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OFFICE OF THE ATTORNEY GENERAL

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2008 SEP 16 AM 10: 20

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September 15, 2008

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

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

Dear Secretary Brilling:

Enclosed please find for filing an original and five copies of the Attorney General's September 15, 2008 comments in the Entergy reorganization proceeding. We are also sending hard copies to the Administrative Law Judges and to counsel for Entergy.

These filings contain color maps of the ground water contamination plumes at Indian Point. We did not provide these maps in color with our electronic filing to the other parties but are correcting this oversight.

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

Very truly yours,

Charlie Donaldson
Assistant Attorney General

cc: Hon. Gerald L. Lynch
Hon. David L. Prestemon

Paul L. Gioia, Esq.
Gregory G. Nickson, Esq.

Service list (electronically)

Original

NEW YORK STATE
PUBLIC SERVICE COMMISSION

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

PSC Case No. 08-E-0077

ALJ Gerald L. Lynch

ALJ David L. Prestemon

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

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September 15, 2008

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PRELIMINARY STATEMENT

The Office of the Attorney General of the State of New York ("OAG") respectfully urges the administrative law judges in the proceeding to recommend that the New York State Public Service Commission ("PSC" or "Commission") reject the Entergy Corporation's ("Entergy") January 28, 2008 petition requesting approval of Entergy's proposed transfer of ownership of its four Indian Point and FitzPatrick nuclear power plants to a separate new corporation, which would also own four out-of-state plants, and to authorize the new corporation to borrow up to $6.5 billion and enter into an unlimited amount of hedging agreements.[1]

The PSC should reject the proposal because it is neither in the public interest nor necessary. The resulting corporate structure would have inadequate capital to meet many obligations that accompany the operation and decommissioning of aging facilities and could frustrate the implementation of closed-cycle cooling at the Indian Point facility. The proposal does not benefit New York citizens and ratepayers and there is no need to decouple the New York facilities from Entergy's $35 billion in assets, shackle them with $6.5 billion in debt, and place them in a corporate structure that will be prone to deadlock and, hence, ineffective governance and decisionmaking.

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[1] As part of this submission, OAG specifically incorporates: OAG's April 7, 2008 Objections to Entergy's Petition for Approval of Corporate Reorganization and Financing, and Motion Urging Rejection of Entergy's Petition or, in the Alternative, a Full Hearing with Discovery; OAG's May 20, 2008 Reply to Entergy's April 29, 2008 Response; OAG's September 5, 2008 Motion to Remove the Confidential Designation of Certain Documents; and the September 5, 2008 Declaration of AAG Charlie Donaldson.

BACKGROUND

1. The Indian Point Facilities.

The owners and operators of a nuclear plant must have ample financial resources to ensure the safe operation of the plant and the subsequent removal of radioactive material and decontamination of the site when the plant ceases to produce power. Owners must also ensure that the plants comply with environmental regulations, such as the implementation of closed-cycle cooling, and emergency evacuation requirements.

The three Indian Point units pose a risk of a serious accident that could release a significant amount of radiation into the surrounding population and environment, and at some point will wear out and be decommissioned. Located on the Hudson River, 24 miles north of the New York City line, the Indian Point facilities have the highest surrounding population density of any reactor site in the nation. The two operating reactors produce approximately 2,100 MWe.[2]

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[2] Attorney General Andrew M. Cuomo has taken the lead in opposing the relicensing of the Indian Point nuclear plants. New York State has identified serious concerns about the safety and environmental impacts of Indian Point Units 1, 2, and 3, and has set these concerns out in the State's Petition to Intervene in the United State Nuclear Regulatory Commission's proceeding to consider whether to renew the operating licenses for these plants. On July 31, 2008, the Atomic Safety and Licensing Board issued a decision admitting 11 contentions presented by the State for an evidentiary hearing. *See In the Matter of Entergy Nuclear Operations, Inc.*, ASLBP No. 07-858-03-LR-BD01, Memorandum and Order (July 31, 2008). The Board also admitted 4 contentions proffered by Riverkeeper and Clearwater. *Id.* The admitted contentions involve, among other things: weaknesses in the units' aging electrical and piping systems, reactor pressure vessel components, and containment dome; unauthorized radionuclide leaks from various components, and significant accident mitigation analyses. Resolution of these problems could either result in the shut down of Indian Point in the near future or the imposition of substantial additional costs on Entergy to keep the plants open. While these safety and environmental problems are being sorted out, it is imperative that Entergy or whoever else owns Indian Point provide adequate and reliable financial support for the plants. Although the Nuclear Regulatory Commission has jurisdiction over the operations and radiological safety of the Indian Point units, New York has authority to ensure that funds are available to remedy operating, safety, or environmental problems at the plants. *See, e.g.*, Case 04-E-0030 - *Petition of R.E. Ginna Power Plant, LLC for a Declaratory Ruling on Regulatory Regime, Order Providing for Lightened Regulation of Nuclear Generating Facility Owner* (issued and effective May 20, 2004).

Constructed between 1957 and 1975, Indian Point is showing its age. Various systems, structures, and components are leaking radioactive pollutants into the groundwater and Hudson River.[3] A recent evaluation conducted by engineers hired by Entergy recommended a number of capital projects to replace certain systems, structures and components at the site as well as investments in emergency planning and monitoring systems. In a tacit acknowledgment of the aging of a reactor pressure vessel head, Entergy has ordered the fabrication and delivery of a new head from Doosan Heavy Industries in Korea.[4] Given the enormous damage an accident at Indian Point could cause to New York residents and their property, it is imperative that the PSC ensure that adequate, actual, and available financial support exists for these plants.

As part of its operation, Indian Point diverts large quantities of water from the Hudson River each day. Staff at the New York State Department of Environmental Conservation ("DEC") have reviewed Indian Point's cooling water intake and discharge systems and have issued a new draft permit that envisions upgrading the existing once-through cooling system to a closed-cycle cooling system to reduce thermal pollution and injury to aquatic life.[5]

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[3] *See* Hydrogeologic Site Investigation Report, GZA GeoEnvironmental, Inc., Jan. 7, 2008; *see also* April 30, 2007 Entergy License Renewal Application, Environmental Report., at 4-87 (stating that Entergy and the Nuclear Regulatory Commission have concluded that "...there appears to be some level of contaminated groundwater that discharges into the Hudson River...").

[4] *See* May 14, 2008 letter from Fred R. Dacimo, Vice President, License Renewal, Entergy, to the Nuclear Regulatory Commission re: Reply to Request for Additional Information Regarding License Renewal Application - Refurbishment. Available in the Nuclear Regulatory Commission's ADAMS database at Accession No. ML081440052.

[5] *See In re Renewal and Modification of a SPDES permit by Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC*, DEC No. 3-5522-00011/00004, 2006 N.Y. ENV LEXIS 3 (February 3, 2006) (ALJ decision); *id.*, 2008 N.Y. ENV LEXIS 52 (August 13, 2008) (Assistant Commissioner decision).

2. Entergy Corporation.

New Orleans-based Entergy Corporation is a publicly-traded holding company whose major lines of business include traditional regulated electric and gas utilities serving various southern states, six operating unregulated merchant nuclear power plants located in New York (Indian Point 2 & 3 and FitzPatrick), Massachusetts, Michigan, and Vermont, two nuclear power plants that no longer produces power (Indian Point 1 and Big Rock Point in Michigan), and the operation of nuclear power plants under contract.[6] Entergy's $35 billion of holdings include roughly $25 billion of conventional utility assets, $8 billion of merchant nuclear facilities, and $2 billion of other unregulated assets.[7] Entergy owns its assets through an extensive and convoluted maze of subsidiary corporations and limited liability companies. Many Energy subsidiaries have no employees and exist to minimize taxes or as defenses against liability.[8]

3. Entergy's Proposed Corporate Restructuring.

In 2007, Entergy decided to spin off its merchant nuclear plants and nuclear plant contract operations businesses into a separately-traded corporation. Entergy claims that its shares are undervalued. Entergy proposes to increase shareholder value by separating its merchant nuclear plants and contract operating assets from its regulated utilities. The theory is that the residual Entergy utility assets will keep most of their value and that the financial markets will value the new Enexus corporation as a growth stock based on expected higher prices for the output of

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[6] *See, e.g.*, Entergy February 29, 2008 Form 10K for fiscal year ending December 31, 2007 *passim*.

[7] *See, e.g.*, June 30, 2008 Entergy Form 10Q, p. 47.

[8] Entergy Supplemental Response EN - 12 to Information Request AG - 12 (June 11, 2008).

unregulated merchant power plants.[9] If everything develops as Entergy hopes, its shareholders will wind up holding the same assets, but the combined prices of the shares of new Enexus and the residual Entergy will be more than the price of shares in the old undivided Entergy.[10] Because the proposed reorganization, if approved, would involve several new business entities, a description of the various entities follows.

Enexus. If the proposal is approved, Enexus would become a stand-alone corporation, which Entergy then would no longer own or control, at least on paper. The most recent description of Enexus Energy Corporation is that it would be a holding company with 17 wholly-owned subsidiaries and four subsidiaries jointly-owned with Entergy.[11] Some proposed Enexus subsidiaries appear to be mere formalities.[12] Entergy indicates that only three Enexus subsidiaries would have employees; wholly-owned Enexus Solutions, Ltd and Enexus Nuclear Nebraska, LLC would respectively have 12 and 8 employees, while jointly-owned ENOI LLC (currently named "Entergy Nuclear Operations, Inc.") would have 3,431.[13] Except for Enexus Solutions, Ltd, all proposed Enexus subsidiaries would have officers, but almost every individual listed as an officer in an Enexus subsidiary is also listed as an officer in several other Enexus

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[9] *See, e.g.*, Entergy 2007 Annual Report to Shareholders at 3.

[10] *Id.*

[11] *See* Entergy Supplemental Response EN - 52 to Information Request AG - 33 (July 25, 2008). Entergy's description of Enexus' proposed structure has changed at least twice.

[12] *See* Supplemental Response EN - 12 to Information Request AG - 12 (June 11, 2008. Proposed Enexus subsidiaries such as Entergy Nuclear Indian Point 2, LLC appear to have no function other than to hold the title to a nuclear plant or otherwise function as a means to limit liability or taxes.

[13] *Compare* Entergy Supplemental Response EN - 52 to Information Request AG - 33 (July 25, 2008) (Enexus structure) *with* Entergy Supplemental Response EN - 12 to Information Request AG - 12 (June 11, 2008) (proposed Enexus and subsidiary workforce).

subsidiaries.[14] Who would actually do the work at Enexus and its subsidiaries is unclear because Enexus would carry out some functions under contract with outside entities.[15] However, any work Enexus would not contract out apparently would be done by ENOI LLC employees under contract to its Enexus affiliates.

Enexus through its subsidiaries would own six operating nuclear power plants themselves (including Indian Point 2, Indian Point 3, and FitzPatrick in New York); two shut down nuclear power plants (including Indian Point 1 in New York); the Nuclear Regulatory Commission *ownership* licenses for all eight plants; half of one nuclear power plant operating company (ENOI LLC) and all of another (Enexus Nuclear Nebraska LLC); half of a nuclear plant service company (EquaGen Services LLC); a power marketing business (Enexus Nuclear Power Marketing LLC); businesses that purchase, prepare and finance nuclear fuel (Enexus Nuclear Fuels Company, Nuclear Services Company LLC, and Enexus Nuclear Finance LLC); an energy conservation and retail power supply company (Enexus Solutions LLC); half of a consulting business (TLGSI LLC); five subsidiary holding companies; and half of EquaGen LLC, which provides the legal structure for Entergy's shared ownership of ENOI LLC, EquaGen Services LLC and TLGSI LLC. Enexus would have 20 employees in subsidiaries and joint control of 3,431 ENOI LLC employees.

EquaGen LLC. EquaGen LLC is a new entity based on Entergy's current Entergy Nuclear, Inc. subsidiary.[16] It would be owned equally by the two parent holding companies, the

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[14] For example, Ms. Wanda C. Curry is listed as an officer of 11 proposed Enexus subsidiaries. Entergy Supplemental Response EN - 12 to Information Request AG - 12 (June 11, 2008).

[15] *See, e.g.*, July 31, 2008 Enexus Amendment No. 1 to Form 10, Exhs. 10.7, 10.8 and 10.9.

[16] May 13, 2008 Enexus SEC Form 10, Exhibit 99.1, pp. 7 - 8.

existing Entergy Corporation and the newly-independent Enexus Energy Corporation, and would be managed by a board half of whose members Entergy would appoint and half of whose members Enexus would appoint.[17] EquaGen LLC would own ENOI LLC. It would also own the TLGSI LLC consulting business and the EquaGen Services LLC nuclear plant services business. EquaGen would have officers but no employees. Any work EquaGen LLC itself actually does would be done by ENOI LLC employees under contract.

ENOI LLC. ENOI LLC , a new company based on Entergy Nuclear Operations, Inc., would own the NRC operating licenses for Enexus' functioning plants. It would also provide the employees who would operate the nuclear power plants. ENOI LLC would employ 3,431 employees who would do almost all the work that Enexus and its subsidiaries do not contract out to Entergy or other sources.[18] It would be the successor to the current Entergy Nuclear Operations Inc. A chart (produced by Entergy in Supplemental Response EN - 52 to Information Request AG - 33 (July 25, 2008)) depicting the proposed corporate relationships after the reorganization is attached to this brief.

Entergy has also used the proposed corporate reorganization as an opportunity to review and revisit financial commitments to various New York host communities. Westchester County is concerned that Entergy is attempting to renege on a 2001 commitment to the County not to use mixed oxide (MOX) fuel in the Indian Point reactors,[19] import spent reactor fuel into the County,

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[17] *See, e.g.*, September 12, 2008 Amendment No. 2 to Enexus Form 10, Exh. 99.1 at 100.

[18] Two wholly-owned Enexus subsidiaries, Enexus Solutions, Ltd and Enexus Nuclear Nebraska, LLC, between them would have 20 employees.

[19] MOX fuel is a mixture of plutonium and uranium. MOX fuel presents terrorist risks that uranium fuel does not, in that plutonium in quantities usable in weapons can be removed from fuel rods by simple chemical means, while separating the fissionable uranium U-235 from inert U-238 in conventional fuel rods is a complicated physical process that requires expensive sophisticated machinery and a large amount of equipment and electricity to do in any quantity.

or store spent fuel from any plant other the Indian Point units, and to remove high level radioactive waste from Indian Point within a reasonable time after the plants shut down, limit the time the plants spend in storage before decommissioning, and return Indian Point to unrestricted "greenfield" use.[20] Oswego County wants to know whether Enexus would honor Entergy's current commitment to payments in lieu of taxes (PILOTS) for FitzPatrick, power purchase agreement with the County, and cooperation in emergency planning.[21] The Town of Scriba is also concerned about its PILOTS agreement for FitzPatrick.[22]

Until three weeks ago, Entergy also publicly stated that the proposed reorganization would allow it to avoid paying the New York Power Authority ("NYPA") $432 million due under Value Sharing Agreements ("VSAs") negotiated as part of Entergy's purchase of the Indian Point 3 and Fitzpatrick nuclear power plants. On August 25, 2008, Entergy informed the PSC that it was abandoning this strategy, and that it would obligate itself to continue to pay NYPA the full amount due under the VSAs.[23]

Moreover, the manufacture of MOX fuel creates the possibility of theft in the fabrication process and provides an incentive to make more plutonium available by reprocess spent fuel. The counter consideration is that MOX fuel is a means of disposing of plutonium from disarmed nuclear weapons. *See, e.g.*, F. Fetter and F. von Hippel,"Is U.S. Reprocessing Worth the Risk?" (Arms Control Association; September 2005) Available at http://www.armscontrol.org/act/2005_09/Fetter-VonHippel.

[20] *See, e.g.*, May 12, 2008 Westchester County Motion to File Reply at 5.

[21] *See, e.g.*, July 30, 2008 Oswego County letter to the ALJs.

[22] September 3, 2008 e-mail from Kevin C. Caraccioli, Esquire, Town Attorney, Town of Scriba, to the ALJs.

[23] August 25, 2008 letter from Entergy counsel Paul A. Gioia to the ALJs.

4. Entergy's Proposed Debt Financing.

Entergy proposes that as part of the reorganization Enexus will sell $4.5 billion of bonds, set up $2.0 billion of credit facilities, and enter into an unspecified amount of hedging arrangements. The expectation is that Enexus will use the credit facilities and the hedging to support its own operations, but Entergy will get at least $4.0 billion of the bond proceeds.[24] Entergy has stated that it intends to use the $4.0 billion it gets from Enexus to buy back Entergy stock from shareholders and retire other Entergy debt.

Entergy concedes that one result of Enexus taking on over $6.5 billion of debt and hedges is that Enexus would begin separate operation with a below investment grade credit rating.[25]

5. Other Administrative Proceedings.

In addition to the Commission's authorization, Entergy must obtain approval of the proposed reorganization from the State of Vermont Public Service Board ("Vermont PSB"), and the U.S. Securities and Exchange Commission ("SEC").[26] Entergy had not completed its filings with the SEC. The Vermont PSB conducted an evidentiary hearing with cross-examination in July 2008 and received post-hearing submissions in August; a decision is pending. Also, ENtergy has not completed its required reorganization filings with the SEC.

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[24] *See, e.g.*, Entergy 2007 Annual Report to Shareholders at 3. The exact mechanism by which Enexus would wind up with the bond obligation and Entergy would get the cash is not clear.

[25] *See, e.g.*, May 13, 2008 Enexus SEC Form 10, Exhibit 99.1, p. 53 (showing that Entergy expects Enexus to begin operations with shareholder equity of negative $669 million).

[26] The Nuclear Regulatory Commission and the Federal Energy Regulatory Commission have approved Entergy's proposed reorganization. Neither Massachusetts nor Michigan requires review of changes in the ownership of merchant generating plants.

STATUTORY AND REGULATORY FRAMEWORK

Entergy's proposal implicates the New York Public Service Law ("PSL") and the Public Service Commission's regulatory authority. PSL § 65 directs the Commission to ensure that every electric corporation under its jurisdiction provide safe and adequate service at just and reasonable rates. In exercising that overarching regulatory regime, Entergy's corporate reorganization and debt issuance also are subject to PSL § 69 and PSL § 70.

PSL § 70 addresses the Commission's consideration of changes in the ownership of electric corporations:

> § 70. Transfer of franchises or stocks
>
> No gas corporation or electric corporation shall transfer or lease its franchise, works or system or any part of such franchise, works or system to any other person or corporation or contract for the operation of its works and system, without the written consent of the commission ... No consent shall be given by the commission to the acquisition of any stock in accordance with th*is section unless it shall have been shown that such acquisition is in the public interest.*

(emphasis added).

PSL § 69 addresses the Commission's consideration of electric corporation issuance of bonds and other debt obligations:

> § 69. Approval of issues of stock, bonds and other forms of indebtedness; approval of mergers or consolidations
>
> A gas corporation or electric corporation ... may issue stocks, bonds, notes or other evidences of indebtedness ... when *necessary* for the acquisition of property, including the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business ... for the construction, completion, extension or improvement of its plant or distributing system, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations ... ; provided and not otherwise that there shall have been secured from the commission an order authorizing such issue, and the amount thereof, and stating the purposes to which the issue or proceeds thereof are to be applied,

> and that, *in the opinion of the commission*, the money, property or labor to be procured or paid for by the issue of such stock, bonds, notes or other evidences of indebtedness is or has been *reasonably required* for the purposes specified in the order ....

(emphasis added).

Entergy's proposal also implicates various provisions of the Environmental Conservation Law ("ECL") and related regulations. Indian Point must obtain a permit from DEC to withdraw cooling water from, and return heated water to, the Hudson River. In 1972, before Indian Point Units 2 and 3 became operational, the New York Legislature declared that the State's public policy "require[s] the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state and to protect fish and wildlife." ECL § 17-0101; *see also* ECL § 17-0303. With respect to water intake structures, New York State water quality regulations also mandate that cooling water intake systems employ the best technology available to minimize adverse environmental impact. 6 N.Y.C.R.R. § 704.5; *see generally Citizens for the Hudson Valley v. N.Y. State Bd. on Elec. Generation Siting & Envt.*, 281 A.D.2d 89, 99 (3d Dep't 2001) (upholding a Public Service Law Article X permit authorizing the construction of the Athens power plant utilizing a dry cooling system).

In addition, the State Environmental Quality Review Act ("SEQRA"), ECL Article 8, requires state agencies, including the Public Service Commission, to examine the potential environmental impacts of their decisions before making final determinations.[27]

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[27] OAG and various parties have submitted written comments explaining that SEQRA requires the preparation of a full Environmental Impact Statement ("EIS") in this proceeding; SEQRA review has been stayed pending further direction from the presiding officers. *See* August 14, 2008 Ruling, at 31.

PROCEEDINGS TO DATE

On January 28, 2008, Entergy petitioned the Commission for approval of the proposed reorganization and debt issue under the summary procedure allowed for lightly regulated electric corporations. The Commission noticed Entergy's petition for comment.[28] After considering comments by OAG, Westchester County, and Riverkeeper opposing the petition and Entergy's replies, the Commission on May 23, 2008 instituted this proceeding.[29]

In its order instituting this proceeding, the Commission found that the approvals Entergy has asked for pose a potential risk to retail electric service rate payers and that a more thorough review of Entergy's proposal was appropriate.[30] The Commission directed that the review include at least sixty (60) days of discovery employing electronic communications and provided for an administrative law judge (ALJ) to preside over discovery, decide when discovery should end, and establish further proceedings appropriate to ensure that an adequate record is assembled and that the proceeding is resolved in an orderly and efficient manner.[31]

OAG began discovery on May 23, 2008 by serving information requests on Entergy. On or about May 29, 2008, the Commission appointed an ALJ, who requested that the parties try to work out discovery issues.

When the parties were unable to agree on the treatment of discovery that Entergy represented contained confidential information, the ALJ issued a protective order on June 17, 2008. *See* June 17, 2008 Protective Ruling and General Protective Order (Protective Order). The Protective Order specifying, *inter alia*, that no party may take possession of information that

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[28] February 20, 2008 *New York State Register* at 24.

[29] Order Establishing Further Proceedings (issued and effective May 23, 2008).

[30] *Id.* at 5 - 6.

[31] *Id.* at 6 - 7.

Entergy unilaterally designates as confidential unless the party agreed that the Commission had the sole authority and exclusive process to determine whether the information is confidential and therefore not subject to release under the New York State Freedom of Information Law. *See id.* at 6 - 7, ¶¶ 2-4. In addition, the Protective Order addressed whether the OAG should take possession of any Information Claimed or Ruled Exempt in this case in light of obligations OAG has under the Freedom of Information Law ("FOIL"), specifically Public Officers Law ("POL") §§ 87 and 89. *See* Protective Order at 22. Because OAG is unable to agree to the Protective Order due to concerns about its own FOIL obligations, the Protective Order precluded OAG from "tak[ing] possession of any Information Claimed or Ruled Exempt." *Id.* at 23. The Protective Order provided OAG (and other potentially similarly-situated parties) with the ability to evaluate and comment on whether or not the bases for exemption offered by Petitioners are or are not adequate. *Id.* at 24.

On or about June 25, 2008, a second ALJ also was assigned to this proceeding. Additional parties entered this proceeding and various discovery was undertaken. Entergy has designated a significant amount of its discovery responses as confidential.

In orders issued July 23, 2008, August 14, 2008, and August 26, 2008, the ALJs specified a briefing schedule, identified issues to addressed, ended discovery, and directed that initial briefs be filed on September 15, 2008 and reply briefs on September 29, 2008.

In attachments to the August 14, 2008 Order the ALJs indicated that they had come to an understanding that the substance of Entergy's proposal is set out in the following documents:

1. Entergy's January 28, 2008 petition;

2. Entergy's April 29, 2008 response to the comments of OAG, Westchester County, and Riverkeeper;

3. Entergy's May 13, 2008 supplemental information filing containing *inter alia*, revised SEC Form 10;

4. Entergy's May 21, 2008 response to Westchester's May 12, 2008 Motion to File Reply;

5. Entergy's Response EN - 33 to Information Request AG - 25 (dated June 16, 2008);

6. Entergy's Response EN - 51 to Information Request AG - 32 (dated June 30, 2008);

7. Entergy's Responses EN - 52 and EN - 52 Supplemental to Information Request AG - 33 (dated June 30 and July 25, 2008);

8. Entergy's Response EN - 53 to Information Request AG - 34 (dated June 30, 2008);

9. Entergy's Response EN - 54 to Information Request AG - 35 (dated June 30, 2008);

10. Entergy's Response EN - 55 to Information Request AG - 36 (dated June 30, 2008);

11. Entergy's Response EN - 79 to Information Request AG - 54 (dated July 18, 2008);

12. Entergy's Response EN - 21 to Information Request DPS - 2 (dated June 6, 2008);

13. Entergy's response EN - 41 to Information Request DPS - 10 (dated June 23, 2008); and

14. Entergy's Response EN - 87 to Information Request WC - 2 (dated July 25, 2008).

It also appears that Entergy's proposal would include:

15. Entergy's supplemental letter filing dated August 25, 2008 concerning the Value Sharing Agreements between Entergy and the New York Power Authority;[32]

16. July 31, 2008 Amendment No.1 to Enexus Form 10; and

17. September 12, 2008 Amendment No. 2 to Enexus Form 10.[33]

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[32] The August 25, 2008 filing came after Entergy identified the documents that comprise its filing in this proceeding; nevertheless, given the substance of the August 25 filing it must be considered as part of the record in this matter.

[33] Entergy served this supplemental filing on Friday, September 12, 2008, one business day before the September 15, 2008 filing date for these comments.

The ALJs asked parties to brief six substantive and standard of review questions, specifically:

i. If the proposed transaction is approved, will the ability of Enexus to meet all financial obligations related to the ownership of the FitzPatrick and Indian Point plants differ from that of Entergy, currently, and, if so, to what extent?

ii. If the proposed transaction is approved, will the ability of Enexus to fulfill other obligations associated with the ownership and operation of the plants be affected?

iii. What consequences will approval of the transaction have for the rights of Entergy and the Power Authority under the VSAs?

iv. May the Commission consider the VSAs in making its public interest determination under PSL § 70? Should it do so? Must it do so?

v. For a transaction of the type proposed in this case, what is the appropriate standard of review for the public interest determination required under PSL § 70?

vi. For a transaction of the type proposed in this case, what is the appropriate standard of review for the reasonably necessary determination required under PSL § 69?

See August 14, 2008 Order at 30 - 31.

The ALJs also provided that parties who believe that any Information Claimed or Ruled Exempt does not qualify for protection against public access could do so in these initial comments and in reply comments. *See* July 23, 2008 Order at 12; August 14, 2008 Order at 19 - 20; September 10, 2008 Ruling.

DISCUSSION

I. ENTERGY'S PROPOSED REORGANIZATION AND MASSIVE DEBT FINANCING ARE SUBJECT TO REVIEW UNDER PSL §§ 69 AND 70.

As the owner of electric generation facilities located within the New York, Entergy is subject to PSL §§ 69 and 70. In this proceeding, the Commissioners have determined that Entergy's reorganization and debt proposal is subject to PSL §§ 69 and 70. *See* May 23, 2008 Order Establishing Further Proceedings.

Despite this ruling, Entergy has sought to argue that the reorganization and debt financing are exempt from PSC oversight. Entergy is wrong. In 1996, the Commission informally adopted a policy of lightened regulation, sometimes referred to as the "Wallkill Presumption," that in some instances may exempt an electric corporation from certain PSL §§ 69 and 70 requirements if the corporation owns a generating plant but does not have retail rate payers. However, the lightened regulation policy also provides that the Commission may require a higher showing if the electric corporation applying for approval of an ownership change or debt issue owns a nuclear power plant and the requested approval poses a potential risk to retail rate payers.[34]

Morever, Entergy has no right to lightened regulation. The Commission's policy of lightened regulation is a rebuttable policy preference. *Cf.* PSC Case 96-E-0900 - In the Matter of Orange & Rockland Utilities, Inc.'s Plans for Electric Rate Restructuring Pursuant to Opinion 96-12, and six related cases, Appendix I - *Statement of Policy Regarding Vertical Market Power* (issued and effective July 17, 1998) (presumption that holding company should not own a generating subsidiary in the same market where the company owns a transmission and distribution subsidiary is rebuttable). Opinion No. 96-12 - Opinion and Order Regarding

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[34] Order Establishing Further Proceedings at 4.

Competitive Opportunities for Electric Service, the basis for the "Wallkill Presumption" as well as the *Statement of Policy Regarding Vertical Market Power*, is a nonbinding statement of general policy and does not constitute a compulsory rule or regulation. *See In the Matter of Energy Association of New York State et al v. Public Service Commission*, 169 Misc.2d 924 (Albany County 1996) (a statement of general policy has no legal effect; State Administrative Procedure Act § 102(2)(b)(iv)).

II. PUBLIC SERVICE LAW § 70 REQUIRES THAT ENTERGY'S PROPOSAL AFFIRMATIVELY BENEFIT THE CITIZENS OF NEW YORK STATE.

Section 70 of the Public Service Law requires the consent of the Commission to the acquisition of the voting capital stock of any gas or electric corporation organized or existing under the laws of New York. The Commission may not approve such a proposal unless it shall have been shown that such acquisition is in the public interest. PSL § 70. Acquisition shall be "upon and subject to such terms and conditions as [the Commission] may fix and impose." *Id.* The burden of proof remains with the petitioner, here Entergy, throughout the entire proceeding. *Id.*

PSL § 70 requires the Commission to engage in a form of cost-benefit analysis. The cost side of the ledger in this analysis generally comprises risks imposed on consumers and taxpayers by the proposed transaction that would not have been present, or present to the same degree, in its absence. Conversely, the benefit side of the analysis should specifically identify and examine the actual benefits that New York State residents and consumers would realize from the completion of the transaction. Such potential benefits, costs and risks must be identified and evaluated, and the proposed transaction should be approved only if it would produce net benefits.

In addressing the public interest standard at Commission's August 15, 2007 public

session on the National Grid/KeySpan transaction, the Acting General Counsel emphasized the need to compare benefits to costs, and discussed the level of judgment that must be exercised by the Commission in its evaluation:

> The basic standard is the public interests standard, which is a very broad standard for the Commission to consider, the benefits that the transaction would provide to the State of New York. When those benefits are considered, they have to be considered in light of the potential detriments ... and in the final analysis, the judgment has to be made and a rational basis has to be set forth that the transaction overall will produce benefits for the State of New York. So it's a simple standard, but a lot of judgment has to go into weighing the two sides of the equation.

See Commission Session, August 15, 2007, Transcript at 19. In interpreting that standard, the Commission has applied a positive, net benefit test, as opposed to a no-harm test, which is used in some other jurisdictions. *Id.* at 20; *see also* Case 07-M-0906, *Joint Petition of Iberdrola, S.A.*, (Abbreviated Order, dated September 9, 2008).

This understanding of the public interest is consistent with the overarching purposes of PSL § 65 that requires the Commission to ensure that the electric corporations under its supervision provide safe and adequate service at just and reasonable rates. That is, for such electric corporations the public interest is that which contributes to safe and adequate electric service at just and reasonable rates. Conversely, anything that makes electric service in New York less safe, less adequate, less just or less reasonable cannot be found to be in the public interest.

III. THE PROPOSED CORPORATE REORGANIZATION DOES NOT ADVANCE THE PUBLIC INTEREST.

Far from advancing the interests of New York citizens, the proposed corporate reorganization erodes the public interest in the provision of safe reliable power at just and

reasonable rates in New York. Entergy's proposal is, therefore, inconsistent with PSL § 70 and must be rejected.

A. Entergy's Proposed Corporate Reorganization Is Not in the Public Interest Because the Reorganization Would Significantly Reduce Indian Point's Access to Financial Resources.

As OAG point out in its initial opposition to Entergy's petition, the proposed reorganization would significantly reduce the access of Entergy's New York plants to adequate financial resources. The proposed reorganization would terminate Entergy's existing formal financial support guarantees to its merchant nuclear subsidiaries[35] and create a new barrier between most of the financial resources that Entergy's New York plants can now call upon. This would leave the Indian Point plants and FitzPatrick with much less financial support.[36] Entergy's most recent financial filing with the Securities and Exchange Commission indicates that Entergy has $35 billion in assets, of which about $8 billion are in its merchant nuclear operations and $2 billion are in other unregulated businesses.[37] Spinning off Enexus would thus create a barrier between Entergy's New York plants and some $25 billion of the resources the plants might be able to call on today.

Entergy has argued that its regulated utility assets are not available to support its

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[35] Petition at 8, n8. Entergy's proposal that the new corporation set up a $700 million guarantee to replace the existing Entergy guarantees is not an adequate substitute even if the dollar amount of the replacement is larger than the total of the existing guarantees. The new company's guarantee would be dependent on the same funding sources as the new corporation. In contrast, the existing Entergy guarantees are from Entergy subsidiaries that Entergy has not indicated would be moved to the new corporation.

[36] The Attorney General's Office does not concede that the proposed corporate reorganization would put any Entergy resources beyond reach if needed to compensate New Yorkers. That said, the reorganization would make access to these resources more difficult if only by creating additional legal arguments that would have to be overcome.

[37] June 30, 2008 Entergy Form 10Q, p. 47.

merchant nuclear plants, citing prohibitions against using regulated utilities to support competitive operations.[38] While true as far as it goes, this argument is misleading. First, cash dividends that Entergy's regulated utility subsidiaries pay to Entergy become Entergy's property and not a regulated utility's asset. Second, the assets of a regulated utility are not available to support Entergy's merchant nuclear plants but Entergy's ownership interest in those utilities is. That is, while Entergy may not be able to direct one of its utility subsidiaries to borrow money and turn the proceeds over to Entergy to pay for repairs to Indian Point, Entergy can sell a portion or all of its ownership interest in that utility and use the proceeds from the sale of its shares to support the plant.

The so-called $700 million Financial Support Agreement that Entergy proposes for Enexus would add nothing to the resources Indian Point and FitzPatrick would have access to under Enexus. This $700 million would not be an escrowed fund or other asset separate and apart from Enexus other assets.[39] Rather, the Financial Support Agreement would be an expression of intent by Enexus that if it honors Enexus would have to fund out of its assets or by borrowing.

Moreover, closer examination of the Financial Support Agreement reveals that it is nothing but window dressing and has no substance. According to the sworn testimony of an Entergy witness in the proceeding before the State of Vermont's Public Service Board, which is also reviewing the proposed reorganization, Enexus would have the option to ignore a request for help under the Financial Support Agreement if Enexus decides that the use of the funds would be

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[38] *See, e.g.*, April 29, 2008 Response at 5.

[39] *See, e.g.*, State of Vermont Public Service Board Entergy Vermont Yankee Reorganization Proceeding, Docket No. 7404, transcript of July 30, 2008 hearing at 31:9 through 32:6 (Wanda Curry, Entergy witness).

uneconomic.[40] Enexus would have the option of withholding such financing even if the requested funds are requested in response to an NRC directive to correct an unsafe condition; Entergy's witness stated that Enexus would have the option of shutting down a plant rather than paying for repairs the NRC requires.[41] In reality, the Financial Support Agreement would have no impact on Enexus' discretion to provide funds to its nuclear power plants. Entergy's flimsy proposal is entirely inconsistent with the sentiments expressed by Commissioner (then Chairwoman) Acampora, when she stated, with respect to the National Grid/KeySpan transaction, that: "We act on guarantees, not promises." *See* Commission Session, August 22, 2007, Transcript at 81.

The bottom line on financial resources is that under the proposed reorganization Entergy's New York plants would lose access to at least 70% ($25 billion out of $35 billion) of the financial assets that the plants currently have access to.

B. Extracting $4.0 Billion from Enexus Would Put at Risk Indian Point's Access to Financial Support.

By Entergy's own admission, Enexus would begin operation with a credit rating of below investment grade.[42] Entergy assumes that a below investment grade rating will have no effect on

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[40] *See, e.g.*, State of Vermont Public Service Board Entergy Vermont Yankee Reorganization Proceeding, Docket No. 7404, transcript of July 29, 2008 hearing at 140:23 through 144:12 (Wanda Curry, Entergy witness).

[41] *See, e.g.*, State of Vermont Public Service Board Entergy Vermont Yankee Reorganization Proceeding, Docket No. 7404, transcript of July 30, 2008 hearing at 9:23 through 18:18 (Wanda Curry, Entergy witness).

[42] State of Vermont Public Service Board Entergy Vermont Yankee Reorganization Proceeding, Docket No. 7404, transcript of July 29, 2008 hearing at 23:1 through 23:4 (Susan Abbott, Entergy witness). *See also, e.g.*, Entergy Response EN - 59 to Information Request DPS - 21 (dated July 1, 2008).

Enexus' meeting its financial needs.[43] Neither of these facts promotes the public interest of New York State and New York retail electric service customers. If there is a need for significant cash to ensure the safe, reliable, or environmentally acceptable operation of Indian Point, and Enexus does not have the cash and can not borrow, New Yorkers, their property, and their environment would be at risk.

Entergy predicts that the nuclear power plants it proposes to transfer to Enexus will produce so much cash that Enexus will be able to handle any financial contingency.[44] Entergy's prediction is based on an assumption that no more than one of Enexus' plants will have an unplanned outage lasting longer than a year, and does not take into account an outage as long as Davis-Besse's 26-months, much less a premature permanent shutdown.[45]

C. The Decommissioning Trust Funds That Entergy Proposes to Transfer to Enexus to Pay for Decontaminating and Restoring Indian Point Have Significantly Eroded.

Entergy states that the equities in the Indian Point, FitzPatrick, and other decommissioning trust funds it proposes to transfer to Enexus are picked to mirror broad markets such as the Wilshire 5000, the Wilshire Completion 4500 and the Standard and Poors 500.[46]

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[43] State of Vermont Public Service Board Entergy Vermont Yankee Reorganization Proceeding, Docket No. 7404, June 16, 2008 redacted Rebuttal Prefiled Testimony of Susan Abbott (Entergy witness), at 2:4 through 2:14.

[44] *Id.* at 15:15 through 16:4.

[45] *See, e.g.*, Entergy Response EN - 70 to Information Request AG - 45 (dated July 14, 2008).

[46] *See, e.g.*, Entergy Response EN - 114 to Information Request AG - 43A (July 25, 2008).

However, all of these indexes are significantly lower today than they were at the end of 2007,[47] and the future trend of the equity markets is uncertain at best.[48]

Given the equity market retreat and uncertainty, the Commission cannot rely on Entergy's representation that appreciation alone will ensure that the decommissioning trust funds that Entergy proposes to transfer to Enexus will have sufficient cash to pay for decontaminating and decommissioning Indian Point or FitzPatrick at the end of the plants' operating lives, whenever that is.

D. As Structured, the Proposed Reorganization Would Allow Entergy to Extract Unjustified Premiums from Enexus.

The Enexus Form 10 filed with the SEC on July 31, 2008 contains as Exhibits 10.7, 10.8 and 10.9 proposed shared service agreements between Entergy subsidiaries and Enexus subsidiaries that would disproportionately favor Entergy at Enexus' expense. Specifically, the shared services agreements provide that Enexus will pay Entergy's fully allocated cost plus 5% for services, while Entergy will pay Enexus the lower of fully allocated cost or market cost.[49] Under this formula Entergy would profit, while the best that Enexus can do is break even.

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[47] *See, e.g.*, Wilshire Completion 4500 index; as of September 11, 2008 the Wilshire Completion was down $129.33 (18.6%) from the historic high of $695.24 on July 13, 2007. *See, e.g.*, http://www.wilshire.com/Indexes/Broad/Wilshire4500/.

[48] *See, e.g.*, "Stocks Fall After Drop In Retail Sales," Associated Press September 12, 2008). Available at http://biz.yahoo.com/ap/080912/wall_street.html.

[49] *See, e.g.*, July 31, 2008 Amendment No. 1 to Enexus Form 10, Exhibit 10.7, Form of Shared Services Agreement between EquaGen, LLC, and Entergy Operations, Inc., Article 7 (on p. 18). Entergy claims that this disparity in compensation is required by certain unspecified settlements with the regulators of its utilities and that this disparity is consistent with unspecified FERC requirements. September 12, 2008 Amendment No. 2 to Enexus Form 10, Exh. 99.1, at 164. Assuming that Entergy's claims are accurate, this does not change the fact that if put into effect the Shared Services Agreements would disproportionately favor Entergy over Enexus and take cash that otherwise would be available to support Indian Point and FitzPatrick.

Moreover, the question remains as to the meaning of the phrase "fully allocated cost" as used in the shared service agreements.

E. Under the Proposed Reorganization, Enexus' Income Would Be Much Less Reliable than Entergy's Income.

Entergy currently engages in two main lines of business - regulated gas and electric utility service and merchant nuclear power generation. Entergy reports that for the six months ending June 30, 2008, its utility operations brought in $4.7 billion from the use of $26.8 billion of assets, while its merchant nuclear operations brought in $1.3 billion from the use of $7.3 billion of assets.[50]

In its utility business Entergy has five nuclear power plants and many more fossil-fuel plants, as well as transmission lines, distribution facilities and captive customers spread over a significant area.[51] If all of Entergy's utility nuclear plants go down as the result of a storm, Entergy can still bring in about the same amount of revenue by increasing generation at its fossil-fuel plants and buying replacement power. Furthermore, Entergy can turn most, if not all of its rising utility costs into higher regulated rates and is reasonably certain of recovering its utility investments, with a profit, from its captive ratepayers. The bottom line for Entergy's utilities is that they can encounter many challenges and still generate billions in revenue.

The six operating merchant nuclear plants Entergy proposes to spin off to Enexus occupy a world entirely different from what the utilities experience. Enexus would have no transmission, distribution, captive customers, or regulators to fall back on for revenue. If five of its plants shut down, Enexus would have one nuclear plant, a few small gas turbines that share

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[50] June 30, 2008 Entergy Form 10Q, p. 47.

[51] *Id. passim.*

the plant sites and its management of a nuclear plant in Nebraska to bring in revenue.[52] If even one its six plants goes out of service, the effect on Exenus revenue would be significant and in any event much greater than the effect of a single nuclear plant outage on Entergy. A single plant outage might drive up Entergy's costs for fossil fuel, repayment power and repairs but should have little impact to Entergy's revenues. Moreover, nuclear power plants are complex mechanisms that can be difficult and expensive to fix.[53] Not only would it be at risk of diminished revenue if a plant goes off line, Enexus might have significant repair costs to pay out of diminished cash flow. Moreover, nuclear plants face more risks than mechanical failures and bad weather; as President Bush has informed the nation, nuclear plants have attracted the attention of terrorists.[54] In contrast to Entergy, Enexus would be highly dependent on a single, vulnerable revenue source.

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[52] *See, e.g.,* New York Independent System Operator, 2007 Load And Capacity Data, at 21 - 22 (Entergy owns three gas turbines at Indian Point.) *Available at* http://www.nyiso.com/public/webdocs/services/planning/planning_data_reference_documents/2007_GoldBook_PUBLIC.pdf. *See also*, September 12, 2008 Amendment 2 to Enexus Form 10, Exh. 99.1, at 94 (Entergy would transfer to Enexus a contract to operate Cooper Nuclear Station for the Nebraska Public Power District).

[53] *See, e.g.*, August 15, 2007 NRC Confirmatory Order (confirming FirstEnergy commitments to changes at Davis-Besse and $5.45 million fine for undetected reactor head degradation), *available at* ADAMS Accession No. ML072260535; March 8, 2004 NRC EA-03-214, CAL No. 3-02-001, NRC Approval to Restart the Davis-Besse Nuclear Power Station, *available at* ADAMS Accession No. ML040641171; and November 23, 2003 FirstEnergy Integrated Report to Support Restart of the Davis-Besse Nuclear Power Station and Request for Restart Approval, *available at* ADAMS Accession No. ML033360251.

[54] January 29, 2002 State of the Union address. *Available at* http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html.

F. The Reorganization Is Not in the Public Interest Because Entergy's Predominant Control over the Operation of Indian Point Would Put the Plants at Risk.

Entergy characterizes its proposed half interest in EquaGen LLC, the entity that will control EquaGen Nuclear LLC, the entity that will hold the operating licenses for the Enexus plants and operate them, as means to "maintain fleet alignment" with the five nuclear plants that Entergy's utilities own.[55] Why "alignment" by contract isn't possible Entergy doesn't say. Whatever "alignment" its half interest in EquaGen gives Entergy, that half interest gives Entergy the ability to stalemate EquaGen decisions and force time-wasting arbitration.[56] This ability to stall decisions coupled with the vital nuclear service capabilities that Entergy proposes to withhold from Enexus would give Entergy predominant control over the Enexus plants after reorganization.

Entergy proposes that under the reorganization its subsidiaries have different but complementary capabilities needed for nuclear generation. The distribution of services would be:[57]

Entergy's Entergy Services, Inc.	Enexus' ENOI LLC
Engineering	Nuclear Safety and Licensing
Project Management	Operations Support
Information Technology	Emergency Planning

[55] Entergy Response EN - 53 to Information Request AG - 34 (dated June 30, 2008).

[56] *See, e.g.*, State of Vermont Public Service Board Entergy Vermont Yankee Reorganization Proceeding, Docket No. 7404, transcript of July 29, 2008 hearing at 61:15 through 62:15 (Joseph DeRoy, Entergy witness).

[57] Entergy Response EN - 53 to Information Request AG - 34 (June 30, 2008).

Materials, Procurement and contracts	Oversight
Nuclear fuels procurement	Business Development
Security	Planning and Innovation
Safety and Human Performance	
Alliances	
Administrative Services	

Enexus would have fewer types of capabilities, but the real significance is in the nature of the capabilities rather than the number. All of the listed capabilities are important for the long-term safe and reliable operation of nuclear power plants but Entergy would have the core - Engineering; Project Management; Information Technology; Materials, Procurement and Contracts; Nuclear Fuels Procurement; Security; and Safety and Human Performance - needed for day-to-day operation. With Entergy holding all the service capability cards, Enexus would be hard pressed to hold its own if an Enexus plant has a serious technical problem and the options are to do what Entergy wants or invoke the cumbersome dispute resolution provided in the proposed reorganization.

G. The Benefits Claimed for the Proposed Reorganization Are Illusory, Unquantified, or Irrelevant.

In various filings Entergy repeatedly asserts that the proposed reorganization will provide benefits to various parties, among them New York and New York retail electric service customers. These claims are set out in Entergy's June 30, 2008 responses EN - 51 and EN - 53 to, respectively, Information Requests AG - 32 and AG - 35. Information Request AG - 32 asked Entergy to identify the proposed reorganization's benefits for New York or New York retail electric service customers; Information Request AG - 35 was limited to benefits for New York

retail electric service customers but asked Entergy to provide any quantification it has for these alleged benefits.

The sole benefit quantification Entergy proved in its responses to Information Requests AG - 32 and AG - 32 was the $700 million financial Support Agreement (Support Agreement) Enexus is support to give its merchant nuclear power plants. As shown above, the Support Agreement is an illusion, a promise that Enexus would be free to ignore at will.

In its Response EN - 51 to Information Request AG - 32, Entergy claims that the proposed reorganization would provide New York:

- a streamlined, focused corporate organization
- maintenance of the benefits of a large nuclear fleet
- give Enexus exclusive access to the cash flows from its plants
- elimination of the risks involved in the operation of Entergy's utilities
- an optimal capital structure for Enexus with lower cost of capital
- the Support Agreement
- a financially strong company
- a vibrant and robust participant in the wholesale power markets

Entergy Response EN - 53 to Information Request AG - 35 lists only three benefits for New York retail electric service customers, one of which is the Support Agreement also identified in Response EN - 51. The two different benefits claimed in the Entergy Response EN - 53 are:

- plants better able to compete in wholesale power markets
- maintaining safe and reliable operations

Of the ten alleged benefits listed in the two responses, one is illusory (the Support Agreement) and four (maintaining the benefits of a large nuclear fleet, a financially strong company, a vibrant and robust participant in the wholesale power markets, and maintaining safe

and reliable operations) are, or should be, merely the continuation of current conditions.

Among the other five alleged benefits, four are unquantified, and the only quantified alleged benefit, optimal capital structure with lower cost of capital, would, if true, benefit only Enexus' shareholders. Moreover, the way that Entergy proposes to optimize Enexus' capital structure would harm New York and New York ratepayers. Entergy proposes that Enexus reduce its cost of capital by borrowing so much that the rating agencies would classify Enexus debt as below investment grade.[58] Assuming that Enexus can sell its bonds at or below the rate Entergy predicts and Enexus' cost of capital is what Entergy estimates, Enexus' access to cash to deal with plant needs would be at a higher risk because, unlike dividends, debt service payments cannot be deferred and a corporation already heavily in debt would have trouble borrowing.

The claim that Enexus ownership would make nuclear plants more competitive is not relevant to New York. As Entergy acknowledges, nuclear power plants are base load units that produce whatever they can.[59] Consequently, changing Indian Point and FitzPatrick's owner would not increase the plants' ability to sell their output.

As to whether Enexus would be a streamlined, focused corporate organization, the proposed changes from Entergy's current organizational structure are not final.[60] Moreover, there

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[58] Another name for below investment grade securities is "junk."

[59] *See* September 12, 2008 Amendment No. 2 to Enexus Form 10, Exh. 999.1, at 91 (Over the period 2005 - 2007, Entergy's New York plants produced at a capacity factor (percent of theoretical maximum output) of 92% or better (Indian Point 2 at 92%, FitzPatrick at 93%, and Indian Point 3 at 95%). *See also* New York Independent System Operator, 2007 Load And Capacity Data, at 21 - 22. *Available at* http://www.nyiso.com/public/webdocs/services/planning/planning_data_reference_documents/2007_GoldBook_PUBLIC.pdf.

[60] Indeed, Entergy filed an Amendment No. 2 to Enexus Form 10 on September 12, 2008, and even with this Amendment Enexus' Form 10 is still incomplete.

is no information as to what, if any, what improvements the proposed organizational changes would bring about at Indian Point and FitzPatrick. Indeed, Entergy asserts that the transfer to Enexus would make no changes at Entergy's New York plants.[61]

Entergy also claims that Enexus would have exclusive access to cash flows from the former Entergy nuclear power plants, and that transfer to Enexus would insulate Indian Point and FitzPatrick from the risks that Entergy's utilities would require cash that otherwise could be used at the New York plants. However, this is one claim rather than two. What would give Enexus exclusive access to its cash flow is the separation from Entergy and perforce the end of Entergy's ability to use the profits from Indian Point or FitzPatrick to support Entergy's regulated utilities.

It is unclear whether Enexus' not having to share the revenue from Indian Point or FitzPatrick would benefit the plants. Entergy has not shown that it has not had sufficient cash from Indian Point or FitzPatrick, even after Hurricane Katrina. Moreover, regulators are required to provide utilities rates that allow the utilities to cover their expenses and earn a reasonable profit. Consequently there is no showing that sending the cash flow from Indian Point, FitzPatrick and Entergy's other merchant nuclear power plants to a collection point other than Entergy would benefit New York or New York ratepayers.

There is, however, a real down side for Indian Point, FitzPatrick, New York and New York ratepayers if the plants no longer have access to the profits and other assets of Entergy's utilities. Unlike the utilities, Indian Point and FitzPatrick have no associated fossil plants, transmission services or retail customers to provide revenue if they or another Enexus plant stops running or needs extensive repairs. The bottom line is that the benefit claims for the proposed reorganization are not real but the injury to New York and New Yorkers is both real and

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[61] *See, e.g.*, January 28, 2008 Entergy Petition, at 22.

substantial.

IV. PUBLIC SERVICE LAW § 69 REQUIRES THAT THE ISSUANCE OF DEBT BE NECESSARY FOR THE PURPOSE OF ENSURING SAFE AND ADEQUATE SERVICE AT JUST AND REASONABLE RATES.

PSL § 69, *inter alia,* empowers the Commission to authorize electric corporations subject to its jurisdiction to issue bonds and assume other forms of debt upon a finding that the debt is reasonably required or necessary to further the purpose set out in the application for Commission approval. The statue does identify certain purposes as within its scope. Among these are the acquisition of property and the refunding of obligations.

New York courts have held that PSL § 69 must be read in the context of PSL Article 4, and that the purposes for which the Commission may approve a debt issue under PSL § 69 are those related to the provision of electric or gas service in New York for the benefit of utility customers. *See People ex rel Binghamton Light, Heat and Power Co. v. Stevens*, 203 N.Y. 7 (1911) (public service laws enacted to protect and enforce the rights of the public); *Staten Island Edison v. Public Service Commission,* 263 N.Y. 209 (1934) (Commission authorized to deny approval of bond issue when utility proposes to use the proceeds to retire other bonds used to purchase bonds of out of state corporation and for other unexplained purposes); *Brooklyn Union Gas v. Public Service Commission,* 34 A.D.2d 71 (3d Dep't 1970) (Commission authorized to deny Brooklyn Union Gas permission to issue preferred stock to acquire out of state utility where there is no assurance that foreign utility would provide benefit for New Yorkers and transfer would place a substantial portion of Brooklyn Union's assets outside the Commissions jurisdiction). Thus, financing must be reasonably required and necessary as well as in the public interest.

V. SADDLING ENEXUS WITH $ 6.5 BILLION IN DEBT IS INCONSISTENT WITH PUBLIC SERVICE LAW § 69.

Here, Entergy's proposal fails the test required by PSL § 69. Entergy claims that Enexus will use the proceeds from its issuance of debt to acquire property and refund other corporate obligations and that therefore the proposed debt complies with PSL § 69. The proceeds of the bonds that Entergy wants Enexus to issue would contribute nothing to electric service in New York. Entergy already owns that plants that it, in essence, proposes to sell to a piece of itself, and then spin off with that piece. If everything goes as Entergy wants, New York State, its taxpayers, and its ratepayers will gain nothing useful from the purposes of the proposed Enexus bond issue. Instead, if the proposal were completed, New York would have an Indian Point and FitzPatrick burdened with billions of dollars of debt and Entergy would be outside the Commission's jurisdiction with the money. The massive debt issuance proposed by Entergy is neither necessary nor reasonably required for the provision of safe and reliable power to New York citizens and is not consistent with PSL § 69. *See Brooklyn Union Gas,* 34 A.D.2d 71.

VI. THE PROPOSED REORGANIZATION DOES NOT ENSURE THAT INDIAN POINT WILL BE ABLE TO COMPLY WITH THE PROPOSED CLOSED-CYCLE COOLING REQUIREMENT CONTAINED IN DEC'S DRAFT PERMIT.

Cooling water systems fall into three groups. "Once-through" systems take water in from outside sources such as the Hudson River, use it to absorb heat, and return the water to its source at a higher temperature. "Closed-cycle" systems recirculate water after it passes through the heat source to a reservoir or tower where the water is cooled and add water to the system only to replace that which is lost through evaporation. Closed-cycle systems withdraw far less water than once-through systems. "Dry cooling" systems use air drafts to transfer heat, and, as their name implies, they use little or no water. *See generally Riverkeeper, Inc. v. United States EPA,*

358 F.3d 174, 182 n. 5 (2d Cir. 2004); *Citizens for the Hudson Valley*, 281 A.D.2d at 99. The Indian Point power plants (Units 1, 2, and 3) currently employ "once through" cooling systems.

Within the geographic boundaries of New York State, the DEC regulates cooling water intake systems and thermal discharges through a state regulation which has been approved by the federal Environmental Protection Agency ("EPA"). 6 NYCRR § 704.5; *see generally Entergy Nuclear Indian Point 2, LLC v. DEC*, 23 A.D.3d 811 (3d Dep't 2005) (rejecting Entergy's attempt to invalidate the state regulation). The DEC staff has issued a draft State Pollution Discharge Elimination System ("SPDES") permit that requires Entergy to implement closed cycle cooling at Indian Point. *See In re Renewal and Modification of a SPDES permit by Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC*, DEC No. 3-5522-00011/00004, 2006 N.Y. ENV LEXIS 3 (February 3, 2006) (ALJ decision); *id.*, 2008 N.Y. ENV LEXIS 52 (August 13, 2008) (Assistant Commissioner decision).

In this proceeding, Entergy produced a non-confidential document which estimated that closed cycle cooling system at Indian Point could cost $ 612 million to $ 740 million. *See* Entergy Response No. EN - 76 to Information Request AG - 51 (July 18, 2008) ("With customary cost of a performance bond and a 20% contingency, the engineering, procurement, and construction costs approach $740,000,000.00.").[62] Entergy must demonstrate that Enexus, EquaGen LLC, and/or ENOI LLC will have sufficient assets to implement a closed cycle cooling system at Indian Point, should the DEC include such a requirement in the new SPDES permit. Because it has failed to do so, the Commission should reject the proposal as inconsistent with

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[62] The OAG does not pass on the accuracy of Entergy's closed-cycle cooling system cost estimate and reserves the right to dispute such claims elsewhere. However, in this proceeding, Entergy's July 18, 2008 estimate constitutes an admission by Entergy and may be taken into account by the Public Service Commission in reviewing Entergy's proposed corporate reorganization and debt financing.

PSL §§ 69 and 70.

VII. THE COMMISSION SHOULD RETAIN AUTHORITY TO REVIEW ANY CHANGE IN THE ENTERGY-NYPA VALUE SHARING AGREEMENTS AND REQUIRE ADVANCE PUBLIC NOTICE OF ANY FUTURE EFFORTS TO CHANGE THOSE AGREEMENTS.

Although the January 2008 petition is silent concerning obligations to NYPA, Entergy intended to use the proposed reorganization as a pretext for reneging after 2008 on payments to NYPA under ("VSAs") originally part of the sale of Indian Point 3 and FitzPatrick. On August 25, 2008, Entergy represented to the PSC that it had abandoned its effort to avoid the VSAs. Entergy's announcement notwithstanding, any consideration of Entergy's proposal should address the VSAs. Indeed, the Commission should impose obligations concerning the VSAs regardless of the resolution of Entergy's proposal.

The VSAs, both the originals and the current versions, provide a benefit to New York retail electric service customers and to the State in the form of revenue sharing of approximately $72 million a year from the output of Indian Point 3 and FitzPatrick.[63] This revenue enables NYPA to provide power at prices below what it otherwise could, and also supports NYPA efforts to reduce pollution, improve energy efficiency and promote renewable energy. The check is made out to NYPA but New York and New Yorkers benefit. The VSAs promote safe and reliable electric service in New York at just and reasonable service, and thus fall under PSL §§ 65, 69 and 70.

Because the VSAs are subject to Commission authority, the Commission should ensure that the VSAs are honored. OAG urges the Commission to require Entergy, and any successor as

[63] The VSA language to the effect that the VSA create no third party benefits should be ignored as against public policy.

obligor, to advise the Commission in writing sent to the Secretary at least 60 days prior to any proposed changes in a VSAs term or any proposed termination of a VSA.

Specifically, OAG urges that the Commission adopt the VSA notice requirement regards of whether the Commission approves Entergy's proposed reorganization. Although Entergy has now told the Commission that Entergy has abandoned its efforts to use the reorganization to renege on the VSAs, Entergy's past efforts to avoid its obligations under the VSAs counsels vigilance.

Entergy has already avoided some $144 million in VSA payments for 2004 and 2005 by obtaining FERC authority to interpose an Entergy marketing subsidiary in a way that arguably frustrated the value sharing mechanism of the original VSAs.[64] The recently abandoned effort to use the proposed Enexus reorganization to terminate revenue sharing after 2008 was a follow on to Entergy's successful stratagem at FERC. Entergy's history in New York and the company's overreaching elsewhere suggest that there may be a VSA "Round 3".[65] Requiring notice to the Commission before any proposed change in a VSA or termination of a VSA might reduce the likelihood of an attempt and in any event would provide an opportunity to advocate the public

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[64] *See, e.g.*, Entergy 2007 Annual Report to Shareholders at 85 and April 12, 2006 Order in FERC Docket No. EL06-89-01 - Entergy Indian Point 2, LLC *et al.*

[65] Since OAG 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) *see also* July 16, 2008 *NRC Safety Evaluation of Entergy's Proposed Fuel Management Program* (ML081700564). 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).

interest if there is such an attempt.

VIII. ENTERGY'S PROPOSED REORGANIZATION AND DEBT IS A WORK IN PROGRESS AND CANNOT BE FULLY EVALUATED NOW.

On August 6, 2008 through August 8, 2008, the ALJs and Entergy's counsel worked out what documents constitute Entergy's proposal. This list is incomplete. One document not listed as part of Entergy's proposal is the Amendment No. 1 to Enexus Form 10 that Entergy filed on July 31, 2008. Entergy's counsel characterize Amendment No. 1 as changing nothing material in the proposal.[66] In fact, Amendment No. 1 contains over 600 new pages, including new terms, such as the Form of Shared Service Agreement identified as Exhibit 10.7, not in the initial May 13, 2008 Enexus Form 10. However, Amendment No. 1 did not complete Enexus' Form 10.[67] Nor did the Amendment No. 2 to Enexus Form 10 that Entergy filed on September 12, 2008. It is obvious that Entergy's proposal is a work in progress.

Entergy characterizes the changes in the Enexus Form 10 as normal and avers that such changes are of no concern to the Commission because the final Form 10 filed with the SEC becomes the information that the financial community will act on. The fact that the final Form 10 is binding as to the SEC and the financial community is all well and good, but the financial community and the SEC are interested in an accurate disclosure of Entergy's and Enexus' actions and intentions that affect the value of Enexus' shares and debt. The financial community and the

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[66] August 8, 2008 email from Entergy counsel to the ALJs, attached to the August 14, 2008 Order.

[67] For example, many of the documents attached to Amendment No. 1 are not executed and the Form of Shared Service Agreement included as Exhibit 10.7 is missing certain exhibits listed in the Agreement's table of contents. Amended No. 2 to Enexus Form 10, filed September 12, 2008, did not correct this deficiency.

SEC have no responsibility as to the effect of those actions and intentions on electric service in New York.

Since Entergy has not completed its Form 10 filing with the SEC and thus Entergy's proposal is incomplete, the Commission should reject Entergy's proposal because there is no way to determine whether a reorganization is in the public interest if the Commission does not know what it is considering.

IX. BASED ON THE PUBLICLY AVAILABLE INFORMATION, ENTERGY'S PROPOSAL DOES NOT COMPLY WITH PSL §§ 70 AND 69 BECAUSE IT DOES NOT ENSURE THAT THE NEW ENTITIES WILL HAVE SUFFICIENT FUNDS TO DECOMMISSION THE INDIAN POINT FACILITIES AS WELL AS ENTERGY'S OTHER FACILITIES.

At present, because of Entergy's broad assertion of confidentiality regarding decommissioning cost estimates, OAG cannot submit comprehensive comments regarding questions about Entergy's ability to comply with its decontamination, decommissioning, and site restoration obligations. Since no ruling has been made on such claims, OAG respectfully requests the opportunity to submit additional comments on this issue once the status of Entergy's confidentiality claims has been resolved.

Nevertheless, based on decommissioning cost estimate documents that are publicly available as of today, OAG submits that Entergy's corporate reorganization and debt financing do not comply with PSL §§ 69 and 70.

As disclosed by public filings, Entergy has set aside only paltry funds for the decontamination of the Indian Point site and its subsurface radioactive plumes and the restoration of the site to a "greenfield". At present, the Indian Point facilities have two known separate,

subsurface radioactive plumes.[68] It appears that these plumes have been in existence for quite some time. One contamination plume flows from the spent fuel facility connected to the Indian Point Unit 1 reactor, while the second plume flows from the spent fuel facility connected to the Indian Unit 2 reactor. These radionuclide plumes collectively contain strontium, tritium, cesium, cobalt, and nickel. Both of these spent fuel facilities were constructed and operated by the Consolidated Edison Company, which sold its Indian Point facilities to Entergy in 2001. Entergy publicly acknowledges that these two plumes flow into the Hudson River.[69] In addition, on or about April 7, 2007, a steam pipe connecting Indian Point Unit 2 and Indian Point Unit 3 cracked and vented tritium up through the ground and blacktop.[70] In short, the subsurface radionuclide contamination at Indian Point is one of the worst of such situations in the Nation.

These Indian Point plumes will require extensive decontamination efforts. As part of this proceeding, it would be appropriate to review the decommissioning work that has taken place at the Connecticut Yankee Haddam Neck nuclear power plant. Connecticut Yankee's owner began the plant's decommissioning in 1996 with $427 million set aside for the job, but found that unforeseen work, in particular the unanticipated need to remove a significant quantity of soil

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[68] Maps of the plumes – prepared by Entergy's consultant and released to the public in January 2008 – are attached to these comments. *See* Hydrogeologic Site Investigation Report, GZA GeoEnvironmental, Inc., Jan. 7, 2008 at Figure Nos. 9.3, 9.4.

[69] *See* April 30, 2007 Entergy License Renewal Application, Environmental Report, at 4-87 (stating that Entergy and the Nuclear Regulatory Commission have concluded that "...there appears to be some level of contaminated groundwater that discharges into the Hudson River...").

[70] This was not an isolated event. During the recent March 2008 fuel outage for Indian Point Unit 2, hundreds of gallons of tritium-contaminated water leaked from a hose that became uncoupled. *See* April 28 and 30, 2008 Indian Point Condition Reports Nos. CRIP2-2008-01490, CR-IP2-2008-01533. The recent closure of the Barnwell Low Level Radioactive Waste Disposal site in South Carolina will increase the storage of such waste in Westchester County at Indian Point Unit 1. *See* NRC Press Release 07-146 ("Barnwell is currently the nation's only commercial disposal option for certain wastes, and its closure could force licensees to store waste on-site until other disposal options become available.").

contaminated with radioactivity, more than doubled the decommissioning costs.[71] The decontamination work at the single reactor Haddam Neck site likely will pale in comparison to the remediation that will need to take place at Indian Point.

This trend is confirmed by the Vermont Yankee decommissioning cost estimate – for which Entergy withdrew its confidentiality designation only on September 10, 2008. According to a publicly-available report, as of December 31, 2006, Entergy's Vermont Yankee subsidiary had $ 416 million in its decommissioning fund to address an expected $478 million decommissioning expense. *See* March 29, 2007 letter from John Herron, Entergy Nuclear Operations, Inc., to U.S. Nuclear Regulatory Commission, re Status of Decommissioning Funds, p. 7, NRC ML070950209. However, as of January 2007, Entergy forecasted that the cost to decommission Vermont Yankee could be as high as $893 to $991 million depending on the decommissioning scenario employed. *See* January 2007 *Decommissioning Cost Analysis for the Vermont Yankee Nuclear Power Station*, Document E1-1559-002, Rev. 0, Prepared by TLG Services, Inc. p. xvi-xvii.[72] Thus, Entergy's January 2007 forecast acknowledges that it could cost roughly twice as much to decommission Vermont Yankee as the arithmetic formula contained in 10 C.F.R. § 50.75 would indicate.

Applying the above bench marks to the three Indian Point facilities, it is clear that the

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[71] *Compare* Connecticut Yankee Post Shutdown Decommissioning Activities Report (August 1997) ("PSDAR") *with* Haddam Neck Plant License Termination Plan, Rev. 4 (November 2006). The License Termination Plan, at page 7-5, states that $752.9 million had been spent on decommissioning Connecticut Yankee through 2006 and estimated that the job would cost an additional $164.7 million (2006 dollars) through 2023. The Connecticut Yankee PSDAR is *available at* http://www.connvankee.com/assets/pdfs/Document1.pdf and the Haddam Neck Plant License Termination Plan in the NRC's ADAMS electronic files at ML063390404.

[72] As Entergy noted, *see* September 10, 2008 e-mail from Entergy's counsel (4:54 PM), this document is publicly available from the NRC ADAMS document system. *See* NRC ML080430658.

decommissioning of Indian Point will constitute a significant remediation project. As previously noted by this Office,[73] publicly-available information about the Indian Point decontamination/decommissioning funds indicates that they are, and will continue to be, inadequate to accomplish this critical environmental remediation task. For example, in a March 29, 2007 letter, Entergy Nuclear Operations publicly disclosed that as of December 31, 2006, Indian Point Unit 1 had just $254 million in its decommissioning fund, while Indian Point Unit 2 had only $303 million. *See* March 29, 2007 letter from John Herron, Entergy Nuclear Operations, Inc., to U.S. Nuclear Regulatory Commission, re Status of Decommissioning Funds, NRC ML070950209. Each of these totals accounts for less than half of the money expended thus far to decontaminate and decommission the single reactor at the Connecticut Yankee Haddam Neck site.[74] Ultimately, if Entergy, Enexus, their affiliates, or successors lack sufficient money to thoroughly decontaminate the Indian Point site, the responsibility to rededicate the site will pass through to the taxpayers or the ratepayers.

What's more, Entergy has a poor track record of protecting decommissioning funds. Withdrawals of the trust fund under 10 C.F.R. § 50.82(a)(8)(I)(A) are limited to legitimate decommissioning activities consistent with the definition of decommissioning. Your Honors and PSC Staff may take formal notice of the fact that Entergy recently attempted to leverage decommissioning funds for current plant operating obligations at another reactor in its fleet. Specifically, Entergy sought to divert funds from the decommissioning fund for the Vermont Yankee reactor to pay for the ongoing management of spent fuel. *See* July 16, 2008 NRC Safety

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[73] *See* July 14, 2008 OAG Letter Brief filing, at 3.

[74] Similar concerns have been raised about the decommissioning fund for Vermont Yankee, another Entergy-owned facility. *See* Elizabeth Macalaster, *Will there be enough money to unbuild Vermont Yankee?*, The Commons, June 2008 at p. 6 (previously submitted).

Evaluation of Energy's Proposed Fuel Management Program, NRC ML081700564.[75] This sort of attempted creative financial "restructuring" raises concerns about Energy's (and Enexus') long-term commitment to the thorough and complete decontamination of the Indian Point site and its return – as promised to Westchester County – to a "greenfield".

Given Energy's attempts to withdraw money from the Vermont Yankee decommissioning trust fund for unauthorized purposes, and the immense debt that Entergy proposes to saddle Enexus with, it is reasonable to assume that Enexus will resist efforts to increase monies deposited in the Indian Point decommissioning funds and to return the site to an unrestricted-use greenfield. Authorizing Entergy to spin off Indian Point to a thinly-capitalized and debt-laden Enexus will make it all the more difficult to ensure that New York ratepayers and taxpayers do not get stuck with a bill to decontaminate and decommission Indian Point.

X. ENTERGY'S DECOMMISSIONING COST STUDIES ARE NOT "CONFIDENTIAL" AND SHOULD BE MADE PUBLIC.

In this proceeding Entergy has claimed and the ALJs have provisionally granted trade secret protection for Entergy's studies of the cost of decommissioning and decontaminating Indian Point, FitzPatrick, and the five other nuclear facilities that Entergy proposes to transfer to Enexus. OAG and Assemblyman Brodsky have sought the removal of Entergy's confidentiality designation. *See* Joint Motion submitted by OAG and Assemblyman Richard Brodsky, dated

[75] The NRC found that: "Entergy BY plans to use funds from the decommissioning trust fund to cover spent fuel management costs." However, 10 C.F.R. § 50.75, requires that licensees provide decommissioning funding assurance for decommissioning costs. Such costs do not include spent fuel management costs under 10 C.F.R. § 50.54(bb). Accordingly, the NRC rejected Energy's proposal to withdraw funds from the Vermont Yankee decommissioning fund.

September 5, 2008.[76]

These studies contain information that is crucial for the resolution of this proceeding and for public confidence in the Commission's decision. Yet until Wednesday, September 10, 2008, when Entergy in response to OAG and Assemblyman Brodsky's motion released a Vermont Yankee decommissioning cost study, the public in this proceeding was prevented from knowing what was in any of these studies and OAG was barred from using any of their contents in this proceeding. Entergy continues to claim that all its other decommissioning cost studies are confidential and they continue to be withheld from the public and from OAG's use, under the ALJ's September 10, 2008 ruling (Ruling) that FOIL and the regulations implementing FOIL prohibit the Commission's releasing information claimed to be trade secrets or otherwise eligible for confidential treatment until the claimant has exhausted all administrative and legal appeals.[77]

The September 10, 2008 Ruling stated that:

> Consistent with this process, we will consider the objections included in the Joint Filing and the e-mail from Westchester County following the scheduled submission of further comments. We will consider them together with any others that may be raised in those comments, and we will issue a single ruling resolving all such objections at that time. Our ruling will be based on an evaluation of each objection in relation to the justifications for exemption submitted by Petitioners at the time they requested confidential status. To the extent that the September 9, 2008, letter from Petitioners reflects their view that those submissions can be supplemented, we remind them that our August 14, 2008, ruling expressly provided otherwise, absent extraordinary circumstances. (See p. 20.)

September 10, 2008 Ruling. Relying on this instruction and the provisions in the June 17, 2008 Protective Order, the July 23, 2008 Order, and the August 14, 2008 Order in this proceeding, the

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[76] A copy of OAG and Assemblyman Brodsky's September 5, 2008 Motion challenging the confidentiality of the Entergy decommissioning studies is incorporated by reference.

[77] *See* September 10, 2008 e-mail ruling from the ALJs to the parties.

OAG hereby reiterates its objections to any other designation of confidentiality for the information and documents pertaining to the cost of decommissioning[78] its nuclear power reactors that it provided in its response to OAG Information Request AG - 13, and respectfully submits that the provisional designation of these studies as confidential should be lifted.

In addition to the arguments previously submitted by OAG and Assemblyman Brodsky, OAG submits the following additional arguments.

A. The Commission Should Strike Entergy's Letter Filed September 9, 2008.

Pursuant to 16 NYCRR § 3.6, OAG formally requests the Commission to strike Entergy's letter filed on September 9, 2008, because it violates the August 14, 2008 Order issued in this proceeding. As clearly stated in that Order:

> Petitioners already offered arguments concerning why all information they claim is exempt should be protected from public disclosure. Accordingly, we clarify here that *Petitioners will not be allowed to augment their previously submitted arguments on such issues*, except in "extraordinary circumstances" as that term is used in 16 NYCRR § 3.6(d)(3).

August 14, 2008 Order, at 20 (emphasis added); *see also* June 17, 2008 Protective Order at ¶ 3. Yet, disregarding these clear instructions, Entergy's reply to OAG and Assemblyman Brodsky's motion was a six-page letter that does exactly that; the letter belatedly attempts to offer *additional* justification for Entergy's June 2, 2008 request for confidential treatment of its response to AG-13, and changes reasons previously offered for such justification.[79] *Compare*

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[78] Decommissioning includes the demolition, removal, and disposal of all buildings, systems, structures, and components, the removal and disposal of all contaminated soil, rock, the remediation of contaminated groundwater, sediment, and surface water, the removal of accumulated waste, and the grading and restoration of the entire site to unrestricted use status.

[79] Entergy did not seek to justify its response as required by "extraordinary circumstances" pursuant to 16 N.Y.C.R.R. § 3.6(d)(3).

Entergy, September 9, 2008 Letter *with* Entergy, June 2, 2008 Letter in Lieu of Motion Requesting Trade Secret Status. Specifically, the first and second paragraphs on page 3 of the September 9, 2008 Letter as well as the paragraph beginning at the bottom of page 5 contain new information not previously presented to the Commission. As such, this letter is submitted in violation of the August 14, 2008 Order and should be stricken from the record in this proceeding.

In the alternative, OAG requests that the Commission consider Entergy's departure from the June 17, 2008 Protective Order and August 14, 2008 Order and the information revealed for the first time in Entergy's September 9, 2008 letter when considering OAG's request that the confidentiality designation be removed.

B. Entergy's June 2 and September 9 Representations are Inaccurate.

It appears that Entergy's September 9 and June 2 representations are incorrect. In its June 2, 2008 Letter in Lieu of Motion Requesting Trade Secret Status, Entergy represented that its decommissioning cost studies were closely-held trade secrets. At the time Entergy made that representation, the statement was incorrect. First, a decommissioning cost study for Entergy's Vermont Yankee facility was produced in the corporate reorganization proceeding before the State of Vermont Department of Public Service. Second, the exact same decommissioning study for the Vermont Yankee facility that Entergy sought protection of here was delivered to the NRC in early February 2008 – four months *before* Entergy told the Commission that Entergy's decommissioning cost studies were trade secrets. The relevant decommissioning cost study, TLG Report No. E11-1559-002, Rev. 0 for Vermont Yankee - Submittal of Report, "Decommissioning Cost Analysis," Pursuant to 10 CFR 50.75(f)(3) (January 2007), is available on the NRC's public electronic file system (known as "ADAMS") at NRC accession number ML080430658. The NRC file data indicates that this Vermont Yankee study was posted for

public view on February 6, 2008. However, Entergy did not disclose this material fact in its June 2, 2008 request to have the Vermont Yankee study classified a trade secrete in this proceeding.

Entergy may have failed to correct a statement contained in its June 2, 2008 Letter in Lieu of Motion Requesting Trade Secret Status, and then repeated the inaccuracy in its September 9, 2008 letter. In its June 2 letter Entergy claimed trade secrete status for a decommissioning cost study for its Pilgrim plant. A decommissioning study for Entergy's *Pilgrim* facility, TLG Report No. E11-5690-003, "Preliminary Decommissioning Cost Analysis for the Pilgrim Nuclear Power Station" (July 2008), was delivered to the NRC in July 2008.[80] This document is available on the NRC ADAMS system at NRC Accession No. ML082170672. If the study in the NRC's public electronic files is the same document that Entergy obtained protection for in this proceeding, the document ceased being trade secrete no later than the July 16, 2008 public posting date indicated by the NRC. Yet after filing that document with the NRC in July, Entergy made no effort to end its now invalid confidentiality claim and in form the Commission, OAG and the other parties of the change of the document's status. Then, on September 9, 2008, Entergy compounded the failure to correct its earlier representation, when Entergy *reiterated* in its written submission in this proceeding that the Pilgrim report continued to deserve confidential treatment.

Moreover, a review of the NRC ADAMS files located a decommissioning study prepared by Entergy's wholly-owned subsidiary (TLG) for a number of Illinois reactors owned by a company other than Entergy. *See* TLG Report No. E16-1555-002, Rev. 0 for Braidwood Units 1

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[80] OAG submits that this TLG report is likely the same document that Entergy claimed confidentiality designation for in this proceeding. Although it appears Entergy used the same TLG document number (No. E11-1529-002) when referring to the Pilgrim document in its response to AG-13 as it did for the Palisades document (*see* Entergy public Response EN - 13, at p. 2 (items 1 and 3)), OAG surmises that the Pilgrim report should have been denominated No. E11-5690-003 as this number appears on the cover of the July 2008 report posted on the NRC ADAMS document system. *See* TLG Report No. E11-5690-003, "Preliminary Decommissioning Cost Analysis for the Pilgrim Nuclear Power Station" (July 2008), ML082170672.

& 2, Byron Units 1 & 2, LaSalle Units 1 & 2, Site-Specific Decommissioning Cost Estimates (November 2006) (*available at* NRC Accession No. ML063540225). Thus, the nuclear power industry does not view decommissioning costs as trade secretes, and Entergy cannot sustain its burden that such information is a trade secret.

C. Entergy Admitted in its September 9, 2008 Letter that it Failed to Produce All Relevant Decommissioning Cost Estimates in Response to Information Request AG - 13.

Entergy, in its September 9, 2008 letter, for the first time admitted that it creates and maintains two sets of decommissioning cost estimates, one internal, and another that it submits to the NRC,[81] yet Entergy's public response to OAG's earlier request for such studies appears to indicate that Entergy produced only one of these studies for each of its facilities. Neither Entergy's response to OAG's discovery request nor its September 9, 2008 indicates which studies Entergy has supplied in this proceeding.[82]

In response to OAG's request for "each and every decommissioning cost study or decommissioning cost estimate that Entergy, any Entergy subsidiary or any subsidiary of an Entergy subsidiary has or has caused to be created" (Office of the Attorney General Information Request AG - 13, served May 23, 2008), Entergy submitted one "Decommissioning Cost Analysis" for each of the five facilities it operates. *See* Entergy, Response EN - 13 to Information Request AG - 13 (June 2, 2008). It requested confidential status for each of these studies, which was provisionally provided. *See id.; see also* Entergy Letter in Lieu of Motion

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[81] Entergy September 9, 2008 Letter, at p. 2.

[82] Entergy's Response EN - 13 to Information Request AG - 13 (June 2, 2008) has two parts; a public, unrestricted two-page document Entergy provided to all parties including OAG, and decommissioning studies that Entergy forwarded to the Commission staff.

(June 2, 2008).

OAG seeks to remove the confidential designation for Entergy's response to Information Request AG - 13 because Entergy's June 2, 2008 public justification failed to meet the standards set out by FOIL and Commission regulations. In doing so, OAG submits that as one such cost estimate had already been made public in the Vermont Yankee proceeding, Entergy had waived its right to seek confidential treatment of that, and other, cost estimates here. Entergy responded in its letter of September 9, 2008, that what it had publicly disclosed in Vermont Yankee was not in fact its own internal cost estimate, but was a different document prepared according to NRC regulations. *See* Entergy, September 9, 2008 Letter, at p. 2. This response is problematic for one of two reasons, because it indicates that either (1) Entergy has provided OAG, and therefore the parties and ALJs in this proceeding, with only one of multiple cost estimates it prepared for its facilities, in which case its response to AG - 13 is inadequate and incomplete, or (2) Entergy turned over all of its cost estimates in response to AG - 13 (Entergy's public response to AG - 13 lists five studies, one for each operating nuclear plant site Entergy proposes to turn over Enexus) in which case its September 9 letter is misleading.

In its September 9, 2008 letter, Entergy has argued that it creates more than one decommissioning cost estimate, and that in contrast to the cost estimates prepared for the NRC in compliance with 10 C.F.R. § 50.75, "decommissioning cost estimates prepared for internal purposes are based on different assumptions and are not constrained by the NRC's approved methods of calculation." Entergy, September 9, 2008 Letter, at p. 2. Therefore, it appears that, for each plant site, Entergy creates more than one cost estimate, only one of which (it is not clear which one) has been provided to OAG, parties, and the ALJs in this proceeding.

Moreover, this is the first time Entergy has indicated that there is a difference between the way it, and the NRC, calculate decommissioning cost estimates, and there is no indication that

Entergy has explained what the implication of these differences may be – and notably, which studies it believes are more significant for the Commission's considerations in this proceeding.

Entergy attempts to distinguish decommissioning cost information made public in the Vermont Yankee proceeding from the information it seeks to shield here, arguing that "Entergy's internal speculation on decommissioning costs is not the basis upon which governmental action will be taken on funding decommissioning." Entergy, September 9, 2008 Letter, at p. 2. Entergy's assertion is irrelevant to this proceeding and a red herring. OAG did not ask Entergy for information to be used to decide how much Entergy or Enexus must have in the decommissioning trust funds that the NRC mandates. Here the issue is whether the reorganization Entergy has proposed would provide Indian Point and FitzPatrick the resources they need, including the funds needed to decommission the plants and removing all contaminants, not just radioactive materials. For the PSC's purposes a decommissioning cost study following NRC regulations may not provide the most relevant information. Hence, OAG's request for all of Entergy's decommissioning cost studies.

Moreover, Entergy *is* asking the Commission, a governmental agency, to take action based upon Entergy's own "internal speculation" on decommissioning costs; it is asking the Commission to approve a transaction which could put funding for decommissioning Indian Point and FitzPatrick in jeopardy based on Entergy's "internal speculation" that the funds will be available. Whatever information about decommissioning costs Entergy has should be in the record, as the Commission cannot possibly determine if an Enexus would have the funds to cover decommissioning costs if it does not have the best available information on what those costs might be. Entergy's decommissioning cost estimates are at the heart of this proceeding, and are therefore central to the decision placed before the Commission. Therefore, these documents fall squarely within FOIL's presumption of discoverability unless determined to fall within a narrow

exception, a showing which, as discussed above, has not been made.[83]

D. Entergy Changed Its Reasons For Requesting Confidential Treatment of Decommissioning Cost Studies Without Notice and In Violation of FOIL and PSC Regulations.

Entergy provided one reason for refusing OAG's request to turn over its decommissioning cost studies, and then changed its reason. In a telephone conference with Assistant Attorney General Charlie Donaldson on August 26, 2008, Entergy's counsel stated that a confidentiality agreement with TLG prevented release of the decommissioning cost studies. Entergy's September 9 Letter now says that no TLG confidentiality agreement exists, but that an undefined "Code of Entegrity" (so in the original) protects against its disclosure.[84] *See* Entergy, September 9, 2008 Letter, at 2, n2. Before submitting the September 9 Letter Entergy did not notify OAG that its original justification for declining to turn over the studies was inaccurate and the Letter supplies no rationale for the original inaccuracy or why Entergy's self-created "Code of Entegrity" should govern confidentiality designations in this proceeding or trump New York State's legislative freedom of information mandates. Entergy's ever-changing, "follow the bouncing ball" reasoning is inconsistent with FOIL and the Commission's regulations, and in any event is no basis for withholding Entergy's decommissioning cost studies.

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[83] Even if the information turned over in Vermont Yankee was prepared with different assumptions, as Entergy indicates, the fact remains that Entergy has failed to make a particularized showing as required by FOIL to justify confidential treatment.

[84] Entergy's website indicates that the "Code of Entegrity" is a document, created by Energy, which appears to seek to ensure that Energy staff "actions and ... decisions reflect Entergy's values." *See* http://www.entergy.com/about_entergy/entegrity/coe_letter.aspx.

CONCLUSION

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

Dated: September 15, 2008

Respectfully submitted,

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MAPS PULLED FROM:

Case: 08-E 0077

Date: 9-16-2008 (of)

Specific:

- ☐ Brief
- ☒ Comment
- ☐ Correspondence
- ☐ Exhibit
- ☐ Order
- ☐ Petition
- ☐ Plan
- ☐ Report

Map # 1+2