \$ 375 million.<sup>40</sup> Nine Mile Point 1 also had a shorter unplanned outage of just over a year between March 1982 and July 1983.<sup>41</sup>

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PNO-I-82-026 (March 25, 1982), *available at* NRC Microfiche 12454:267 - 12454:267; Preliminary Notification of Event or Unusual Occurrence - PNO-I-82-027 (March 29, 1982), *available at* NRC Microfiche 12498:151 - 12498:151; April 28, 1995 New York Times "Panel Says Indian Point Nears Restart;" Revised Monthly Operating Report for June 1983, *available at* NRC Microfiche 20003:165 - 20003:171.

<sup>37</sup> See, e.g., PSC Case No. 00-E-0612 - Proceeding on Motion of the Commission to Investigate the Forced Outage at Consolidated Edison Company of New York, Inc.'s Indian Point No. 2 Nuclear Generating Facility *et al.*, *Order Instituting Proceeding to Investigate Outage at the Indian Point No. 2 Nuclear Generating Facility* (issued and effective March 30, 2000).

<sup>38</sup> See, e.g., PSC Case No. 00-E-0612 - Proceeding on Motion of the Commission to Investigate the Forced Outage at Consolidated Edison Company of New York, Inc.'s Indian Point No. 2 Nuclear Generating Facility *et al.*, *Order Adopting Terms of Joint Proposal* (issued and effective February 12, 2004). In addition to the outage beginning February 15, 2000, this proceeding addressed three shorter Indian Point 2 outages: (1) January 25, 1997 - March 17, 1997; (2) October 14, 1997 - September 10, 1998; and (3) August 31, 1999 - October 18, 1999; Consolidated Edison Company of New York, Form 10Q for the Quarterly Period Ending September 30, 2000 (contains Con Edison estimate of \$150 million direct cost of replacing steam generators).

<sup>39</sup> See, e.g., PSC Case No. 29327 *et al.* - Niagara Mohawk Power Corporation, *Opinion No. 89-37D* (issued and effective June 28, 1991) and *Recommended Decision*, 31 NY PSC 1745, 1765.

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., Monthly Operating Report for March 1982, *available at* NRC Microfiche 12637:152-12637:155; Corrected Monthly Operating Report for April 1982, *available at* NRC Microfiche 13110:345-13110:355; Revised Monthly Operating Report for July 1983, *available*

6. FitzPatrick. FitzPatrick had one extended unplanned outage of just over a year between November 1991 and January 1993.<sup>42</sup>

7. Extended Outages at other Entergy Merchant Plants. Palisades had a year unplanned outage between August 1973 and October 1974,<sup>43</sup> while Pilgrim has had two such outages, one lasting more than three years between April 1986 and June 1989 and one lasting for one year outage between December 1983 and December 1984.<sup>44</sup>

**C. Unexpected Maintenance and Equipment Replacement Outages and Costs.**

Even if its plants have no extended unplanned outages, Enexus would face unplanned maintenance and equipment replacement outages and costs. The recent history of such costs at Entergy merchant plants includes events at Indian Point 3, Palisades and Vermont Yankee.

1. Indian Point. Indian Point 3 had a transformer fire and a tritium leak from

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*at NRC Microfiche 25892:266-25892:268; Monthly Operating Report for August 1983, available at NRC Microfiche 20410:251-20410:255.*

<sup>42</sup> *See, e.g., Monthly Operating Report for November 1991, available at NRC Microfiche 60018:086-60018:090; Monthly Operating Report for December 1991, available at NRC Microfiche 60360:178-60360:182; Monthly Operating Report for January 1993, available at NRC Microfiche 64906:343-64906:347; Rev. 1 to Monthly Operating Report for January 1993, available at NRC Microfiche 74302:273-74302:273; Monthly Operating Report for February 1993, available at NRC Microfiche 74302:269-74302:272.*

<sup>43</sup> *Semiannual Report of Operations July 1 - December 31, 1973, available at NRC Microfiche 50255-225; Semiannual Report of Operations July 1 - December 31, 1974, available at NRC Microfiche 50255-456.*

<sup>44</sup> *See, e.g., Monthly Operating Report for April 1986, available at NRC Microfiche 36012:319-36012:325; Monthly Operating Report for May 1986, available at NRC Microfiche 36569:237-36569:243; Monthly Operating Report for June 1989, available at NRC Microfiche 50612:339-50612:345; Monthly Operating Report for July 1989, available at NRC Microfiche 50968:194-50968:200; Monthly Operating Report for December 1983, available at NRC Microfiche 21827:119-21827:125; Monthly Operating Report for January 1984, available at NRC Microfiche 22337:338-22337:344; Monthly Operating Report for December 1984, available at NRC Microfiche 28562:080-28562:086; Monthly Operating Report for January 1985, available at NRC Microfiche 29062:112-29062:118.*

a steam line in April 2007.<sup>45</sup> In late March 2008, Entergy convened a panel of ten experts to evaluate conditions at Indian Point and advise the company on what needs to be done. On July 31, 2008, the panel issued a 232-page Indian Point Independent Safety Evaluation (“ISE”)<sup>46</sup> that identified several problematic areas and operations that will likely require significant expenditures to correct. In particular, Entergy’s experts found that Entergy needs to make significant improvements in Indian Point’s emergency response facilities and equipment, security systems, and non-safety related equipment and structures.<sup>47</sup> The ISE panel also identified management weaknesses at Indian Point, including a backlog of maintenance work,<sup>48</sup> inadequate attention to required operating changes and software modifications, and the need to examine and replace portions of buried piping systems.<sup>49</sup> While the ISE contains no cost numbers, Entergy recently estimated that addressing the report’s recommendations will require the commitment of at least \$ 100 million during the next few years. It is expected that Entergy will publicly announced that it will implement the ISE recommendations. This work is expected to take 3 to 5 years.

2. Palisades. Palisades’ recent problems included a six day unplanned

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<sup>45</sup> See, e.g., Preliminary Notification of Event or Unusual Occurrence - PNO-I-07-004 (April 6, 2007), *available at* NRC ADAMS Accession No. ML070960482; Preliminary Notification of Event or Unusual Occurrence - PNO-I-07-004A (April 25, 2007), *available at* NRC ADAMS Accession No. ML071150287.

<sup>46</sup> *Available at* <http://www.nyindianpoint.org/images/Full%20Report.pdf>.

<sup>47</sup> ISE at 146 - 147, Section 5: Emergency Preparedness, Section 4: Security, and *passim*.

<sup>48</sup> The ISE found a backlog of 8,641 workorders and other maintenance items. ISE at 44.

<sup>49</sup> The ISE panel identified the condition of buried piping, in particular leakage of tritium, as an area that Indian Point management should address. ISE at 49 - 51. As previously noted, in April 2007, a buried steam pipe connecting Indian Point Unit 2 and Indian Point Unit 3 vented tritium up through the soil and blacktop.



outage in May 2007 for repairs to water regulators, control rod drive seals and a water pump, and a four day unplanned outage in August 2008 to tend to the control rod drive seals that Palisades apparently did not resolve in 2007.<sup>50</sup> Also in August 2008, several workers were temporarily stuck inside containment when a door would not open.<sup>51</sup>

3. Vermont Yankee. Most of Entergy's recent merchant plant maintenance and mechanical problems have been at Vermont Yankee. One of Vermont Yankee's two cooling towers collapse on August 21, 2007.<sup>52</sup> In May 2008, Vermont Yankee had problems with a reactor building crane, and in July 2008, the plant's cooling towers developed leaks.<sup>53</sup> Another

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<sup>50</sup> See, e.g., Preliminary Notification of Event or Unusual Occurrence - PNO-III-07-006 (May 9, 2007), *available at* NRC ADAMS Accession No. ML071290581; Preliminary Notification of Event or Unusual Occurrence - PNO-III-07-006A (May 14, 2007), *available at* NRC ADAMS Accession No. ML071340284; Preliminary Notification of Event or Unusual Occurrence - PNO-III-08-008 (August 7, 2008), *available at* NRC ADAMS Accession No. ML082200347; Preliminary Notification of Event or Unusual Occurrence - PNO-III-08-008A (August 11, 2008), *available at* NRC ADAMS Accession No. ML012240727.

<sup>51</sup> See, e.g., NRC Pres Release "NRC Begins Special Inspection at the Palisades Nuclear Power Plants Due to Operational and Equipment Problems" (August 8, 2008), *available at* NRC ADAMS Accession No. ML082210507.

<sup>52</sup> See, e.g., Email from R. Power, Vermont Yankee, to NRC re: cooling tower collapse (August 21, 2007), *available at* NRC ADAMS Accession No. ML072750049; Request for Additional Information (August 30, 2007), *available at* NRC ADAMS Accession No. ML072740392; Preliminary Notification of Event or Unusual Occurrence - PNO-I-07-008 (September 14, 2007), *available at* NRC ADAMS Accession No. ML072570337; Vermont Yankee Senate Staffer VY Cooling Tower Follow-Up Response Information (October 2, 2007), *available at* NRC ADAMS Accession No. ML073040237.

<sup>53</sup> See, e.g., Preliminary Notification of Event or Unusual Occurrence - PNO-I-08-006 (May 23, 2008), *available at* NRC ADAMS Accession No. ML081440592; Preliminary Notification of Event or Unusual Occurrence - PNO-I-08-006A (May 30, 2008), *available at* NRC ADAMS Accession No. ML081510695; Preliminary Notification of Event or Unusual Occurrence - PNO-I-08-009 (July 11, 2008), *available at* NRC ADAMS Accession No. ML082600632; Preliminary Notification of Event or Unusual Occurrence - PNO-I-08-009A (July 16, 2008), *available at* NRC ADAMS Accession No. ML081980102; Preliminary Notification of Event or Unusual Occurrence - PNO-I-08-009B (July 22, 2008), *available at* NRC ADAMS Accession No. ML082050034.

leak in a cooling tower occurred in September 2008.<sup>54</sup>

**D. Early Retirement and Unexpected Decommissioning Costs.**

Nuclear plant owners can be faced with a reactor to decommission but lack sufficient funds to complete the task and return the site to unrestricted public use. This can happen if a plant goes out of service before it completes the 40-year term of an initial operating license during which the NRC assumed the decommissioning trust fund would build up. There can also be a cash shortage if the actual cost of decommissioning is more than the amount the NRC requires for decommissioning trust funds.

1. Early Plant Retirements. 21 commercial power reactors have ceased power generation before the expiration of their 40 year term.<sup>55</sup> For example, Indian Point 1 operated for only 12 years, and that facility has yet to be decommissioned.<sup>56</sup> A shuttered nuclear plant imposes security and standby maintenance costs on its owner while the owner waits for the interest to compound to reach the ever increasing decommissioning costs. Moreover, the time that Enexus could store Indian Point plants is limited by Entergy's commitment to begin decommissioning the Indian Point plants shortly after the last Indian Point plant shuts down.<sup>57</sup>

2. Unexpected Decommissioning Costs. Even if a plant that operates for a

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<sup>54</sup> See, e.g., "Cooling Tower Woes Continue at Vermont Yankee," Burlington Free Press (September 17, 2008), available at <http://www.burlingtonfreepress.com/apps/pbcs.dll/article?AID=/20080917/NEWS02/80917018>.

<sup>55</sup> Compare 2008 - 2009 Information Digest, Appendix A - U.S. Commercial Nuclear Power Reactors (U.S.N.R.C. Nureg - 1350, Vol. 20) with *id.*, Appendix B - U.S. Commercial Nuclear Power Reactors Formerly Licensed to Operate (Permanently Shut Down). The 2008 - 2009 NRC Information Digest is available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1350/v20/sr1350v20.pdf>.

<sup>56</sup> *Id.*, Appendix B, p. 113.

<sup>57</sup> See, e.g., Entergy Initial Comments, at 21 (commitment is to Westchester County).

full 40-year license period, the sum in its decommissioning trust fund may not be enough to cover unforeseen costs. This happened when unforeseen subsurface contamination was found at Connecticut Yankee, where the original decommissioning cost estimate was low by 120% (\$426 million vs final decommissioning costs of \$938 million).<sup>58</sup> Indian Point has subsurface contamination, and the final decommissioning cost for Indian Point may well exceed the funds set aside in the decommissioning trust funds for all three plants at the site.<sup>59</sup>

#### **IV. THE COMMISSION SHOULD CONDITION ANY REORGANIZATION ON ENTERGY'S CONTINUED OBLIGATION FOR ANY CAPITAL SHORTFALL AT ANY OF ITS NEW YORK PLANTS.**

Entergy secured Commission approval of Entergy's acquisition of Indian Point and FitzPatrick on the basis that Entergy is a large corporation with assets worth tens of billions.<sup>60</sup> In its Initial Comments the DPS Staff proposes that the Commission allow Entergy to spin off its New York plants to Enexus with substantially less resources, as long as the Enexus either begins

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<sup>58</sup> Compare Connecticut Yankee Post Shutdown Decommissioning Activities Report ("PSDAR") (August 22, 1997), at 8 of 10 (estimated decommissioning cost of \$426 million) with Haddam Neck Plant License Termination Plan, Rev. 4, at 7-4 (November 2006) (estimated final decommissioning cost of \$938 million). The PSDAR is available at <http://www.comnyankee.com/assets/pdfs/Document1.PDF>; the Haddam Neck Plant License Termination Plan, Rev. 4, is available at NRC ADAMS Accession No. ML063390404.

<sup>59</sup> The \$512 million decommissioning cost increase that subsurface contamination caused at Connecticut Yankee undercuts Entergy's estimate that cleaning up under Indian Point would add only \$42 million to Indian Point's decommissioning cost. See Entergy Response EN - 49 to Information Request DPS - 18 (dated June 30, 2008).

<sup>60</sup> See PSC Case 00-E-1225, *Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point III LLC, and Entergy Nuclear Operations, Inc. - Joint Petition for a Declaratory Ruling That Lightened Regulation be Applied Concerning Their Purchase of Nuclear Power Facilities From the Power Authority of the State of New York*, Declaratory Ruling (Issued August 23, 2000) at 2 ("Their ultimate parent, the Entergy Subsidiaries stress, is Entergy Corporation, a global energy company that offers electric power production, distribution, and related diversified services. Entergy Corporation owns, manages, or invests in power plants generating nearly 30,000 MW of electricity domestically and internationally. It also owns and operates six nuclear power plants at five locations.").

operation with an investment grade bond rating or maintains a \$1.0 billion trust fund to provide capital to the nuclear plants that Entergy proposes to transfer.<sup>61</sup>

The DPS Staff has made no showing that the reorganization conditions it proposes would provide Entergy's New York plants sufficient resources to operate safely and reliably and would ensure adequate funding for the decommissioning the plants. If nothing else, the DPS Staff has made no attempt to quantify the New York plant's probable financial needs and the resources that Enexus is likely to be able to provide. Without these quantities it is impossible to say whether Enexus' resources can reasonably be expected to be adequate or whether either of the conditions that the DPS Staff has proposed would fill in the gap between the plants' needs and Enexus' resources.

What can be quantified is the \$25 billion in resources that Entergy is trying to move beyond the Commission's reach should one or more of its New York plants need financial help. OAG questions whether Entergy can escape its obligations for its nuclear power plants, but recognizes that Entergy may used the alleged spinoff to try to obfuscate Entergy's corporate responsibility.

Conditioning any reorganization on Entergy's continuing obligation to provide any financing for safe, reliable, and environmentally sound plant operation and for decommissioning would eliminate both the shortcomings in the DPS Staff's proposal and the potential that Entergy's New York plants would have less resources under a reorganization. If the choice comes down to Entergy or New York ratepayers and taxpayers, Entergy should be required to step up and satisfy its obligations.

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<sup>61</sup> DPS Staff Initial Comments, at 13 - 14.

**V. DPS STAFF STATEMENTS CONCERNING THE DECONTAMINATION AND DECOMMISSIONING OF THE INDIAN POINT SITE ARE ERRONEOUS.**

**A. Entergy Has Not Produced a Decontamination Plan for its New York Sites.**

In its Initial Comments, at 20, DPS Staff states that in this proceeding Entergy has submitted:

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.

DPS Staff Initial Comments, at 20. DPS cites as support for this assertion Entergy's responses to Information Requests AG - 13 and AG - 14.

DPS staff is mistaken. Information Request AG - 13 asked for decommissioning cost estimates, not decommissioning plans. The public version of Entergy's Response EN - 13 to Information Request AG - 13 (dated June 2, 2008) lists four decommissioning cost analyses and one decommissioning cost evaluation, but no decommissioning plan. Information Request AG - 14 asked for decommissioning plans. The public version of Entergy's Response EN - 14 to Information Request AG - 14 (dated June 2, 2008) states, in pertinent part, that:

there are no decommissioning plans for Entergy's non-utility nuclear power plants, including the plants located in New York, which (sic) Entergy proposes to transfer to NewCo (Enexus) as part of the corporate reorganization.

Entergy Response EN - 14 to Information Request AG - 14 (dated June 2, 2008). Response EN - 14 goes on to say that Entergy's TLG Services subsidiary periodically updates the Post-Shutdown Decommissioning Activities Report ("PDSAR") for Vermont Yankee, and that a copy of the August 7, 2007 Vermont Yankee PDSAR was being provided to the DPS Staff.

DPS Staff may have mistaken the decommissioning cost estimates that the NRC requires of licensees pursuant to 10 CFR § 50.75 ("Reporting and recordkeeping for decommissioning

planning”) with the PDSAR and license termination plans that are submitted pursuant to 10 CFR § 50.82 (“Termination of license”) in connection with permanent shut down of a plant and that include descriptions of the actual work that is to be done or that has been done to decommission a site. In any event, according to Entergy, with the exception of the Vermont Yankee decommissioning cost study (a study that Entergy improperly claimed to be confidential throughout the entire discovery period), the documents that Entergy submitted in response to Information Request AG - 13 “were prepared for *internal use only*” (emphasis in the original).<sup>62</sup> Entergy characterized non-Vermont Yankee responses to Information Request AG - 13 as “Entergy’s internal speculation on decommissioning costs” that “is not the basis on which government action will be taken on funding decommissioning.”<sup>63</sup> Given Entergy’s position that the studies for New York facilities submitted in response to Information Request AG - 13 are not a valid basis for government decisions, and that Entergy’s response to Information Request AG - 14 contains no information at about a New York facility, DPS Staff’s position that the proposed reorganization would deal adequately with decommissioning Indian Point is untenable.

**B. Decommissioning Costs Have Not Been Resolved.**

In its initial comments DPS Staff incorrectly asserts that “[o]ther decommissioning issues” at Indian Point, “such as soil decontamination from leaking spent fuel pools, have been addressed,”<sup>64</sup> and cites Response EN - 49 (also numbered “EN - 48”) to Information Request DPS - 18 (dated June 30, 2008).

The public version of Response EN - 49 indicated that actual plans for cleaning up sub-

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<sup>62</sup> Redacted version September 9, 2008 letter from Entergy counsel to the ALJs in response to OAG and Assemblyman Brodsky’s Motion to Remove Entergy’s Provisional Designation of Certain Documents as “Confidential,” at 2.

<sup>63</sup> *Id.*

<sup>64</sup> DPS Staff Initial Comments, at 20.

surface areas at Indian Point will be prepared at some unspecified future date in accordance with the criteria applicable at the time; provided some numbers excerpted from a 2000 TLG Services study that appears to have been limited to the portion of Indian Point previously owned and controlled by Con Edison; and referred DPS Staff to the response to Information Request AG - 13 for more recent information on the estimated cost of cleanup under Indian Point's surface. Nothing in the public version of Response EN - 49 indicates that at the time of its 2000 subsurface decontamination cleanup cost estimate TLG was aware of the extensive contamination plumes under Indian Point 1 and Indian Point 2. While the plumes existed for many years, they were not "discovered" by Entergy until 2005.<sup>65</sup> Moreover, Entergy has disavowed government use of the Indian Point decommissioning cost study that Response EN - 49 referred DPS Staff to.<sup>66</sup>

Given the questions about the basis for TLG's 2000 estimate of the cost of cleaning up under Indian Point and Entergy's explicit disavowal of government use of the Indian Point

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<sup>65</sup> In September 2005, during planned excavation adjacent to the Indian Point Unit 2 spent fuel pool, Entergy discovered cracks in the concrete wall caused by shrinkage during the concrete curing process that leaked spent fuel pool water. Upon further investigation, the licensee determined that groundwater underlying portions of the Indian Point Nuclear Power Station site was contaminated with tritium due to possible leakage from the spent fuel pool or other on-site sources. On February 27, 2006, a sample showed tritium contamination levels of 30,000 pCi/L at a location close to the Hudson River. See Indian Point Nuclear Generating Unit 2 - NRC Special Inspection Report No. 05000247/2005011 (March 16, 2007) NRC Accession No. ML060750842. Thereafter, on March 21, 2006, Entergy announced that samples taken from an on-site monitoring well located near the Hudson River also showed detectable levels of strontium-90, a radionuclide that was traced back to the Indian Point Unit 1 spent fuel pool; Entergy also has identified elevated levels of nickel-63 and cesium in groundwater under the Indian Point Nuclear Power Station. See Jim Fitzgerald, High Levels of Strontium-90 Found in Indian Point Groundwater, Associated Press, Mar. 21, 2006; Greg Clary, *Indian Point Leak of Radioactive Element Spreads*, Poughkeepsie Journal News, Mar. 22, 2006; E-mail from Donald Croulet of Entergy to James Noggle of USNRC, "regarding H-3 sources IPEC-RL-Comments-1" (attachment, table) (Dec. 12, 2005), NRC Accession No. ML061000598.

<sup>66</sup> Redacted version September 9, 2008 letter from Entergy counsel to the ALJs in response to OAG and Assemblyman Brodsky's Motion to Remove Entergy's Provisional Designation of Certain Documents as "Confidential," at 2.

decommissioning cost study provided in response to Information Request AG - 13, DPS Staff's position that the Commission now has enough information about the cost of removing subsurface contamination at Indian Point is not tenable.

**VI. ENTERGY HAS OPENED THE DOOR TO PUBLIC EXAMINATION OF ITS INDIAN POINT DECOMMISSIONING AND DECONTAMINATION COST STUDIES.**

In its initial comments Entergy provided certain specific information that Entergy characterized as from "decommissioning cost estimates prepared by TLG Services Inc. for the Indian Point facilities."<sup>67</sup> Specifically, Entergy's submission – which was verified by Entergy's Vice President Walter C. Ferguson – asserted that the unidentified TLG studies included the cost of (1) removing non-contaminated structures to a nominal depth of three feet below grade, (2) backfill voids with clean debris and cap with soil, (3) regrade the sites to conform to the adjacent landscape, and (4) establish vegetation to inhibit erosion.<sup>68</sup> This statement raises 3 distinct issues.

First, Entergy's reference to plural TLG Indian Point decommissioning cost estimates raises the immediate question of whether Entergy properly complied with Information Request AG - 13, which asked for "each and every decommissioning cost study or decommissioning cost estimate" that Entergy and its subsidiaries "has or has caused to be created." In its response EN - 13 provided one such study or estimate for each site. Entergy is now referring to such Indian Point decommissioning cost estimates in the plural. Coupled with its response to OAG's and

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<sup>67</sup> Entergy Initial Comments, at 21, n30.

<sup>68</sup> *Id.*



Assemblyman Brodsky's Joint Motion,<sup>69</sup> Entergy, at a minimum, owes the public and OAG an explanation of why Entergy is now referring to multiple Indian Point decommissioning cost estimates.

Second, if Entergy does have multiple Indian Point decommissioning cost estimates, Entergy must provide all such studies forthwith and explain why any such estimates or studies were not provided in response to Information Request AG - 13.

If Entergy has only one Indian Point decommissioning cost study, estimate, or analysis, the disclosure of the significant details in its Initial Comments raises the question of whether Entergy has waived any confidentiality claim for this document. The PSC should not allow Entergy to selectively waive portions of its decommissioning estimates, but continue to shield the remainder of the documents. Confidential documents must be kept confidential. The party making a claim of confidentiality for a document may not do so and then selectively reveal portions of the protected information for its own purposes.<sup>70</sup>

Third, OAG notes that the scope of decommissioning work described by Entergy's verified submission is grossly deficient. *See* Entergy Initial Comment at 21, n. 30. If by "greenfield" Entergy means that its decommissioning work will only remediate what is visible to the eye (i.e., a few inches below the existing grade), Entergy is describing a superficial exercise to the PSC. GZA GeoEnvironmental, the hydrogeological engineering firm hired by Entergy to

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<sup>69</sup> In OAG's Initial Comments at 41-49, OAG discussed the discovery implications of Entergy's September 9, 2008 response to the September 5, 2008 Joint Motion.

<sup>70</sup> OAG continues to press its request that Entergy's provisional designation of its responses to AG-13 as trade secrets be lifted. In addition to that request, as noted in OAG's Initial Comments, Entergy improperly designated the Vermont Yankee decommissioning estimate as a trade secret and improperly continued to designate the Pilgrim decommissioning estimate as a trade secret. Although the Pilgrim study is publicly available, OAG has not discussed the substance of that document in this filing or its September 15 Initial Comments given the June 17, 2008 Protective Order.

examine the Indian Point site, had identified radionuclide contaminated plumes at depths ranging from 80 feet (below Indian Point 2) to 160 feet (near the Hudson River bank) for tritium, and from 120 feet (below Indian Point 1) to 150 feet (near the Hudson River bank) for strontium 90. See January 7, 2008 GZA GeoEnvironmental Inc., *Hydrogeologic Site Investigation Report*, Figure 9.1 - Unit 2 Tritium Plume, Cross Section A - A',<sup>71</sup> and Figure 9.2 - Unit 1 Strontium Plume, Cross Section B - B'.<sup>72</sup> The geology under the Indian Point site is characterized by fractured bedrock, in particular Inwood Marble. *Id.* at 50.<sup>73</sup> Strontium is chemically similar to calcium and prone to substitution for calcium in carbonate minerals such as marble.<sup>74</sup> Given the size and depth of the radionuclide plumes at Indian Point, and the tendency of strontium to become physically part of the marble, decommissioning of the site likely will entail extensive removal of bedrock as well as structures and soil.

## **VII. ENTERGY ALSO HAS OPENED THE DOOR TO PUBLIC EXAMINATION OF THE INFORMATION THAT IT PROVIDED TO THE FINANCIAL INDUSTRY.**

In its responses to Information Request AG - 18 requesting information Entergy provides the financial industry, Entergy has provided copies of certain documents such as its quarterly public statements concerning earnings but claimed that other documents, such as financial forecasts, are confidential.<sup>75</sup> On September 29, 2008, at 11:18 a.m., OAG received from

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<sup>71</sup> Available at NRC ADAMS Accession No. ML0800320055.

<sup>72</sup> Available at NRC ADAMS Accession No. ML0800320056.

<sup>73</sup> OAG hereby incorporates the GZA report by reference. The report is available at NRC ADAMS Accession No. ML080320540.

<sup>74</sup> See, e.g., Zoltai Tibor & Stout James H., *Mineralogy: Concepts and Principles*, p. 429 (1st ed. 1984).

<sup>75</sup> See, e.g., Entergy Response EN - 18 to Information Request AG - 18 (dated June 2, 2008).

Entergy a Fifth Supplemental Response to Information Request AG - 18. OAG has had no time to do more than a cursory examination of this Entergy response, but notes that this Response includes a PowerPoint presentation that is dated September 8, 2008, that Slide 49 of the presentation states that the document is “subject to a confidentiality agreement,” and that Slides 46 and 48 contain financial projections. By distributing this PowerPoint to disseminate information that Entergy considers useful, Entergy has waived any claims for the continued confidentiality of its other responses to Information Request AG - 18. Confidential documents must be kept confidential. The party making a claim of confidentiality for a document or set of data may not do so and then selectively reveal portions of the protected information for its own purposes. Moreover, minimal due process prohibits a party’s slipping in information at the very last minute so that other parties have no effective opportunity to comment. The PowerPoint presentation is three weeks old, but Entergy chose to distribute only today – five hours before reply comments are due. Accordingly, the Commission should lift Entergy’s confidentiality designations for all response to Information Request AG - 18. The public interest would be better served by letting the public see all the responses.

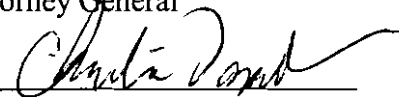
## CONCLUSION

For the above reasons, OAG respectfully requests that the administrative law judges recommend that the PSC reject Entergy's proposed corporate reorganization and debt financing. In addition, OAG requests that Entergy's designation of its decommissioning studies and communications about the financial condition of Entergy/Enexus as "confidential" be lifted.

Dated: September 29, 2008

Respectfully submitted,

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