

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of Entergy Nuclear FitzPatrick, LLC and Exelon Generation Company, LLC Pursuant to Section 70 of the New York Public Service Law for Approval of the Transfer of the James A. FitzPatrick Nuclear Power Plant and Related Assets and for a Declaratory Ruling Continuing Lightened Regulation

Case 16-E-_____

JOINT PETITION OF ENTERGY NUCLEAR FITZPATRICK, LLC AND EXELON GENERATION COMPANY, LLC PURSUANT TO SECTION 70 OF THE NEW YORK PUBLIC SERVICE LAW FOR APPROVAL OF THE TRANSFER OF THE JAMES A. FITZPATRICK NUCLEAR POWER PLANT AND RELATED ASSETS AND FOR A DECLARATORY RULING CONTINUING LIGHTENED REGULATION

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I. INTRODUCTION

Entergy Nuclear FitzPatrick, LLC (“Entergy FitzPatrick”) and Exelon Generation Company, LLC (individually, “ExGen” and collectively with Entergy FitzPatrick, the “Joint Petitioners”) hereby petition the New York State Public Service Commission (the “Commission”) for approval under Section 70 of the New York Public Service Law (“PSL”) to transfer the James A. FitzPatrick Nuclear Power Plant (the “FitzPatrick Facility”) and related assets from Entergy FitzPatrick to ExGen (the “Transfer”).¹ The Joint Petitioners further request

¹ Entergy FitzPatrick is a merchant wholesale generator to which lightened regulation status was applied by the Commission. See Case 00-E-1225: *Joint Petition of Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. 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 on Lightened Regulation (Issued Aug. 23, 2000); Case 01-E-0113, *et al.: Joint Petition of Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Operations, Inc. for a Declaratory Ruling that Lightened Regulation be Applied*, Order Providing for Lightened Regulation of Nuclear Generating Facilities (Issued Aug. 31, 2001) (“Lightened Regulation Order”). The Commission has determined that, among other things, the procedural requirements set forth in 16 NYCRR §§ 18 and 31 are not applied to lightly regulated generators seeking PSL § 70 approval. See *e.g.* Case 06-M-0948: *Alliance Energy New York, LLC and RPL Holdings LLC – Joint Petition for Approval of Ownership Interests in an Electric Generation Facility*, Order Approving Transfer (Issued Oct. 25, 2006), at 4.

that the Commission declare that the lightened regulatory regime approved for the owner and operator of the FitzPatrick Facility will continue unchanged as applied to ExGen after the Transfer.²

As discussed in detail below and applying the reduced level of scrutiny applicable to lightly regulated wholesale generators, the Transfer is in the public interest.³ Accordingly, the Joint Petitioners respectfully request that the Commission take action at its November 17, 2016 session and issue an order no later than November 18, 2016, (1) approving the transfer of the FitzPatrick Facility and related assets from Entergy FitzPatrick to ExGen under PSL § 70, and (2) declaring that the FitzPatrick Facility's new owner will be lightly regulated pursuant to Commission precedent applicable to merchant electric generators participating in New York's wholesale electric markets.⁴

II. COMMUNICATIONS

The following persons should be included on the official service list in this proceeding, and all communications concerning this filing should be addressed to them:

² The Joint Petitioners are also seeking approvals related to the Transfer from regulatory agencies including the United States Nuclear Regulatory Commission ("NRC") and the Federal Energy Regulatory Commission ("FERC") and review by the United States Department of Justice.

³ The Commission has established a "lightened" regulatory regime for wholesale electric generators in New York, including owners and operators of nuclear generating facilities. *See* Case 91-E-0350: *Wallkill Generating Co., L.P. – Petition for Declaratory Ruling that the Public Service Law is Inapplicable, or that Further Regulation Thereunder is Unnecessary, or in the Alternative that Light-Handed Regulation be Applied*, Order Establishing Regulatory Regime (Issued Apr. 11, 1994) ("Wallkill Order"); *see also* Lightened Regulation Order.

⁴ As reflected in the attached Asset Purchase Agreement, Commission approval under PSL § 70 is a condition precedent to the closing of the proposed transaction.

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III. BACKGROUND

A. The James A. FitzPatrick Nuclear Power Plant

Entergy FitzPatrick owns the FitzPatrick Facility, a boiling water reactor located in Scriba, New York in Oswego County with a generating capacity of approximately 882 MW. The FitzPatrick Facility began operations in 1975. Its current Nuclear Regulatory Commission (“NRC”) operating license expires in 2034. The FitzPatrick Facility is a lightly regulated merchant generating facility that sells energy, capacity, and ancillary services in the wholesale markets administered by the New York Independent System Operator, Inc. (“NYISO”) and through bilateral contracts.⁵ On average, the FitzPatrick Facility, a base load facility with a high capacity factor, has generated over 7,000,000 MWh of zero-emission energy annually. To date, Entergy FitzPatrick has not been adequately compensated for the zero-emission attributes produced by the FitzPatrick Facility.⁶

The FitzPatrick Facility is operated by approximately 600 highly skilled, full-time workers. Entergy FitzPatrick estimates that the FitzPatrick Facility’s economic impact on the surrounding upstate community and the State, through employment, property tax payments and other economic contributions, exceeds \$74 million annually. Additionally, the FitzPatrick Facility’s bi-annual refueling outages bring 1,200 specialty jobs to the site, thereby generating substantial additional economic activity in the region and for the State. Entergy FitzPatrick and the FitzPatrick Facility’s employees contribute over \$325,000 to community events and non-profit organizations each year.

⁵ See Case 00-E-1225, *supra*; Lightened Regulation Order.

⁶ See Case 15-E-0302: *Proceeding on Motion of the Commission To Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting a Clean Energy Standard (Issued Aug. 1, 2016) (“CES Proceeding” and “CES Order,” respectively), at 145 (identifying the FitzPatrick Facility’s zero-emissions contribution of 7,014,972 MWh based on a multi-year average constituting 25.4 percent of the upstate nuclear facilities’ total contribution).

On November 2, 2015, Entergy FitzPatrick filed a Notice of Intent to Retire the FitzPatrick Facility with the Commission.⁷ In its Notice, Entergy FitzPatrick stated that “[l]ow commodity prices, combined with the plant’s distance from key load centers and market structure design flaws, including the failure of markets to compensate [Entergy] FitzPatrick for the generation of clean energy, have rendered the facility uneconomic now and for the foreseeable future.”⁸ As a result, Entergy FitzPatrick stated in its Notice that it intended to retire the FitzPatrick Facility at the end of its current fuel cycle (the “Scheduled Shutdown Date”).⁹

On July 13, 2016, Entergy Corporation (“Entergy”) announced that it was in discussions with Exelon Corporation (“Exelon”) for the potential sale of the FitzPatrick Facility and Exelon confirmed that it had entered into such discussions.¹⁰ A week later, Entergy FitzPatrick stated in its comments filed in the Commission’s CES Proceeding that it planned to continue on two parallel tracks – ongoing efforts to decommission the FitzPatrick Facility on or about the Scheduled Shutdown Date and sale negotiations.¹¹ At that time, Entergy FitzPatrick reaffirmed the FitzPatrick Facility would be permanently retired absent the Transfer.¹²

⁷ See Case 15-E-0640: *Petition of Entergy Nuclear FitzPatrick, LLC to Retire the James A. FitzPatrick Nuclear Generating Facility*, Notice of Intent to Retire James A. Fitzpatrick Nuclear Generating Facility (Filed Nov. 2, 2015) (“Notice”). On the same date, Entergy FitzPatrick filed a deactivation notice with the NYISO pursuant to tariff revisions pending before the FERC.

⁸ *Id.*

⁹ *Id.* The Scheduled Shutdown Date is based on available fuel. It was initially identified as January 27, 2017 but has been more recently moved to January 31, 2017.

¹⁰ See Case 15-E-0302, *supra*, Constellation Energy Nuclear Group, LLC – Response to Request for an Extension (Filed Jul. 13, 2016); see also Entergy Press Release: “Entergy in Discussions for the Potential Sale of the James A. FitzPatrick Nuclear Power Plant to Exelon” (Jul. 13, 2016), <http://www.entergynewsroom.com/latest-news/entergy-discussions-potential-sale-jamesfitzpatrick-nuclear-power-plant-exelon/>; Exelon Press Release: “Exelon Says New York Rules Could Preserve Plants, Open Door for Hundreds of Millions in Investment” (Jul. 13, 2016), <http://www.exeloncorp.com/newsroom/fitzpatrick-release-2016>.

¹¹ See Case 15-E-0302, *supra*, Comments of the Entergy Entities on DPS Staff’s CES Tier 3 Responsive Proposal (Filed Jul. 22, 2016), at 5-6.

¹² *Id.* (identifying January 31, 2017 as the last day of operations for the FitzPatrick Facility based on available fuel supply).

The Joint Petitioners now seek Commission approval to transfer the FitzPatrick Facility from Entergy FitzPatrick to ExGen.

B. The Parties

i. Entergy FitzPatrick

Entergy FitzPatrick is an indirect subsidiary of Entergy, an energy company with power production, distribution operations, and related diversified services. Entergy owns, manages, or invests in power plants generating nearly 30,000 MW of electricity nationwide. Entergy, through its subsidiaries, currently owns and operates eight nuclear plants in the United States, including the FitzPatrick Facility, which is owned by Entergy FitzPatrick. Entergy is Entergy FitzPatrick's ultimate corporate parent.

Entergy FitzPatrick is lightly regulated by the Commission, as is the FitzPatrick Facility's operator Entergy Nuclear Operations, Inc. ("ENOI").¹³ Because the FitzPatrick Facility is a nuclear power plant, the Commission imposed additional requirements beyond those applicable to lightly regulated fossil-fueled facilities when Entergy FitzPatrick and ENOI were granted lightened regulation. Specifically, the Commission held:

"[M]ore complete information on nuclear facilities is needed because nuclear units are more complex to operate and maintain than other types of generation units. Moreover, the potential for extended outages is greater, given the stringent regulatory scrutiny directed towards the safe operation of these facilities. Additional reporting and monitoring requirements will ensure that the public is adequately informed of events that occur at nuclear facilities and that the impact of these major generators on the availability of supply in New York is adequately tracked."¹⁴

The Commission further determined that nuclear wholesale generators raise two issues under PSL Article 4. Specifically, the Commission held:

¹³ See Lightened Regulation Order; Case 00-E-1225, *supra*

¹⁴ *Id.* at 11.

“Under traditional utility ownership, expenses for nuclear facility decommissioning were funded in advance. While the NRC has jurisdiction over the decommissioning of radioactive plant components, New York nuclear owners were required to ensure the adequacy of additional funding for decommissioning of non-radioactive plant components. A condition of the transfer to the new owners is a continuation of the funding for non-radioactive decommissioning. Public Service Law jurisdiction over reports on and the spending of that fund is retained.”¹⁵

Entergy FitzPatrick and ENOI have operated the FitzPatrick Facility in accordance with these additional requirements.

ii. The Exelon Entities

ExGen is one of the largest competitive power generators in the United States, with approximately 32,000 MW of owned capacity in a number of organized markets comprising one of the Nation’s cleanest and lowest-cost power generation fleets. ExGen, which owns or co-owns and operates 13 nuclear plants, is the largest licensed nuclear operator in the United States and has a proven record of best-in-class nuclear operations. For example, during 2015 and 2014, respectively, the nuclear generating units operated by ExGen achieved capacity factors of 93.7 percent and 94.3 percent, respectively. ExGen will bring significant nuclear operational and management experience, resources, and expertise to the FitzPatrick Facility.

Through its subsidiaries Constellation Nuclear, LLC (“CNL”) and CE Nuclear, LLC (“CEN”), ExGen owns 50.01 percent of Constellation Energy Nuclear Group, LLC (“CENG”). CENG is a joint venture between CNL, CEN, and Electricite de France (“EDF”), which owns the remaining 49.9 percent of the company. CENG owns a total of five nuclear generating facilities on three sites – Calvert Cliffs Nuclear Power Plant in Maryland (“Calvert Cliffs”) and R.E. Ginna Nuclear Power Plant (“R.E. Ginna”) and Nine Mile Point Nuclear Station (“Nine Mile Point”) in New York.

¹⁵ *Id.* at 11, Appendix.

Exelon is ExGen's corporate parent and conducts operations and business activities in 48 states, the District of Columbia, and Canada. Exelon owns Atlantic City Electric Company, Baltimore Gas and Electric Company ("BGE"), Commonwealth Edison Company, Delmarva Power & Light Company, PECO Energy Company ("PECO"), and Potomac Electric Power Company ("Pepco"). Together, Atlantic City Electric, BGE, Delmarva Power, ComEd, PECO, and Pepco own electric transmission and distribution systems that deliver electricity to approximately 10 million customers in the District of Columbia, northern Delaware and the Delmarva Peninsula, southern New Jersey, Northern Illinois, Maryland, and southeastern Pennsylvania. In addition, BGE distributes natural gas to over 650,000 customers in central Maryland and also operates a liquefied natural gas facility for the liquefaction and storage of natural gas as well as associated propane facilities, Delmarva Power distributes natural gas to over 122,000 consumers in northern Delaware, and PECO distributes natural gas to over 500,000 consumers in the suburban Philadelphia area. Exelon does not own any transmission or distribution assets in New York beyond the limited facilities that interconnect its generation assets to the grid.

IV. THE TRANSFER

A. Asset Purchase Agreement

Under the terms of the Asset Purchase Agreement ("APA") between ExGen and Entergy FitzPatrick, attached hereto as Exhibit 1, ExGen will acquire Entergy FitzPatrick's right, title, and interest in and to the FitzPatrick Facility and related assets. This will include, but will not be limited to, (1) real property, buildings, and improvements; (2) all machinery and equipment; (3) all transferrable permits; (4) all spent nuclear fuel, waste, source and byproduct material, and inventory; and (5) all books and records relating to the FitzPatrick Facility.

The APA also addresses decommissioning the FitzPatrick Facility, including provisions that detail the transfer of decommissioning funds to ExGen. Upon closing, ExGen will assume the decommissioning obligations for the FitzPatrick Facility. ExGen will be obligated to meet the NRC minimum funding assurance requirements once it becomes the licensed owner and operator of the FitzPatrick Facility.

In addition, prior to closing the proposed transaction, ExGen will offer employment to substantially all of the ENOI employees at the FitzPatrick Facility.

B. Interconnection Agreements

Entergy FitzPatrick is a party to two interconnection agreements: (1) an Interconnection and Operation Agreement, dated March 28, 2000, between Entergy FitzPatrick and the Power Authority of the State of New York; and (2) a Large Generator Interconnection Agreement between Entergy FitzPatrick and Niagara Mohawk Corporation (d/b/a National Grid). Closing the transaction will include, among other things, assignment of these interconnection agreements to ExGen.

V. THE TRANSFER IS IN THE PUBLIC INTEREST AND SHOULD BE APPROVED UNDER PSL § 70

With respect to transfers of ownership interests in a New York electric plant, PSL § 70 (1) states:

“No gas corporation or electric corporation shall transfer or lease its franchise, works or system . . . to any other person or corporation . . . without the written consent of the Commission.”¹⁶

The Commission applies a “public interest” standard to its review of proposed transfers under PSL § 70.¹⁷ In conducting Section 70 review of asset transactions between electric corporations

¹⁶ PSL § 70 (1).

operating in wholesale electric markets, the Commission applies a reduced level of scrutiny, which matches the risks posed by transfers between merchant generators, examining “any affiliations, including those with fully-regulated New York utilities or power marketers, that might afford opportunities for the exercise of market power or pose the potential for other harms detrimental to captive ratepayer interests.”¹⁸

To conduct this review, the Commission considers whether (1) the proposed transfer will result in a concentration of wholesale generation ownership that may enable the exercise of horizontal market power, (2) the purchasing entity is affiliated with entities that own or control traditional public utilities, electric transmission facilities, or fuel inputs into generation that operates in markets affecting New York or that otherwise have the ability to impose prices on captive ratepayers, (3) the transferee is financially sound, and (4) the assets being transferred will be safely operated following the transaction.¹⁹

As set forth in detail below, the Transfer is in the public interest and fully satisfies the Commission’s standard of review under PSL § 70.

A. There Are No Horizontal Market Power Issues

As demonstrated in a two-part analysis set forth in the affidavit of Julie R. Solomon annexed hereto as Exhibit 2, the Transfer does not create the potential for the FitzPatrick

¹⁷ PSL § 70; *see also* Case 10-M-0186 *et al.*: *Joint Petition of Alliance Energy Renewables, LLC, AER NY-Gen, LLC, AG-Energy, LP, Alliance Energy, New York LLC, Eagle Creek Hydro Power, LLC, Eagle Creek Water Resources, LLC, Eagle Creek Land Resources, LLC, and Eagle Creek Ogdensburg, LLC for an Order Approving Transfer Pursuant to PSL Sections 70 and 83 and Approving a Limited Lightened Regulatory Regime*, Order Approving Transfers Upon Conditions and Making Other Findings (Issued Jul. 23, 2010), at 18.

¹⁸ Case 10-M-0186 *et al.*, *supra*, at 17; *see also* Case 16-E-0244: *Joint Petition of Castleton Energy Center, LLC, Castleton Power, LLC and Fortistar Castleton LLC for Approval of the Transfer of Ownership Interests Pursuant to Section 70 of the Public Service Law*, Order Approving Transfer and Continuing Lightened Regulation (Issued Jul. 14, 2016) (“Castleton Order”), at 6.

¹⁹ *See e.g.* Case 03-E-1231: *Petition of Rochester Gas and Electric Corporation for Approval to Transfer by Auction Sale the R.E. Ginna Nuclear Generating Station*, Order Approving Transfer, Subject to a Modification (Issued May 20, 2004), at 13.

Facility's new owner to exercise horizontal market power.²⁰ The potential horizontal market power effects of the Transfer are those arising from the combination of the electric generating assets currently owned by ExGen and its affiliates and Entergy FitzPatrick that theoretically could enable ExGen or its affiliates to increase prices in relevant electricity markets.²¹ The relevant markets for the purpose of conducting this analysis are defined as the New York wholesale markets and the wholesale markets in the two adjoining regions, PJM and ISO-NE.²²

The Transfer will not have an adverse effect on horizontal competition in any relevant wholesale electricity market. ExGen is an electric corporation that owns and operates electric generating facilities and engages in wholesale power and energy marketing and trading operations in the United States pursuant to FERC-approved market-based rate authority. All of the ownership interests in ExGen are indirectly held by Exelon.

ExGen, through its subsidiaries, owns a 50.01 percent interest in CENG, a joint venture with EDF. CENG owns a total of five nuclear generating facilities on three sites – Calvert Cliffs (in PJM) and R.E. Ginna and Nine Mile Point (in NYISO). ExGen purchases on a unit-contingent basis 50.01 percent of the nuclear plant output owned by CENG not sold to third parties. To reach the most conservative results, Ms. Solomon assumed that ExGen was assigned 100 percent of the R.E. Ginna and Nine Mile Point generation that is owned by CENG for purposes of this market power analysis.²³ This excludes the 18 percent share of Nine Mile Point Unit 2 owned by the Long Island Power Authority.²⁴ The analysis also took into account that

²⁰ See accompanying Affidavit of Julie R. Solomon, sworn to on August 19, 2016 (“Solomon Affidavit”).

²¹ *Id.* at 2.

²² *Id.* at 3.

²³ *Id.* at 8.

²⁴ *Id.*

EDF has the rights to 49.99 percent of the output of the portion of Nine Mile Point owned by CENG.²⁵

The total installed generation capacity in NYISO markets for 2016 is approximately 39,000 MW.²⁶ Affiliates of Exelon currently own or control 1,428 MW of base load generation capacity in NYISO, representing 3.7 percent of total installed capacity, all of which is located in the unconstrained Rest of State (“ROS”) subregion of the NYISO market.²⁷ Following the consummation of the Transfer and the acquisition of the FitzPatrick Facility, Exelon and its affiliates would own or control 2,276 MW of generating capacity in NYISO, or 5.9 percent of the total installed capacity in the ROS subregion, all of which is base load capacity.²⁸

The change in market concentration, as measured by the Herfindahl-Hirschman Index (“HHI”), resulting from the Transfer based on installed capacity is -7 points.²⁹ This reflects the fact that, while the Transfer increases ExGen’s affiliated market share (and its contribution to the HHI), it reduces Entergy’s affiliated market share (and its contribution to the HHI).³⁰

Granting Section 70 approval of the Transfer is consistent with Commission precedent. Although it involved a stock transfer, the proceeding initiated by LS Power Development LLC (“LS Power”) concerning its acquisition of Calpine Corporation common stock is instructive. There, as here, the Commission was presented with a market power analysis and supporting affidavit of Ms. Solomon to support the conclusion that LS Power’s ownership of the petitioners’

²⁵ *Id.* Nine Mile Point sells to EDF Trading North America, LLC approximately 50 percent of the energy output of the Nine Mile Point 1 and 2 units under a long-term firm agreement in effect until the complete and permanent cessation of power generation by the units.

²⁶ *Id.* at 4-5.

²⁷ *Id.* at 5, Table 2.

²⁸ *Id.*

²⁹ *Id.* at 5.

³⁰ *Id.*

combined interests would not create an adverse market concentration. In evaluating the proposed transaction, the Commission observed:

“The change in the HHI index state-wide as a result of the transaction is only ten points, far below the level needed to raise a concern that the transaction would significantly increase market concentration. In the NYISO’s state-wide ICAP market, the HHI change is even smaller, at six points.”³¹

Even after applying stringent “worst case” assumptions about the new owner’s ability to control generation and dispatch, the Commission concluded that LS Power was “highly unlikely to embark upon” an economic withholding strategy in the New York Control Area (“NYCA”), Long Island, or New York City installed capacity (“ICAP”) markets.³² In sum, the Commission found that LS Power’s total ownership share of the 39,000 MW NYISO market -- 3,047 MW of generation, or just less than 8 percent³³ -- did not rise to a level that was sufficient to cause concern.³⁴

³¹ Cases 07-E-1385, *et al.*: *Petition of Calpine Corporation and LS Power Development LLC for a Declaratory Ruling Regarding Acquisition of Common Stock, or in the Alternative, Approval Under PSL Sections 70 and 83*, Declaratory Ruling on Review of Stock Transfer and Acquisition Transactions (Issued Jan. 22, 2008) (“Calpine Ruling”), at 12.

³² *Id.* at 13. The Commission estimated that “the best benefit LS Power could realize from executing such a withholding strategy is calculated as less than \$36,000 a month.” *Id.* Relatedly, the FERC has previously determined that baseload generation, including nuclear generation, is not suited to strategic economic withholding. *See USGen New England, Inc.*, 109 FERC ¶ 61,361 at P 23 (2004); *Ohio Edison Co.*, 94 FERC ¶ 61,291 at 62,044 (2001); *Commonwealth Edison Co.*, 91 FERC ¶ 61,036 at 61,133-34 (2000); *see also FirstEnergy Corp.*, 133 FERC ¶ 61,222 at PP 49-50 (2010) (finding that withholding baseload generation capacity would not increase prices enough to offset lost revenue). The only generation ExGen and its affiliates own in NYISO consists of nuclear generation, and the generation it is acquiring is baseload nuclear generation, thereby providing no opportunities for strategic withholding.

³³ Calpine Ruling, at 8. In another analogous proceeding, the Commission applied the *Wallkill* Presumption and found that “LS Power’s total ownership share would amount to 3,181 MW, which represents only an 8.1% share of the approximately 39,000 MW of NYISO installed capacity. This percentage is only slightly greater than that allowed in the Calpine Ruling and *is insufficient* to cause concern[.]” Case 08-E-0410: *Petition of LS Power Development, LLC for a Declaratory Ruling Regarding the Acquisition of Common Stock, or in the Alternative, Approval Under Section 70 of the PSL*, Declaratory Ruling on the Acquisition of Common Stock (Issued May 27, 2008), at 8 (emphasis added).

³⁴ Calpine Ruling, at 13; *see also* Case 08-E-0397: *Petition of Harbinger Capital Partners Master Fund I, Ltd, and Harbinger Capital Partners Special Situations Fund, L.P. for Declaratory Ruling Regarding Acquisition of Common Stock, and, in the Alternative, Approval Under Section 70 of the New York State Public Service Law*, Declaratory Ruling on the Acquisition of Common Stock (Issued Jun. 23, 2008) (“Harbinger I”)

Because each of the Joint Petitioners has affiliated capacity in NYISO, and ExGen’s post-Transfer market share exceeds 5 percent, Ms. Solomon also performed a second analysis, the Competitive Analysis Screen or Delivered Price Test (“DPT”), for the NYISO market.³⁵ As demonstrated in Ms. Solomon’s affidavit, for Economic Capacity (“EC”) the DPT is easily passed.³⁶ The market is unconcentrated, and HHI changes are slightly negative (reflecting the fact that Entergy’s affiliated market share and its contribution to the HHI is reduced more than ExGen’s affiliated market share and its contribution to the HHI is increased).³⁷ The DPT results under the requisite price sensitivities (plus 10 percent and minus 10 percent) are quite similar, and the screens are passed there as well.³⁸

Even if CENG’s sale to EDF is ignored to produce the most conservative results, the market remains unconcentrated, and the HHI change is no more than about 20 points.³⁹ As further demonstrated in Ms. Solomon’s affidavit, the DPT is readily passed under the Available Economic Capacity (“AEC”) measure.⁴⁰ As with EC, the market is unconcentrated. The HHI changes are negative to slightly positive, and the DPT is passed.⁴¹ The DPT results under the price sensitivities are very similar, and the screens are passed there as well. In sum, the Transfer does not raise horizontal market power issues.⁴²

Furthermore, the Transfer will not allow Exelon and its affiliates to exercise market power in the adjacent ISO-NE or PJM control areas. In PJM, Exelon indirectly owns or controls

(approving a stock transaction that would result in Harbinger controlling 9.7 percent of NYISO installed capacity).

³⁵ Solomon Affidavit, at 11-13.

³⁶ *Id.* at 16-17.

³⁷ *Id.* at 16.

³⁸ *Id.*

³⁹ *Id.* at 17.

⁴⁰ *Id.* at 17-19.

⁴¹ *Id.* at 18.

⁴² *Id.* at 15-19.

approximately 25,000 MW of installed generating capacity, or 13.5 percent of the total installed capacity of approximately 182,000 MW, and the Transfer will not change that amount.⁴³ To the extent the generation affiliated with Exelon in PJM has cleared the PJM Reliability Pricing Model market, such supply is required to be offered in the PJM energy markets. Moreover, due to the limited transfer capability between the two regions, the amount of power that can be transferred from PJM to NYISO is constricted.

In ISO-NE, Exelon indirectly owns 2,200 MW of generation capacity, which is approximately 7.2 percent of the total installed capacity of approximately 30,000 MW in ISO-NE, and the Transfer will not change that amount.⁴⁴ To the extent that the generation affiliated with Exelon in ISO-NE clears the ISO-NE Forward Capacity Market, such supply is required to be offered into both the ISO-NE day-ahead and real-time energy markets. Limited transfer capability between NYISO and ISO-NE also constricts transfers between these two markets.

Finally, after consummation of the Transfer, Exelon and its affiliates will own or control, across all three markets, a total of about 29,000 MW of the more than 250,000 MW of total installed capacity, or 11.6 percent, which should be considered well below a level of concern.⁴⁵

In sum, the Transfer does not raise any horizontal market concerns in any of the relevant markets.

B. There Are No Vertical Market Power Issues

The Transfer does not raise the potential for the exercise of vertical market power. Neither ExGen nor any of its affiliates owns or controls any transmission and distribution facilities in New York beyond the interconnection facilities specific to their nuclear facilities.

⁴³ *Id.* at 6.

⁴⁴ *Id.*

⁴⁵ *Id.* at 7.

In conducting a review under PSL § 70 involving a lightly regulated electric corporation operating in wholesale electric markets, the Commission also examines any affiliations with power marketers that might afford opportunities for the exercise of market power.⁴⁶ ExGen is affiliated with a power marketer, Constellation. Constellation is one of the nation's leading marketers of electricity and natural gas and related products in wholesale and retail markets. These businesses serve approximately 2.5 million residential and business customers in various markets throughout the United States. ExGen's affiliation with Constellation does not raise any market power concerns because Constellation does not own or control transmission or distribution assets in New York beyond the limited facilities that interconnect its generation plants to the grid.

C. The Interests Of Captive Ratepayers Are Not Harmed

The Transfer does not create any potential for harm to the interests of captive utility ratepayers because the Transfer does not result in the potential for ExGen to exercise market power. ExGen will operate the FitzPatrick Facility in the competitive wholesale markets, and ExGen will continue to have no captive ratepayers.

D. ExGen Is Financially Sound, And The FitzPatrick Facility Will Be Safely Operated Following The Transfer

ExGen is sufficiently capitalized and is fully qualified to own and manage the FitzPatrick Facility under lightened regulation. ExGen is the largest licensed nuclear operator in the United States. It currently owns or co-owns, directly or through a co-owned subsidiary, and operates 13 nuclear plants consisting of 22 units (Braidwood Station Units 1 and 2, Byron Station Units 1 and 2, Calvert Cliffs Nuclear Power Plant Units 1 and 2, Clinton Power Station, Dresden Nuclear Power Station Units 2 and 3, LaSalle County Station Units 1 and 2, Limerick Generating Station

⁴⁶ See Castleton Order, at 4, 6.

Units 1 and 2, Oyster Creek Nuclear Generating Station, Nine Mile Point Units 1 and 2, Peach Bottom Atomic Power Station Units 2 and 3, Quad Cities Nuclear Power Station Units 1 and 2, R.E. Ginna Nuclear Power Station, and Three Mile Island Nuclear Station Unit 1). Together, the nuclear units operated by ExGen produce approximately 18,455 MW of electricity. During 2015 and 2014, respectively, the nuclear generating units operated by ExGen achieved capacity factors of 93.7 percent and 94.3 percent. During 2015, the first full year during which ExGen was the operator of the New York nuclear facilities, R.E. Ginna and Nine Mile Point had an overall capacity factor of 95.4 percent.⁴⁷ As the largest nuclear fleet operator in the United States, ExGen will bring significant nuclear operational and management experience, resources, and expertise to the FitzPatrick Facility. The overall technical resources available to the FitzPatrick Facility will be enhanced as a result of ExGen acquiring ownership and assuming operating authority. As a result, the FitzPatrick Facility will be safely operated following the Transfer.

ExGen is financially sound and has the financial wherewithal to own and operate the FitzPatrick Facility. ExGen has an investment grade credit rating and is financially qualified based upon its own revenues and assets. Moody's and Standard and Poor's bond ratings for the past three years demonstrating ExGen's investment-grade bond ratings are shown in the table below.

⁴⁷ ExGen became the NRC licensed operator of the R.E. Ginna and Nine Mile Point facilities on April 1, 2014, at which time those facilities were fully integrated with the ExGen nuclear fleet.

Moody's and Standard and Poor's Bond Ratings

Moody's			S&P		
2014	2015	2016	2014	2015	2016
Baa2	Baa2	Baa2	BBB	BBB	BBB

In addition, historical financial information regarding Exelon and its subsidiaries, including ExGen, is provided in the 2015 Annual Report Exelon filed with the Securities and Exchange Commission.⁴⁸

E. The Only Alternative To The Transfer Is The Permanent Retirement Of The FitzPatrick Facility, A Result That Will Cause New York State To Backslide Substantially On Its Carbon Emission Reduction Gains And Will Lead To Increased Fossil-Fueled Facility Operations

In the CES Proceeding, the Staff of the New York Department of Public Service (“DPS Staff”) highlighted the critical role played by nuclear facilities in the State’s efforts to achieve a 40 percent reduction in carbon emissions end state by 2030, stating:

“New York has been active in pursuing lower emissions of GHG and other pollutants. . . . The closure of the upstate New York nuclear plants . . . would have a large negative impact on the State’s ability to meet its carbon reduction goal. If the upstate New York power plants were to close in the near-term, New York would have to procure more of its electricity from fossil fuel generating plants, primarily those burning natural gas, resulting in significant increases in carbon dioxide (CO₂), nitrogen oxide, and other air pollutants.”⁴⁹

In its CES Order, the Commission confirmed the critical role that New York’s existing nuclear facilities play in the State’s ability to achieve its carbon emission reductions end state and

⁴⁸ Available at: <https://www.sec.gov/Archives/edgar/data/1109357/000119312516457652/0001193125-16-457652-index.htm>

⁴⁹ See Case 15-E-0302, *supra*, Staff White Paper on Clean Energy Standard (Issued Jan. 25, 2016), at 29 (footnotes omitted). “For CO₂ alone, this would mean over 15.5 million metric tons of additional emissions each year.” *Id.*

focused on the significantly increased air emissions that will result absent the operation of these facilities.⁵⁰ The Commission found that the FitzPatrick Facility was eligible to participate in the CES Program.⁵¹

The Transfer will allow for the FitzPatrick Facility's continued operation in Oswego County, which would not otherwise be the case. Entergy FitzPatrick has continued with its decommissioning efforts to align with its Scheduled Shutdown Date and will revert to moving forward solely with its decommissioning plans absent the Transfer. Were that to occur, the FitzPatrick Facility's zero-emission attributes would be permanently unavailable to New York State's wholesale markets beginning in February 2017. Instead, the Transfer will assist the State in maintaining its carbon reductions secured to date and achieving its 40 percent reduction in carbon emissions end state by 2030, thereby furthering the State's environmental initiatives. In addition, it will preserve the valuable economic benefits that the FitzPatrick Facility provides to the region and the State. Approval of the Transfer will, therefore, further the CES program and provide substantial economic benefits for New Yorkers.

For all of the foregoing reasons, the Transfer is in the public interest and should be approved.

VI. THE COMMISSION SHOULD DECLARE THAT THE TRANSFER WILL NOT ALTER THE REGULATORY FRAMEWORK OTHERWISE APPLICABLE TO THE PARTICIPANTS

The Commission previously held that, because the FitzPatrick Facility provides electric service on a wholesale basis as a participant in the NYISO competitive markets, the FitzPatrick Facility's owner (Entergy FitzPatrick) and operator (ENOI) qualify for lightened regulation

⁵⁰ CES Order, at 19.

⁵¹ *Id.* at 128.

under Commission precedent.⁵² The Transfer will have no effect on the underlying bases supporting the Commission's prior determination to grant Entergy FitzPatrick and ENOI lightened regulation. The FitzPatrick Facility will continue to sell its energy, capacity, and ancillary services exclusively at wholesale in the NYISO markets or through bilateral contracts. Moreover, ExGen understands the additional requirements that were placed on the lightened regulation status of Entergy FitzPatrick when the FitzPatrick Facility was transferred to it and hereby accepts these requirements as applied to its ownership. Accordingly, the Joint Petitioners respectfully request that the Commission affirm and declare that the Transfer will not affect the lightened regulatory regime applied to the owner of the FitzPatrick Facility upon its transfer.⁵³

VII. THE COMMISSION SHOULD TAKE ACTION ON THE JOINT PETITION AT ITS NOVEMBER 17, 2016 SESSION AND ISSUE AN ORDER APPROVING THE TRANSFER NO LATER THAN NOVEMBER 18, 2016

The Joint Petitioners respectfully request that the Commission take action on or before its November 17, 2016 session and issue an order, approving the Transfer under PSL § 70 no later than November 18, 2016. Prompt approval is warranted here because, as demonstrated above, the Transfer does not raise any issues regarding retail energy sales to captive ratepayers, it does not raise any market power concerns in the competitive wholesale markets in New York or the adjoining regions and it is consistent with Commission precedent. Additionally, ExGen must soon make certain near-term investment decisions, including a refueling determination for the FitzPatrick Facility requiring a substantial expenditure of funds to keep it operational beyond the end of its current fuel cycle, which runs through approximately January 31, 2017. As set forth in the APA, the Joint Petitioners agreed that certain conditions must be satisfied prior to refueling

⁵² See Lightened Regulation Order; Case 00-E-1225, *supra*.

⁵³ In accordance with the PSL and Commission precedent, the Joint Petitioners hereby seek approval from the Commission for the lawful transfer of the FitzPatrick Facility from Entergy FitzPatrick to ExGen under PSL § 70 as the sole action required by the Commission.

the FitzPatrick Facility including, among other things, authorization of the actions addressed in the instant petition no later than November 18, 2016. Satisfaction of this precondition to refueling is required to close on the transfer of the FitzPatrick Facility and will provide added certainty that ExGen can recover the tens of millions of dollars in certain refueling expenses through participation in the market. Any delay in Commission action jeopardizes the continued operation of the FitzPatrick Facility. Therefore, prompt approval is necessary so that the proposed transaction may close and ExGen can make the investments needed for the continued operation of the FitzPatrick Facility.

VIII. STATE ENVIRONMENTAL QUALITY REVIEW ACT

Under the State Environmental Quality Review Act (“SEQRA”), Article 8 of the Environmental Conservation Law, and its implementing regulations (6 NYCRR Part 617 and 16 NYCRR Part 7), the Commission must determine whether its action in this proceeding may have a significant impact on the environment. Because no additional state or local permits are required for the approval of the Transfer, the Commission may declare itself the SEQRA “lead agency” to conduct an environmental assessment and determine the significance of the action proposed.⁵⁴

The proposed action (*i.e.*, approving the Transfer) does not meet the definition of Type I or Type II actions listed in 6 NYCRR §§ 617.4, 617.5, and 16 NYCRR § 7.2 and is, therefore, classified as an “unlisted” action requiring SEQRA review. To facilitate this assessment, the Joint Petitioners have attached an Environmental Assessment Form (“EAF”) describing the potential impacts, if any, of the Transfer as Exhibit 3.

⁵⁴ See 6 NYCRR § 617.6 (b).

No significant adverse environmental effect will result from the Transfer. As an initial matter, the Commission has recently completed a Supplemental Generic Environmental Impact Statement, which presents a comprehensive identification and analysis of the potential environmental impacts of the CES program. The Commission's accompanying Findings Statement provides:

“The CES program is expected to yield overall positive environmental impacts, primarily by reducing the State's use of, and dependence on, fossil fuels, among other benefits. In conjunction with other State and Federal policies and initiatives, CES is designed to reduce the adverse environmental, social and economic impacts of fossil fuel energy resources by increasing use of clean energy resources and technologies.”⁵⁵

Transfer of the FitzPatrick Facility from Entergy FitzPatrick to ExGen will not result in any material changes comparing the manner in which Entergy FitzPatrick operated the FitzPatrick Facility to operations by ExGen following closing. Specifically, following approval and closing of the proposed transaction, the FitzPatrick Facility will continue to be operated by ExGen in accordance with the requirements specified in the Commission's lightened regulation orders, its NRC licenses, relevant environmental permits, and all applicable environmental laws. As such, the Transfer will not cause new environmental impacts, and, thus, the Commission should determine that the Transfer will not have a significant impact on the environment, adopt a negative declaration pursuant to SEQRA, and undertake no further environmental review.⁵⁶

⁵⁵ CES Order, Appendix G, State Environmental Quality Review Act Findings Statement (Issued Aug. 1, 2016), at 51; *see also, id.* at 5 (noting that, absent a viable CES program, “New York would need to procure more of its electricity from fossil fuel generating plants, likely natural gas plants, which would result in increases in carbon dioxide, nitrogen oxide, and other pollutants”); *id.* at 8 n.1 (finding that the impacts from operating the FitzPatrick Facility were fully described and addressed by the NRC during its process of relicensing the facility) (citations omitted).

⁵⁶ 6 NYCRR § 617.7.

IX. NEW YORK STATE ADMINISTRATIVE PROCEDURE ACT

Pursuant to Section 202 of the State Administrative Procedure Act (“SAPA”), the Commission’s consideration of the Transfer is a rulemaking requiring that notice be published in the *New York State Register* allowing 45 days for public comment.⁵⁷ A draft form of notification suitable for publication in the *New York State Register* pursuant to SAPA is attached hereto as Exhibit 4.

X. CONCLUSION

As demonstrated above, the Transfer offers numerous benefits and is in the public interest. By approving the transfer of the FitzPatrick Facility to ExGen, the State will retain approximately 882 MW of base load capacity capable of producing over 7,000,000 MWh of zero-emission attributes annually, thus furthering the State’s environmental objectives. The local and State economies will retain positions for approximately 600 highly-skilled, full-time workers in the Oswego, New York area, and the ongoing operations of the FitzPatrick Facility will continue to contribute approximately \$74 million to the local and State economies on an annual basis, which will be further bolstered by the substantial additional contributions bi-annually tied to unit refueling outages. Applying the reduced level of scrutiny applicable to lightly regulated wholesale generators consistent with Commission precedent, the Transfer is in the public interest. Accordingly, the Joint Petitioners respectfully request that the Commission take action at its November 17, 2016 session and issue an order no later than November 18, 2016 (1) approving the transfer of the FitzPatrick Facility and related assets from Entergy FitzPatrick to ExGen under PSL § 70, and (2) declaring that the FitzPatrick Facility’s new owner will be


⁵⁷ SAPA § 202 (1).

lightly regulated pursuant to Commission precedent applicable to merchant electric generators participating in New York's wholesale electric markets.

Dated: August 22, 2016
Albany, New York

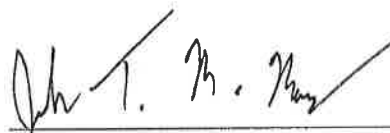
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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of Entergy Nuclear FitzPatrick, LLC and Exelon Generation Company, LLC Pursuant to Section 70 of the New York Public Service Law for Approval of the Transfer of the James A. FitzPatrick Nuclear Generating Facility and Related Assets and for a Declaratory Ruling Continuing Lightened Regulation

Case 16-E-_____

VERIFICATION

STATE OF MARYLAND)
) ss:
CITY OF BALTIMORE)

David O. Dardis, Esq. being duly sworn, deposes and states as follows:

1. I am the Senior Vice President and Deputy General Counsel of Exelon Corporation (parent of Exelon Generation Company, LLC) and the General Counsel of Constellation Energy.
2. I am authorized to sign this verification on behalf of Exelon Generation Company, LLC.
3. I have reviewed the foregoing Joint Petition and the statements of fact contained therein are true and correct to the best of my knowledge, information, and belief.



David O. Dardis

Sworn to and subscribed before me
this 19 day of August 2016.

Melissa A. Kerchner
Notary Public



STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of Entergy Nuclear FitzPatrick, LLC and Exelon Generation Company, LLC Pursuant to Section 70 of the New York Public Service Law for Approval of the Transfer of the James A. FitzPatrick Nuclear Generating Facility and Related Assets and for a Declaratory Ruling Continuing Lightened Regulation

Case 16-E-_____

VERIFICATION

STATE OF LOUISIANA)
) ss:
PARISH OF ORLEANS)

Daniel T. Falstad, being duly sworn, deposes and states as follows:

1. I am Secretary of Entergy Nuclear FitzPatrick, LLC, one of the joint petitioners in the above-captioned proceeding.
2. I am authorized to sign this verification on behalf of Entergy Nuclear FitzPatrick, LLC.
3. I have reviewed the foregoing Joint Petition and the statements of fact contained therein are true and correct to the best of my knowledge, information, and belief.


Daniel T. Falstad

Sworn to and subscribed before me
this 22nd day of August, 2016.



Jennifer B. Favalora
Notary Public (ID# 57639)
Orleans Parish, Louisiana
Commission Issued For Life

