



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

Hon. Jaclyn A. Brilling  
Secretary  
New York State  
Department of Public Service  
Three Empire State Plaza  
Albany, New York 12223

May 20, 2008

2008 MAY 20 AM 11:39

Re: PSC Case No. 08-E-0077 - *Entergy Corporate Reorganization and Debt Financing*

Dear Secretary Brilling:

The Office of the Attorney General (or "OAG") respectfully requests that the Public Service Commission (or "PSC") accept and docket this reply to the recent submission by Entergy Nuclear Operations, Inc. and various affiliates.

**Procedural History and Request for Leave to File a Reply**

In the February 20, 2008 *New York State Register*, under the caption "Transfer of Ownership by Entergy Nuclear Fitzpatrick LLC, *et al.*," No. PSC-08-08-00016-P, the PSC published a notice of a petition submitted by Entergy Nuclear Operations Inc. and various subsidiaries and affiliates seeking authorization to: (1) transfer the ownership of the limited liability companies that operate Indian Point Unit 1, Unit 2, and Unit 3 as well as the Fitzpatrick facility to a newly-created limited liability corporation variously identified as "NewCo" or "SpinCo"; and (2) incur \$6.5 billion of debt financing as part of the proposed transfer. The PSC stated that the notice and proceeding were pursuant to the New York State Public Service Law ("PSL") §§ 69 and 70 and the State Administrative Procedure Act ("SAPA").

At the same time that the PSC noticed Entergy's petition, it also invited public comment. The February 20, 2008 notice stated that the PSC would accept public comment on the proposed transfer and debt financing through April 7, 2008. On April 4, 2008, Westchester County served comments questioning the proposed transaction. On April 7, 2008, the New York State Office of the Attorney General served comments. The comments included a motion urging rejection of Entergy's petition, or, in the alternative, a full hearing preceded by discovery. On April 17, 2008, Riverkeeper, Inc., filed a response to the OAG's April 7, 2008 motion.

On April 29, 2008, Entergy filed with the Public Service Commission a document titled “Verified Response to the Comments of the New York State Attorney General’s Office, Westchester County and Riverkeeper, Inc.,” and a cover letter addressed to the PSC Secretary, which the Office of the Attorney General received on May 1.<sup>1</sup> In its cover letter, Entergy requested permission to submit the document that accompanied the cover letter; however, Entergy did not refer to any authority for the PSC Secretary to accept the proffered document.

The Office of the Attorney General requests leave to file this reply to address new information contained in Entergy’s April 29, 2008 submission and inform the PSC about recent regulatory developments. Collectively, these considerations further underscore the need for a formal PSC evidentiary hearing to ensure an orderly and open process to review Entergy’s petition. As is discussed below, the April 29 Entergy submission raises new and significant information that justifies the submission of a reply under the “extraordinary circumstances” provision of 16 N.Y.C.R.R. § 3.6(d)(3).<sup>2</sup>

**Entergy’s Late April 29, 2008 Submission Contains New Information, Raises Additional Legal Issues, and Implicates Recent Regulatory Events**

Although much of Entergy’s April 29, 2008 submission was thin on substance, it did provide some significant new information and raised additional issues that were not contained in Entergy’s January 28, 2008 petition to the PSC. The new information and issues included in Entergy’s submission raise significant questions that underline the importance of holding a full evidentiary hearing on Entergy’s petition.

Summary of New Information. The significant new information in Entergy’s April 29 submission includes:

- (1) Entergy has negotiated “amended Value Sharing Agreements” with the New York Power Authority (“NYPA”) such that Entergy now claims that the issue of ratepayer benefits from Indian Point 3 and Fitzpatrick should no longer be of concern to the PSC (pp. 22-23). Notably, Entergy did not include the amended Value Sharing Agreements with its April 29, 2008 submission. The PSC should require Entergy to file these documents;

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<sup>1</sup>Both Entergy’s submission and the accompanying cover letter have a date of April 29, 2008. Although Entergy filed the submission with the PSC Secretary on April 29, Entergy did not effectuate service on the OAG on April 29.

<sup>2</sup>The OAG also notes that Entergy’s response was untimely. Any response to the OAG’s April 7, 2008 motion was due by April 16, 2008. See 16 N.Y.C.R.R. § 3.6(d)(1). Entergy, however, did not serve its submission on Westchester, Riverkeeper, and the OAG until April 30, 2008. Thus, Entergy missed its deadline to respond to that motion, and it did not seek a waiver to file an out-of-time response to the motion. See generally 16 N.Y.C.R.R. § 3.3(a), (b), (c). If the PSC nonetheless accepts Entergy’s April 29, 2008 submission, OAG requests leave to submit this letter as a reply. If the Commission reviews the April 29 Entergy submission as a motion for waiver under 16 N.Y.C.R.R. § 3.3(c) to permit the late filing of a response to the April 7 OAG motion, the Office of the Attorney General respectfully requests leave to file a reply pursuant to the “countermotion” provision of 16 N.Y.C.R.R. § 3.6(d)(3). At any rate, as noted above, the April 29 Entergy submission raises new and significant information that justify the submission of a reply under the “extraordinary circumstances” provision of 16 N.Y.C.R.R. § 3.6(d)(3).

- (2) after the reorganization, Entergy intends that there will be service and operating agreements between NewCo and ENOI, LLC ("ENOI"), a business that Entergy would control through its half interest in ENOI Holdings, LLC (pp. 6-7 & 15-16). However, Entergy has not provided the actual terms of these service and operating agreements; and
- (3) that there will be a dispute resolution provision governing disagreements between NewCo and Entergy about ENOI Holdings (pp. 16-17) although there is no requirement for the prompt resolution of any corporate disputes through such procedures.

In addition, Entergy submitted redacted versions of five documents (listed on page 27 of Entergy's April 29 submission). The redactions, however, impede an intelligent review of the proposed terms. Pursuant to PSL §§ 69 and 70, the PSC should direct Entergy to submit unredacted versions of these documents so that the public may examine and comment on the proposed corporate reorganizations and debt authorizations and the PSC can exercise its statutory responsibilities in a meaningful manner.

Summary of New Issues. Entergy's April 29 submission also implicates new legal issues. The first significant new issue is whether the PSC should defer to the Nuclear Regulatory Commission (or "NRC") on questions related to corporate organization and finance (pp. 25-27). The second issue concerns Entergy's novel assertion that in proceedings involving merchant generating plants such as the nuclear units Entergy proposes to transfer to NewCo, the public interest is less important than the public interest in matters involving regulated utilities (pp. 24 - 25). Third, although it disclosed the amended Value Sharing Agreements with NYPA, Entergy did not provide copies of those documents as part of its April 29 submission (pp. 22-23).

Summary of Recent Regulatory Events. Since the Office of the Attorney General filed its comments and motion on April 7, 2008, certain regulatory actions have occurred that the PSC should take into account when reviewing Entergy's petition. First, the NRC has confronted Entergy over Entergy's unlawful effort to use \$157 million from the Vermont Yankee decommissioning fund to pay for care of that plant's spent fuel. *See Vermont Yankee Nuclear Power Station, License No. DPR-28 (Docket No. 50 - 271), Responses to Request for Additional Information* (Entergy Nuclear Operations, Inc., April 24, 2008) (ML081200753). Also, the Federal Energy Regulatory Commission published notice of a Louisiana Public Service Commission complaint that Entergy and various Entergy subsidiaries were using unauthorized methods and inappropriate data when calculating power cost allocations. 73 Fed. Reg. 19,212 (April 9, 2008); Fed. Energy Regulatory Comm. Docket No. EL08-51-000, Complaint of the Louisiana State Public Service Commission (March 31, 2008). The OAG respectfully asks the PSC to review these issues as part of the current proceeding.

On May 15, 2008, this Office received a copy of SEC Form 10 and attachments for "Enexus Energy Corporation," the name by which Entergy apparently will refer to NewCo in the future. In the filing, Entergy states "we do not expect to make value sharing payments to NYPA" after 2008 if the corporate restructuring is approved. *See* May 12, 2008, Enexus SEC Form 10 (p. 69 & F-19). The PSC should review the filing to better understand the company's proposed

capitalization and its implications under PSL §§ 69 and 70.<sup>3</sup>

**The PSC Should Reject Entergy's New Legal Arguments, Re-Notice the Proceeding, and/or Hold a Formal Evidentiary Hearing Preceded by Discovery**

The Office of the Attorney General submits that the public interest requires that the PSC test Entergy's claims by subjecting them to discovery and a hearing. The recent Louisiana PSC filing with FERC questioning whether Entergy has deviated from authorized methods of calculating power charges and the NRC's revelation that Entergy attempted an unauthorized use of \$157 million of the Vermont Yankee decommissioning fund strongly suggest that vetting all Entergy numbers is in order. Indeed, under the circumstances Entergy should welcome an opportunity to confirm the accuracy of its filing.

Given the new information contained in the April 29 submission and recent regulatory events, the public interest requires at a minimum that the PSC re-notice Entergy's petition so that the public may have sufficient time to read and reflect on the petition and formulate comments based on Entergy's recent PSC and SEC filings and the FERC and NRC proceedings.

**1. The Public Service Commission May Not Rely on the Nuclear Regulatory Commission's Review of Entergy's Proposed Reorganization and Debt Issuance**

In its April 29 submission, Entergy argues that the PSC need not worry about the proposed reorganization and debt issuance because the federal Nuclear Regulatory Commission is looking at the same proposal. *See* Entergy April 29, 2008 Submission at 25-27. To support this claim, Entergy submitted copies of redacted documents (totaling approximately one inch in thickness) that it filed with the NRC concerning its reorganization and financial requests.

One weakness with Entergy's argument is that the PSC's duties are different from the NRC's. As Entergy acknowledges, under the Atomic Energy Act ("AEA") the NRC has a duty to ensure that nuclear power plant licensees have the financial resources needed to operate their plants safely. *Id.* at 25-26. But the AEA does not preempt State regulation of financial matters in the nuclear power sector. Indeed, in financial matters, the NRC's ordinary practice is to rely on State regulators to ensure that nuclear plants have sufficient funds. For example, in its Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Power Industry, the NRC recognized the primary financial role of State and federal rate regulators.<sup>4</sup> Here, Entergy urges that the PSC turn the NRC's policy on its head.

A second fundamental weakness with Entergy's argument is that it relies on scores of redacted NRC documents. Blank pages or even simple captions provide no reliable information about the data that has been removed from a page. The PSC should put an end to Entergy's farce. To ensure that it can undertake a meaningful review, the PSC should order Entergy to submit the unredacted versions of the documents.

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<sup>3</sup>The Office of the Attorney General reserves the right to submit further comments on the NewCo / Enexus Form 10 filing as it continues to review the document.

<sup>4</sup> 62 Fed. Reg. 44,071, 44,076 (August 19, 1997).

## **2. Entergy Wrongly Claims that a Diluted Public Interest Standard Exists for Merchant Power Plants**

Entergy asserts a novel claim that under the Public Service Law the public interest standard for merchant power plants like Entergy's New York plants somehow is different from the public interest standard for other electric corporations. *See* Entergy April 29, 2008 Submission at 24. Entergy is wrong. To begin with, the public interest is broader than the narrow financial interest of a utility or a merchant generator. PSL § 65(1) focuses on whether a decision would promote "safe and adequate" electric service at "just and reasonable" rates. Moreover, the three PSC orders to which Entergy cites do not live up to their billing.<sup>5</sup> Simply put, the question of whether merchant plants may enjoy the "benefit" of a special, diluted public interest standard was not addressed in any of the orders. In two of the cases, the merchant generator was the only party. In the third proceeding, the only additional party was the City of Lockport, and neither Lockport nor the merchant generator raised the question of the applicable public interest standard, much less whether merchant generators have a special standard.

Moreover, if the PSC had developed such a special, diluted public interest standard for merchant generators along the lines suggested by Entergy in its April 29 submission, the PSC would need to change it. According to Entergy's view, if a PSC proceeding involves a merchant generator, the consequences to ratepayers are relevant only to the extent that the decision in the proceeding might enable the generator to use its affiliations with "fully-regulated New York utilities or power marketers" to harm "captive ratepayers." *See* Entergy April 29, 2008 Submission at 24. Presumably, the adjective "fully-regulated" here modifies only "New York utilities." Even so, this suggested standard has no basis in the Public Service Law and would conflict with the PSC's statutory responsibility to protect New York ratepayers, in that taken literally it would exempt merchant generator transactions with out-of-state utilities – in much the same manner that Enron claimed its activities were not subject to State regulation.

Entergy also defines the purported special merchant generator public interest standard as whether a PSC decision enables the merchant generator to exert "vertical or horizontal [economic] power." *Id.* at 25. This is essentially an antitrust concept. The PSC is not the Federal Trade Commission, nor does it enforce the Sherman Act. While economic market power is certainly a PSC concern, it is only one of the factors that the PSC must examine when determining the public interest. The Public Service Law implicates broader interests than

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<sup>5</sup> *Id.* at 24 and fn 49, *citing* PSC Case 07-E-0170 - Re Alliance Energy Renewables LLC and Mirant New York, Inc. - Joint Petition for Expedited Approval Under Lightened Regulation of Transfer of Ownership Interests in Mirant NY - Gen LLC Pursuant to PSL § 70 and Request for Continued Lightened Regulation, *Order Approving Transfer and Making Other Findings* (issued and effective Apr. 23, 2007); PSC Case 05-E-1341 - Orion Power Holdings, Inc., Astoria Generating Company, L.P., and Astoria Generating Company Acquisitions, LLC – Petition for Authority to Transfer Ownership Interests and to Issue Corporate Debt, *Order Approving Transfer and Financings and Making Other Findings* (issued and effective Feb. 15, 2006); PSC Case 04-E-0789 - Orion Power Holdings, Inc. and Great Lakes Power, Inc. - Joint Petition for Application of Lightened Regulation, Approval of a Financing, and a Declaratory Ruling that the Commission Will Not Assert Jurisdiction Over a Transfer, or, in the Alternative, Approval of the Transfer, *Order Approving Transfers and a Financing and Making other Findings* (issued and effective Sept. 22, 2004).

Entergy's crabbed view.<sup>6</sup>

**Conclusion**

For the above reasons, the Office of the Attorney General respectfully requests that the PSC authorize the filing of the reply proffered herein pursuant to 16 N.Y.C.R.R. § 3.6.

Respectfully submitted,

by: Charlie Donaldson/HIS  
Charlie Donaldson  
Assistant Attorney General

cc:

Paul Gioia, Esq., Dewey & LeBoeuf, counsel for Entergy  
Stewart Glass, Esq., Westchester County  
Phillip Musegaas, Esq., Riverkeeper, Inc.  
Leonard Van Ryn, Esq., PSC Staff Counsel

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<sup>6</sup> Finally, Entergy asserts that its amended Value Sharing Agreements, which could provide NYPA with up to \$360 million through 2014, are private matters between Entergy and NYPA and should be outside the PSC's review and jurisdiction. *See* Entergy April 29, 2008 Submission at 23-24. Although Entergy informed the PSC that NYPA and Entergy have negotiated amended Value Sharing Agreements, Entergy's April 29 submission to the PSC did not include copies of the amended Value Sharing Agreements, the original Value Sharing Agreements, or an explanation of why the original Agreements were replaced. OAG submits that the Value Sharing Agreements are highly relevant to the PSC's consideration of Entergy's petition because their terms may impact New York's ratepayers and economy. *See* May 12, 2008, Enexus SEC Form 10 filing (p. 69 & F-19); *see also* OAG April 7, 2008 Submission and Motion at 17-18. Entergy's failure to provide these Agreements to the Commission provides another basis for the Commission either (1) to deny the Petition or (2) to authorize discovery and schedule a full evidentiary proceeding to test Entergy's claims.