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September 29, 2008

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

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

Dear Judge Lynch and Judge Prestemon:

Enclosed please find Staff's Reply Comment in this proceeding, served today on all active parties via e-mail and regular mail.

Very truly yours,

Leonard Van Ryn
Peter Catalano
Staff Counsel

Enclosure
cc: All Active Parties

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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STAFF REPLY COMMENT

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Dated: September 29, 2008
Albany, New York

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DEPARTMENT OF PUBLIC SERVICE

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PRELIMINARY STATEMENT

On September 15, 2008, Staff received Initial Comments (IC) from the Attorney General (AG, AGIC), the County of Westchester (Westchester, WCIC), the International Brotherhood of Electrical Workers, Local 97, RiverKeeper, Inc. (RiverKeeper, RKIC), and the petitioners, Entergy Corporation (Entergy) and Enexus Energy Corporation (Enexus)(PIC). Staff responds to those arguments that require explication, clarification, or were not adequately addressed in its Initial Comment (SIC).

DISCUSSION

The AG, RiverKeeper, and Westchester (collectively, the Opponents) misstate the standard for review applicable to this proceeding under PSL §70. As to PSL §69, however, some clarification of Staff's analysis, in response to the petitioners, is needed. Moreover, the environmental issues the Opponents raise are irrelevant to this proceeding, while the

petitioner's arguments on investment grade ratings are superficial and do not withstand a close analysis.

The PSL §70 Standard

The Opponents all assert that the PSL §70 standard for review in this proceeding is the same standard as that applicable to acquisition of a fully regulated delivery utility, where the acquirer must show that captive ratepayers will realize "positive benefits" from the transaction (AGIC 16-18, RKIC 12-15; WEIC 15). That standard, however, is irrelevant here. Instead, the applicable standard is that adopted in the Commission's Light Regulation Order,[1] which establishes that a §70 transaction will be reviewed with reduced scrutiny, and so passes muster if there is no harm to captive ratepayers.

Leading the Opponents, the AG asserts "Entergy has no right to lightened regulation" (AGIC 16). The AG premises its argument upon the assumption that light regulation is merely a non-binding statement of general policy and is not a rule. The AG is mistaken.

The Light Regulation Order was adopted in conformance with the State Administrative Procedure Act (SAPA), and is therefore a rule. While, as the AG points out, a statement of general policy has no binding effect because adopted outside the

[1] Case 01-E-0113, Entergy Nuclear Operations, Inc., Order Providing For Lightened Regulation of Nuclear Generating Facilities (issued August 31, 2001), p. 2.

scope of SAPA, the legal effect of such non-SAPA determinations cannot be compared to the binding effect of a rule that is adopted under SAPA. Since the Light Regulation Order is such a SAPA-endorsed rule, Entergy may rely upon it. That rule establishes that PSL §70 transactions involving Entergy are judged with reduced scrutiny, which means the no-harm test adheres, not the positive benefit test.

Like any other rule, the reduced scrutiny standard adopted in the Light Regulation Order may be changed on a prospective basis, if the modification is justified under the Field doctrine.[2] That doctrine requires a showing that circumstances have changed, or that there is some other reasoned explanation for altering course, before a rule is changed. The Opponents have not even attempted to meet the Field doctrine. Instead, their arguments are premised upon the assumption that the positive benefits test may be selected because Entergy's generation facilities are nuclear plants. That reasoning, however, is insufficient and unpersuasive, because the reduced scrutiny standard was explicitly applied in the Light Regulation Order, with full knowledge that it would adhere to nuclear plants and their owners.

[2] Matter of Field Delivery Service, Inc. v. Comm. Of Labor, 66 N.Y.2d 516 (1985); Long Island Lighting Co. v. Public Service Commission, 137 A.D.2d 205 (3rd Dept., 1988).

As a result, the Opponents have failed to establish the legal foundation for their contention that the "positive benefit" test can be imposed upon this review of the Enexus spin-off transaction. To deploy that test upon the arguments the Opponents present here would repudiate the Light Regulation Order without adequate justification.

The PSL §69 Standard of Review

As the petitioners point out, PSL §69 does not specifically refer to the public interest (PIC 34). Staff refers to a public interest standard (SIC 27). It would be more accurate to reference, as the petitioners do, the actual PSL §69 standard, which is that a debt issuance may be approved if it is "reasonably required." It is the inquiry into what is reasonable that Staff defines as a public interest standard.

The Environmental Contingencies

The Opponents raise a variety of environmental contingencies, including such matters as the potential for a mandate to build expensive cooling towers at the site of the Indian Point nuclear plants (AGIC 32-34; RKIC 10-12; WEIC 6-8). Those contingencies are irrelevant to this proceeding.[3]

The purpose of this proceeding is independent of any particular environmental requirement that might or might not be

[3] Staff addressed decommissioning and operational costs at SIC 14-21.

imposed in the future. Rather, this proceeding is directed towards ensuring that Enexus will be just as capable as Entergy was in meeting the financial responsibilities inherent in owning nuclear generating facilities. Environmental contingencies do not affect that determination, which is based on a comparison of the financial parameters Entergy and Enexus can control, not an evaluation of risks external to the transaction proposed.

The goal of this proceeding is not, as the opponents imply, to ensure that Enexus can cope with all potential environmental contingencies. Instead, Enexus should be required to achieve financial strength similar to Entergy's, so that it will be as capable of remediating environmental contingencies as Entergy was. The financial conditions Staff detailed, at SIC 13-14, accomplish that goal, and protect the public interest. Overreaching beyond that goal, by requiring Enexus to achieve the financial strength the Opponents find sufficient to meet whatever environmental contingencies they might pose, would be unreasonable.

While Enexus should be financially prepared to bear the responsibilities of operating nuclear generating facilities, it cannot be required to guarantee that the Indian Point plants will continue to generate if environmental restrictions are

adopted that render Indian Point uneconomic to operate.[4] Since even a fully regulated utility cannot be forced to operate at a loss indefinitely,[5] a competitive entity like Enexus cannot be expected to remain, un-compensated and for an indeterminate period of time, in a business that has become unprofitable.[6]

Instead, Enexus should be sufficiently funded to meet the challenges of operating in a competitive market. The conditions Staff proposes at SIC 13–14 are adequate to provide for an Enexus that should be as financially strong as Entergy was. Since the environmental contingencies the Opponents pose are irrelevant to the arrangements needed to create a financially-strong Enexus, those contingencies are irrelevant to this proceeding.

Investment Grade Rating Arguments

Responding to Staff's proposal to condition approval upon achieving an investment grade rating for Enexus, the petitioners argue most owners of wholesale nuclear generators carry only non-investment grade ratings (PIC 14). They also

[4] The responsibilities of Entergy and Enexus to provide notice of the shut down of the nuclear facilities, if that becomes necessary, are detailed in the Light Regulation Order, p. 12.

[5] Market Street Railway v. Railroad Commission of California, 324 U.S. 54 (1945).

[6] See also, Case 05-E-0889, Policies Regarding Generation Unit Retirements, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

assert that Enexus will not be able to initially achieve an investment grade rating and reducing the amount of debt it will incur would not assist it in securing that rating (PIC 14-15). The petitioners' arguments lack merit.

When called upon to identify other wholesale nuclear generators that would be rated in the BB range, as Enexus plans, the petitioners could point to only three companies -- NRG Energy, Inc. (NRG), Texas Competitive Electric Holdings Co. LLC (TXU), and Central Vermont Public Service (CVPS).[7] The ratings difficulties of these three companies are not directly related to their nuclear holdings. The ratings of NRG and TXU are attributable to their business decisions. NRG filed for bankruptcy in May 2003, and has been slow to return to financial health since. TXU's rating is the product of a leveraged buy-out that loaded the company's books with significant amounts of debt. CVPS has only a 1% ownership interest in a nuclear plant, which is too small to affect its ratings. In contrast, other owners of nuclear generators have been able to achieve investment grade. The petitioners have therefore failed to substantiate their claim that ownership of nuclear assets prevents them from obtaining an investment grade credit rating.

The petitioners also complain that merely reducing the debt load Enexus plans to incur will not necessarily yield an

[7] IR Response EN-42 (DPS-11).

investment grade rating. While a small-sized reduction in the amount of debt Enexus will incur upon the spin-off might not significantly alter the ratings evaluation for it, that outcome is driven by the equity position Entergy and Enexus selected in structuring the spin-off, as detailed at confidential IR Response EN-185 (AG-18), p. 8. Since that equity position is the fault of Entergy and Enexus, it is incumbent upon them to rectify the problem they have created. Finally, instead of achieving an investment grade rating, they may select the trust fund option for providing assurance of sufficient financial support, as detailed at SIC 14.

As presently structured, Enexus is not the financial equivalent of Entergy. As a result, the spin-off transaction fails to meet the "no harm" test for approval adopted in the Light Regulation Order, as discussed at SIC 21-25. In order to rectify that shortcoming, and gain approval of the spin-off transaction, Entergy and Enexus should be required to select and fulfill one of the conditions proposed at SIC 14-15. Difficulties in reaching investment grade rating status should not excuse the petitioners from structuring an Enexus that is as financially strong as Entergy was.

CONCLUSION

For the reasons discussed above, and in the Staff Initial Comment, the spin-off transaction proposed by Entergy

Corporation and Enexus Energy Corporation should be approved, subject to the conditions proposed in the Staff Initial Comment.

Respectfully submitted,

Leonard Van Ryn
Peter Catalano
Staff Counsel

Dated: September 29, 2008
Albany, New York