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By FedEx
September 16, 2008

Hon. Jaclyn A. Brilling, Secretary
New York State Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

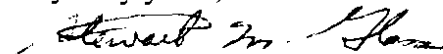
Re: Case 08-E-0777 – Verified Petition Filed by Entergy Nuclear Fitzpatrick, LLC,
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC,
Entergy Nuclear Operations, Inc., NewCo and Entergy Corporation
for a Declaratory Ruling Regarding a Corporate Reorganization, or, in the
Alternative, an Order Approving the Transaction and an Order Approving
Debt Financing.

Dear Secretary Brilling:

Enclosed for filing is an original of the Redacted Initial Comments of the County of Westchester in the above referenced case. A pdf copy of these Comments were sent to your office electronically.

Redacted copies of the Initial Comments of the County of Westchester were forward to all parties electronically and are being provided to all Active Parties by copy of this letter. Unredacted copies of the Initial Comments of the County of Westchester were provided electronically to those parties identified as being entitled to receive them by the Petitioner and by the Administrative Law Judges.

Very truly yours,


Stewart M. Glass
Senior Assistant County Attorney

SMG:me
Encl.

cc: Administrative Law Judge Gerald L. Lynch
Administrative Law Judge David L. Prestemon
All Active Parties by e-mail

NEW YORK STATE
PUBLIC SERVICE COMMISSION

Case 08-E-0077 Verified Petition Filed by Entergy Nuclear Fitzpatrick, LLC,
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Alternative, an Order Approving the Transaction and an Order Approving
Debt Financing.

INITIAL COMMENTS OF THE COUNTY OF WESTCHESTER

Stewart M. Glass
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County of Westchester
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September 15, 2008

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INITIAL COMMENTS OF THE COUNTY OF WESTCHESTER

BACKGROUND

In November 2007, Entergy Corporation's(Entergy) Board of Directors approved a plan to pursue separation of its non-utility nuclear business consisting of J.A. FitzPatrick (JAF), Indian Point 2 (IP2), Indian Point 3 (IP3), Palisades, Pilgrim and Vermont Yankee (VY) and to enter into a nuclear services joint venture with the spun-off entity, Enexus Energy Corporation ("Enexus"). The units are located in three markets: the New York ISO (NYISO), the New England ISO (ISO-NE), and the Midwest ISO (MISO). Enexus' primary assets include the generation portfolio of six nuclear power units, the management services contract for the Cooper Nuclear Station and a power marketer, Entergy Nuclear Power Marketing (ENPM). Under the plan, a joint venture company (to be named EquaGen LLC ("EquaGen")) will be formed to, among other things, operate Enexus nuclear facilities with ownership split 50/50 between Enexus and Entergy.

Assumptions for the spin-off and financing transactions in the financial forecast as provided by Entergy are as follows:

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This results in Enexus being classified as **START OF INFORMATION CLAIMED TO BE CONFIDENTIAL** **END OF INFORMATION CLAIMED TO BE CONFIDENTIAL** Entergy Corp., which is projected to remain an investment grade company after the divestiture.

The three New York plants are projected to generate over the next few years **START OF INFORMATION CLAIMED TO BE CONFIDENTIAL**

END OF INFORMATION CLAIMED TO BE CONFIDENTIAL (AG-18 (EN-18TS) Attachment 2 - Confidential Trade Secret Information / Information Claimed Exempt)

- **START OF INFORMATION CLAIMED TO BE CONFIDENTIAL**

END OF INFORMATION CLAIMED TO BE CONFIDENTIAL However, this does not account for return to Greenfield or even the removal of certain “low level” radioactive material. Entergy claims that if there are “surplus funds from the decommissioning” they would be *available* for greenfielding. (WC-44, EN-149a)

QUESTIONS REQUIRING ANSWERS

How can the NYS Public Service Commission (“Commission”) assure that Enexus and its applicable subsidiary corporations and limited liability companies will respect and be legally bound to comply with the representations made by Entergy in this proceeding, including, but not limited to, the fulfillment of its obligation to honor the Revenue Sharing Agreement with NYPA; the assurances given by Michael R. Kansler on behalf of Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Northeast to the County of Westchester (“Westchester”); and the conditions approved by

the Commission as part of the transfer of Indian Point 2 ("IP2") from Consolidated Edison Company of New York, Inc. to Entergy Corp., Inc. In addition, how can the Commission and the parties be assured that the NY plants will not be used, to the detriment of the residents and businesses of NYS, to support the nuclear plants outside New York? There are also concerns whether the new entities will be required to live up to all of its other obligations to NYPA, including, but not limited to, the eventual decommissioning of IP3 and FitzPatrick and the payment of additional funds to NYPA if licenses for IP3 and FitzPatrick are extended?

**THE NEW YORK PLANTS AND THE RESIDENTS, BUSINESSES AND GOVERNMENTS
OF NEW YORK STATE SHOULD BE INSULATED FROM THE OPERATIONS OF
ENEXUS' PLANTS OUTSIDE OF NEW YORK.**

In the case before the Vermont Public Service for the uprate of Vermont Yankee, Entergy promised to protect Vermonters from costs which could result from extended refueling outages and forced outages from power uprate modifications **START OF INFORMATION CLAIMED
TO BE CONFIDENTIAL**

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CONFIDENTIAL Westchester asked how Enexus will be able to fulfill that promise. Entergy refused to answer that question. However, it should be noted that Entergy/Enexus originally **START OF INFORMATION CLAIMED TO BE CONFIDENTIAL**

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Entergy now claims that the obligor of the \$4.5 billion of debt will be Enexus itself stating further that there is no specific allocation of debt being made to the subsidiaries of Enexus, including the various LLC's that have licenses for each of the plants. **"However,** it is anticipated that a portion of that debt may be secured by a corporate guarantee or other security interest issued by the LLCs.

While some of these securities may be issued prior to the restructuring, there would be no plant liens or guarantees put in place **prior** to closing or receipt of regulatory approvals.” (*emphasis added*) WC-2 (EN-87). All that Entergy is stating is that they decided to allocate the debt after they get the approvals so that the Commission can not ascertain or rule on whether this will adversely affect the New York plants and the residents and businesses of New York. In addition, in that same response they acknowledge that an additional \$2.0 billion of Senior Revolving Credit may be allocated to its nuclear facilities WC-2 (EN-87, pg. 2).

In a recent decision in the Iberdrola case, the Commission required that Iberdrola insulate its New York operations from any financial risks the Company assumes in other states and abroad (outside NYS). The Commission also approved protective conditions designed to minimize the financial and business risks of the transaction. These conditions assure that ratepayers are not burdened with the acquisition costs and transaction cost of the merger and include requiring NYSEG and RG&E to establish a special voting right so that a bankruptcy of Iberdrola or its affiliates would not cause a bankruptcy of the New York companies. The Commission also ordered improved financial transparency and reporting requirements. (CASE 07-M-0906 - Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A.; (Abbreviated Order Authorizing Acquisition Subject To Conditions, Issued and effective September 9, 2008)

However, it is apparent that the NY plants, especially the Indian Point plants, **START OF INFORMATION CLAIMED TO BE CONFIDENTIAL**

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INFORMATION CLAIMED TO BE CONFIDENTIAL

**DOES THE ISSUANCE OF BONDS BY ENEXUS RELATE OR BENEFIT THE
OPERATION OF THE NEW YORK PLANTS?**

“All of Enexus obligations under the \$4.5B debt securities will be secured by Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear FitzPatrick, LLC, along with other subsidiaries of Enexus on a joint and several basis.” WC-45 (EN-150b). Entergy also admits that there will be a series of inter company credit agreements with and between Enexus subsidiaries. WC-35 (EN-140) The various LLCs will utilize the lending/borrowing function of these agreements to fund normal operating costs. WC-45 (EN-150a)

**WILL ENEXUS AND ITS SUBSIDIARIES BE REQUIRED TO FULFILL THEIR
OBLIGATIONS TO WESTCHESTER AND NEW YORK STATE?**

Entergy, in its pleading of May 21, 2008 in this case stated that ENO, ENIP2 and ENIP3 “fully intend to stand by those commitments [to Westchester] after the Corporate Reorganization and their obligations will remain unchanged. (Response of Entergy Nuclear FitzPatrick, LLC., Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear Operations, Inc., NewCo and Entergy Corporation to Westchester County’s Motion to File Reply, or in the Alternative Strike Entergy’s Response to the Comments of the New York State Attorney General’s Office, Westchester County and Riverkeeper, Inc., Pg. 7) However, when Entergy was specifically asked about each of those assurances in interrogatories a number of its responses were not so clear or emphatic. In fact, they were evasive. For example, see WC-13

(EN-98), WC-15 (EN-100) as compared to a definitive commitment in WC-17 (EN-102) and WC-16 (EN-101).

Will Enexus be required, and by what enforceable mechanism, to fulfill the commitments made by Entergy and various Entergy subsidiaries to Westchester. On March 16, 2001, Michael R. Kansler, Senior Vice President & Chief Operating Officer, made the following representations to Westchester on behalf of Entergy Nuclear Northeast, Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear Indian Point 2, LLC and Entergy Corp.

- 1) we agree that MOX fuel will not be used at the Indian Point facilities.
- 2) Entergy has also pledged not to import spent or used fuel into Westchester County, nor to store spent or used fuel in Westchester County that comes from facilities other than the Indian Point plants.
- 3) Entergy agrees that it will be beneficial to both Entergy and the residents of Westchester County to cooperate with one another to encourage the U.S. Department of Energy to develop and implement the DOE central spent fuel storage facility.
- 4) Entergy understands and appreciates the County's right and need to be informed about decisions that will affect the operation of the plants and the host communities. Accordingly, Entergy is committed to promptly informing the County prior to any planned changes in the operation of the plant, including any plans to increase output, extend the term of the operating license or close the plant, or otherwise to develop or utilize the site on which the facilities are located.
- 5) Entergy recognizes that Indian Point is an important resource to the County and the local communities.
- 6) You have made it abundantly clear that the manner in which this site is managed is of prime importance.
- 7) As we explained, we expect to decommission all three units at the same time after the last facility stops operating. Entergy is committed to returning the Indian Point Unit 1, 2 and 3 facilities and the surrounding site to a "Greenfield" condition.
- 8) Entergy commits, after the last unit stops operating, to limit to a reasonable period the duration the facilities will remain in a "SAFESTOR" condition. If for some reason, a decision is made at the end of the license to either delay returning the site to

"Greenfield" or otherwise reuse the site or facilities, we will promptly advise the County of our plans and reasoning, so that the County will have an adequate opportunity to fully comment.

- 9) If Entergy determines, after the plants cease operation, that it is more prudent to use the site for other purposes, such as energy generation or comparable industrial uses, rather than to immediately return the site to "Greenfield" conditions at that time, we will promptly advise the County of our plans. However, this does not in any way alter our commitment to eventually restore the site to Greenfield when the site is no longer used for such energy generation or comparable industrial uses.
- 10) We commit to removing the high-level waste (spent fuel) in a reasonable amount of time after operation of the three units ends, depending on the ability of the U.S. Department of Energy to accept it.
- 11) We also will inform you of any plans to use on-site dry cask storage, which would be necessary as a result of DOE's delays in accepting spent fuel.
- 12) As you know, we have begun working with your Emergency Management Office to make improvements in the emergency plan, which has lately received a great deal of public attention. I hope that these efforts assure you of our commitment to work with you and the other three counties to ensure a viable emergency planning program, including providing the appropriate financial support for off-site preparedness.

So that Westchester County may rely upon our commitments, we agree that Entergy will be bound by the terms set forth herein. (Letter from Michael R. Kansler to Westchester dated March 16, 2001)

Entergy's responses have been evasive on a number of these issues if not completely contradictory or in violation of this agreement. The County is entitled to absolute assurances that the above conditions will be complied with. (See responses to COW-13 (EN-98) & WC-15 (EN-100) as compared to the unequivocal responses to WC-16 (EN-101) and WC-17 (EN-102).

In addition, as part of the approval of the transfer of IP 2 from Con Edison to Entergy, the Commission approved a number of conditions, which Entergy agreed to follow, not only for IP 2 but also for IP 3.

In fact, Entergy had committed that after the last unit stops operating to limit to a reasonable period the duration the facilities will remain in a "SAFESTOR" condition. However, in response to WC-11 (EN-96), WC-37 (EN-142) and WC-38 (EN-143) Entergy disregards its commitment to limit to a reasonable period the duration the IP facilities will remain in Safestor and proposes a **START OF INFORMATION CLAIMED TO BE CONFIDENTIAL**

END OF INFORMATION CLAIMED TO BE CONFIDENTIAL is certainly not a reasonable period of time. Not by Westchester's standard's, not by any reasonable person's standard. The longer the period between the cessation of operations and the actual decommissioning of the plant the more likely that there will be disconnects: insufficient decommissioning funds; actual costs are more likely to be inconsistent with present projections of costs; it is more likely funds will be expended on maintaining the site in Safestor to the detriment of final decommissioning; it is more likely that the corporations themselves will not have the resources, manpower and skills necessary to accomplish the decommissioning. In fact, ENIP2, ENIP3 and FitzPatrick do not have any employees, rather they are under contract with other Entergy/Enexus firms for operating services.

As to the issue of restoring the site to "Greenfield conditions", Entergy states that the removal of low level waste is going to be determined by economics. WC-37 (EN-142 p.2 items 5, 6 & 7) This is contradictory to the position taken by Entergy in the IP2 Asset Transfer Proceeding. In the IP2 Asset Transfer Proceeding Entergy assumed responsibility and obligations for returning IP1 & IP2 to Greenfield status at the end of the decommissioning process. Entergy admits that obligation was extended to IP3 by Mr. Kansler's letter of March 16, 2001. WC-40 (EN145c) However, those representations are meaningless unless funds are

available. Entergy admits that “surplus funds from the decommissioning trust would be available for greenfielding activities. WC-44 (EN-149a) However, “there is no “dedicated fund for greenfielding”. WC-44 (EN-149c). Entergy then attempts to limit this obligation to the subsidiaries ENIP2, LLC and ENIP3,LLC striving to relieve Entergy Corp. and other Entergy subsidiaries, and eventually Enexus and its subsidiaries, from their obligations. WC-43 (EN-148).

The issue of restoration of a site to Greenfield is important as was discussed in Wisconsin as it related to the FPLE commitments and the Kewaunee Commitments regarding the timing of decommissioning and the level of site restoration affect Wisconsin residents:

These differences can create a serious risk of harm to residents. A site restored for unrestricted use rather than simply intended use has a wider range of uses and a greater natural resource value. It also costs more to achieve. The State of Wisconsin is clearly better off with the site restored to unrestricted use with the costs of doing so incurred in the course of the Point Beach decommissioning process and paid from the Point Beach decommissioning fund than by having FPLE choose an intended use for the site in order to minimize restoration costs. However, choosing an intended use to minimize restoration costs is precisely what the language in Section 5.17 would provide a “perverse incentive to do, just so the owner could keep the unused fund,” to quote once again the Commission’s own phrase in the Kewaunee Initial Final Decision. ... The State of Wisconsin has a strong public interest not only in the ultimate result of the decommissioning process at Point Beach, but also the timing of its accomplishment. ... Prompt decommissioning removes most of the nuclear contaminated facilities, equipment and materials from the site at the earliest opportunity, thereby reducing the associated risks and liabilities as soon as possible. SAFSTOR could result in these risks and liabilities remaining on-site for as long as 60 years, with the possibility of even further extension with NRC approval. ...With decommissioning delayed by twenty to fifty years, SAFSTOR would necessarily interrupt the continuity in FPLE-PB organizational structure and personnel. This lack of continuity in organization and personnel between cessation of operation and initiation of decommissioning could have major risks and ramifications. The decommissioning process is more costly, complicated and protracted than any other activity planned and implemented in the expected life cycle of a nuclear plant following its initial construction. Therefore, continuity of organization and personnel is critical to its effective and efficient performance. ... (Wisconsin, Initial Final Decision, Docket No. 05-EI-136, p. 14 (December 16, 2004).

The same logic applies in New York, maybe more so and is of paramount concern to the host communities.

**CLAIMS OF CONFIDENTIALITY WERE USED INDISCRIMINATELY BY ENTERGY TO
THE DETRIMENT OF THE OTHER PARTIES**

The items that were claimed to be exempt by Entergy also require further examination, though it may be too late for their consideration in this case to undue the unnecessary burden placed upon the other parties in this proceeding. However, there is certainly concern that in future cases a party can obfuscate a proceeding and hinder access to vital information by placing blanket claims of “confidentiality” without actually taking the time to review what limited segments of a document should have been protected while releasing the rest of the document. This is of special concern, and raises the question whether the claims were specious, when the documents were in fact in the public domain but the other parties were put to the burden to establish that fact. For example, the Decommissioning Study for Vermont Yankee and the Decommissioning Study for Palisades Nuclear Power Plant in Michigan were claimed to be confidential when in fact it appears they were released in other proceedings. In addition, the fact that the **START OF INFORMATION CLAIMED TO BE CONFIDENTIAL**

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CONFIDENTIAL was a wholly owned subsidiary of Entergy was conveniently omitted when the studies were provided or when the issue of the propriety of maintaining the confidentiality of those documents was first raised,

WHEN IS A SUPPORT AGREEMENT NOT A SUPPORT AGREEMENT OR A GUARANTEE

The short answer is: When there are no actual funds set aside, the Agreement specifically states it is not a guarantee and the entity controlling the funds can refuse to provide them.

When asked (COW-31) (EN-136) if both Indian Point plants ceased operation for an extended period of time would Enexus be able to continue to operate and be able to refinance its debt, the response provided was that the “NY facilities will have increased access to capital under the proposed \$700 million Support Agreement.” However, there are at least three (3) flaws in that argument: it is just a “proposed” agreement that can be changed before it is executed or may even provide for modifications thereafter. Most of the agreements and economic conditions, including the allocation of debt among the limited liability companies that hold the licenses for the respective plants, will not be determined until after the Commission decides to grant its approval to the transfer of the NY plants from Entergy to Enexus. In fact, what Entergy is asking for is that the Commission grant its approval without it having all or most of the important facts upon which it stated in its order should be considered by the Commission in this case.

The document itself clearly states that it is not a guarantee:

No Guarantee. This Support Agreement is not, and nothing herein contained, and no action taken pursuant hereto by Parent shall be construed as, or deemed to constitute, a direct or indirect guarantee by Parent to any person of the payment of the Operating Expenses or of any liability or obligation of any kind or character whatsoever of the Subsidiary Licensees. This Agreement may, however, be relied upon by the NRC in determining the financial qualifications of each Subsidiary Licensee to hold the operating license for a Facility.
(Paragraph 2 of Proposed Support Agreement)

It should also be noted that this Support Agreement terminates when the plant shuts down, the very time that the Agreement may be needed most to assure the local communities that

they are not burdened with the detritus of the plant:

Amendments and Termination. This Agreement may not be amended or modified at any time without 30 days prior written notice to the NRC. This Agreement shall terminate at such time as Parent is no longer the direct or indirect owner of any of the shares or other ownership interests in a Subsidiary Licensee. This Agreement shall also terminate with respect to the Operating Expenses and NRC Requirements applicable to a Facility whenever such Facility permanently ceases commercial operations and certification is made as to the permanent removal of fuel from the reactor vessel. (Paragraph 4 of Support Agreement)

The local communities can not rely on this Support Agreement as it specifically states:

Third Parties. Except as expressly provided in Sections 2 and 4 with respect to the NRC, this Agreement is not intended for the benefit of any person other than the parties hereto, and shall not confer or be deemed to confer upon any other such person any benefits, rights, or remedies hereunder. (Paragraph 6 of Support Agreement)

In fact, the Agreement specifically states:

the parties agree that this Section 7 does not apply to financial guarantees or commitments made to third parties, even where such agreements may relate to compliance with NRC requirements. (Paragraph 7 of Support Agreement)

Entergy claims that the NY plants will be better off with the Support Agreement in place since it is for “\$700 million”. But that is the total that is available to all the plants. In fact, the Support Agreement lists the Agreements that it supercedes, which includes at least \$145 million of guarantees to the New York plants. As noted above, it would appear that the \$145 million currently available is far superior to the Support Agreement as currently written.

In fact, Wanda C. Curry, CFO, Nuclear Operations, Vice President Entergy Services, Inc. in Docket No. 7404 before the State of Vermont Public Service Board stated that the Support Agreement (can) be called upon, if that requirement is due to NRC requirements, it (Enexus) generally cannot say no. If those requirements - if the need for those advances is for operational

expenses, Enexus can say no if it is uneconomical to advance those funds to Vermont Yankee.”

(Page 10, ll 19-25)

Ms. Curry went further and stated that if the NRC imposed a condition upon the plant but Enexus did not want to comply that instead of using funds under the Support Agreement Enexus could have its subsidiary/affiliate “forfeit” its license rather than comply with the NRC directive.

(Pg. 13, ll 19-21)

This Support Agreement was designed to meet NRC requirements (pg. 15-16)
This agreement puts in place from Enexus the parent that will have the benefit cash flows from its entire nuclear fleet, and it commits them to make that available to Vermont Yankee. (Pg. 16, ll. 17-21)

The local plants, such as Vermont Yankee, will be funded by the parent company “(a)s long as it's in their (Enexus') best business interest to do so. Absolutely. (Ms. Curry, Pg. 18, ll. 17-18)

This certainly does not reflect a concern for the interests of the host communities, the state or the eventual consumers of the power. That is certainly something that the Commission must consider in its decision.

When asked “On the basis of that investment not being economical, okay, the company could simply say no, not going to tap the fund? MS. CURRY: That is correct.” (Pg. 23, ll. 17-21)

Upon further questioning: “and then potentially because it's operating at a reduced -- in a reduced condition Vermont receives less power than it would have otherwise under our contract and then we're harmed by that? Isn't that possible? MS. CURRY: If -- I believe that that may be possible (pg. 24, ll, 1-8)

Support Agreement only covers a plant as long as it is operating. Once the plant ceases operation the Support Agreement does not cover it. So once Indian Point is shut down, the funds from the Support Agreement are not available. That may be the very time that those additional funds are required.

In fact, the Support Agreement is not a guarantee nor is it a segregated fund of money that is available to be drawn down as need as shown during the following colloquy during the testimony on Vermont Yankee:

MR. YOUNG: And that triggered a question in my mind and I think you said yesterday, and as I understand the transaction, the 700 million support agreement, Enexus won't be setting aside 700 million dollars in the fund, correct? There's not going to be just a fund put aside for that?

MS. CURRY: It is more of a guarantee. It is not the fund." (Pg. 31, ll.17-25 & Pg. 32, l.1)

In fact "MR. YOUNG: So there's no separate 700 million this comes out of this pot, this comes out of this pot because there's no separate pot that you're setting up, correct?

MS. CURRY: That is correct." (Pg. 32, ll. 2-6)

In fact, it is Enexus' decision whether the funds from the \$700 Support Agreement could be transferred to a plant as either a loan or in the form of a capital contribution (Pg. 33, ll. 18-21) making it clear this is not a guarantee that a third party can call on. It is a guarantee that is there for the exclusive use of Entergy Nuclear Vermont Yankee and the NRC. (Ms. Curry, Pg. 34, ll. 11-14)

WHAT IS THE APPROPRIATE STANDARD OF REVIEW IN THIS CASE?

The appropriate standard of review under PSL §70 is whether the transaction results in a "positive net benefit" as enunciated by the Commission in the Iberdrola proceeding. (Ibid.) Since Entergy has not been able to affirmatively resolve the issues raised above, Entergy has failed to establish that the relief requested in its Petition would result in a "positive net benefit" for the residents and businesses in New York State.

CONCLUSION

For the above reasons, Entergy's Petition should be denied. In the alternative, the Commission could direct that discovery be reopened and that hearings be held to allow the other parties to fully study the impact of this transaction on the New York plants and the residents and businesses dependent on the power they provide.

Respectfully submitted,

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