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Andrew J. Spano
County Executive

Office of the County Attorney

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County Attorney

By FedEx
September 29, 2008

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

Re: Case 08-E-⁰⁰⁷⁷~~0777~~ - Verified Petition Filed by Entergy Nuclear Fitzpatrick, LLC,
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC,
Entergy Nuclear Operations, Inc., NewCo and Entergy Corporation
for a Declaratory Ruling Regarding a Corporate Reorganization, or, in the
Alternative, an Order Approving the Transaction and an Order Approving
Debt Financing.

Dear Secretary Brilling:

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

Copies of these Reply Comments of the County of Westchester were forward to all parties electronically and are being provided to all Active Parties by copy of this letter.

Very truly yours,


Stewart M. Glass
Senior Assistant County Attorney

SMG:me
Encl.

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

NEW YORK STATE
PUBLIC SERVICE COMMISSION

Case 08-E-0077 Verified Petition Filed by Entergy Nuclear Fitzpatrick, LLC,
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Entergy Nuclear Operations, Inc., NewCo and Entergy Corporation
for a Declaratory Ruling Regarding a Corporate Reorganization, or, in the
Alternative, an Order Approving the Transaction and an Order Approving
Debt Financing.

REPLY COMMENTS OF THE COUNTY OF WESTCHESTER

Stewart M. Glass
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REPLY COMMENTS OF THE COUNTY OF WESTCHESTER

THE STAFF'S POSITION IS INCONSISTENT AND IGNORES KEY ISSUES

The Department of Public Service Staff ("Staff") correctly stated that "(w)hen these nuclear facilities are transferred, it must also be demonstrated that arrangements for decommissioning the plants at the end of their useful lives will not be adversely affected." However, the Staff then claims, without any basis, that "Entergy and Enexus have made the requisite showings". (Staff Initial Comments, p. 14). Staff inexplicably ignores the fact that the inadequate financing of Enexus calls into serious question the ability of Enexus to fulfill its obligations to fully decommission the plants by restoring the property to Greenfield condition. Then Staff states that the "Commission retains PSL jurisdiction over the decommissioning of non-radioactive components. Under that jurisdiction, nuclear plant owners were required to restore nuclear sites beyond merely dismantling and removing radioactive components." (Ibid, p. 17) However, after acknowledging that Entergy was obligated under the terms of Case 01-E-0113 and the commitments contained in Senior Vice President Michael Kansler's letter of March 16, 2001 to County Attorney Alan Scheinkman ("Kansler letter") to promptly restore the site to Greenfield, Staff acknowledges that Enexus could, upon the expiration of the NRC license for Indian Point 2, instead of dismantling and removing the generation facilities, meet NRC

regulations by entoming or store facilities on-site and then split any savings 50/50 with Con Edison. (Ibid, p. 18). Staff accepts Petitioner's argument that Enexus will assume the responsibilities of Entergy to fulfill the obligations conditioned under Case 01-E-0113 and the Kansler letter. However, by Staff's own admission the new entity, Enexus, will not be investment grade and will not necessarily have the resources necessary to fulfill all the obligations, including restoring the property to Greenfield. In fact, the funds for decommissioning do not account for return to Greenfield or even the removal of certain "low level" radioactive material. Petitioner claims that if there are "surplus funds from the decommissioning" they would be *available* for greenfielding. (WC-44, EN-149a) However, as clearly pointed out by Staff the financial uncertainty of Enexus raises serious questions about its ability to meet its obligations. With such a clear statement of concern about Enexus being able to meet its obligations there appears to be a disconnect when the Staff states that Enexus will be able to fulfill its obligations as set forth in Case 01-E-0113 and in the Kansler letter.

Staff focuses on the economic shortcomings of Enexus and then states that other aspects of the transaction do not appear to cause significant harm to customers. (Ibid, p. 5) But the customers are not the only entities that can and will be harmed if Enexus is unable to fulfill its obligations. The host communities and the State of New York will be left to address any failure to restore or any delay in the restoration of the site. The Indian Point plants are situated at a key location, not only because of its interconnection with transmission facilities, but because of its prime Hudson River setting. If Enexus is insufficiently funded and encumbered with debt at a time when credit markets are extremely tight how will there be sufficient funds to restore the site to Greenfield conditions, including the cleanup of the underground contamination?

Not only won't the Support Agreement be available to remedy reliability or other non-safety related concerns as pointed out by the Staff (Ibid, p. 11) but those funds will not be available to support the decommissioning efforts, including those not mandated by the NRC but which are nonetheless crucial to New York.

If Enexus is required to promptly restore the site "to an unrestricted and natural state, under PSL jurisdiction, after it dismantles and removes radioactive and non-radioactive components and structures" why won't Entergy clearly respond to the County of Westchester's request for a clear statement that Enexus will promptly restore the site to Greenfield condition after the last plant ceases operation?

The Staff proposes that additional financial guarantees be put in place in order for the Commission to approve the Petition. This proposal has some merits but it needs to go further. It must **assure** that there are adequate funds available to not only cover any temporary shutdown or need for additional capital expenditures but it must also be sufficient to cover the additional costs, which are not necessarily mandated to meet NRC standards, to assure that the ground contamination, both soil and water, is addressed and the site is returned to Greenfield conditions. In fact there is a precedent for the Staff's proposal in Vermont where the State of Vermont Public Service Board required Entergy Vermont Yankee ("EVY") to provide additional financial assurances "in the form of a non-Entergy-affiliated, third-party instrument – such as letter of credit or bond in the amount of the current Entergy Corporation guarantee" "In fact, EVY agreed to obtain a third-party letter of credit in an amount required to manage spent fuel for six months following the VY Station's shutdown if Entergy Corporation's debt should be rated below

investment grade.” (Prefiled Testimony of Wanda C. Curry, January 28, 2008, p. 41) As part of the recent case before the Vermont Board, Entergy offered to have Enexus provide “a third-party letter of credit in the amount of \$60 million” ... issued by a financial institution with a minimum S&P rating of A’. (Ibid., p.43) However, a letter of credit has limitations, it is usually issued for a limited term and there is no guarantee that the financial institution will reissue the letter of credit when the original letter expires, especially if the financial condition of the institution has deteriorated or it is more likely that there will be a demand upon the letter.

The Staff acknowledges the fact that “nuclear facilities have a greater impact on the public interest than hydro and fossil facilities” but it then argues that nuclear plants should not be subject to stricter standards. In fact, it argues that (Staff Initial Comments, p. 24) these plants should be subject to the “no harm” test. Contrary to the assertion by the Staff that the standard of review to be applied is the “no harm” test the appropriate standard of review under PSL §70 is whether the transaction results in a “positive net benefit” as enunciated by the Commission in the Iberdrola proceeding.

THE PETITIONER IS WRONG WHEN IT ARGUES THAT THE STANDARDS UTILIZED
IN RECENT PSL SECTION 70 REVIEWS FOR TRADITIONAL REGULATED UTILITIES
IS NOT APPROPRIATE FOR LIGHTLY REGULATED ENTITIES LIKE THE
PETITIONERS.

Petitioners argue in support of its position that this transfer should be subject to a lower standard of review, (Petitioners Initial Comments, p. 11) than “in the case of traditionally regulated utilities, captive ratepayers fund the utility’s investments.” (Ibid, p. 10) This may be true in certain cases, however, what Petitioners fail to acknowledge is that, at least in the case of Indian Point 2, ratepayers paid for the initial investment in that facility and paid for the

decommissioning fund. Accordingly, they should not be required to pay again when the Indian Point facilities no longer are of “economic benefit” to Enxus. In order to ensure that this does not occur, the Commission must adopt and utilize a standard of review that will ensure that adequate resources are available, committed and can not be revoked or otherwise placed in jeopardy when it becomes time, either prematurely or at the end of a license extension, to decommission the site and restore it to Greenfield conditions. Too much is at stake for the host community, the County of Westchester, the Hudson River and the State of New York for the Commission to accept anything less than a clear and unequivocal commitment to promptly restore the premises to Greenfield conditions after the last Indian Point plant ceases operation and with a fully funded and properly guaranteed fund to ensure that the commitment is fulfilled.

Even Petitioner acknowledges the Commission’s determination that “(a)uthority over these matters has been exercised flexibly, at our discretion, with the extent of scrutiny afforded a particular transaction reduced to the level the public interest requires.” (cite omitted) (Petitioner Initial Comments, p. 11) What the Petitioner fails to understand or acknowledge is that a higher level of scrutiny is required when you are dealing with facilities such as the Indian Point and Fitzpatrick plants. Petitioner would have the Commission believe that the Commission’s authority over Petitioner’s operations is limited to a review of Petitioner’s opportunity to exercise market power or “pose the potential for other transactions detrimental to captive ratepayer interests.” The Office of the Attorney General has shown how sales are scheduled can have such an impact on ratepayers. In fact, it demonstrates the potential for transactions detrimental to all electric customers in New York, which, in fact, could make all such customers “captive” to the actions of a “lightly regulated” entity.

ENEXUS RELIANCE ON PROJECTED STRONG CASH FLOWS AND ACCESS TO
CAPITAL MARKETS FAILS TO ADDRESS THE ISSUE IF THERE IS AN INTERRUPTION
OF SUCH CASH FLOW OR A LIMITATION IN ACCESS.

Enexus fails to address the issue of whether there is a failure at more than one plant other than to refer to the Support Agreement. The Support Agreement may give some level of comfort to Enexus since it gets to decide whether or not, in its judgment, it is economical to advance those funds. (Westchester Initial Comments, p. 13-15) In fact, Petitioner acknowledges that “ a nuclear incident could potentially have a lengthy forced outage, stressing the operator’s liquidity position and financial flexibility”. (Petitioner Initial Comments, p. 14)

The economy has undergone a radical change since Petitioner first proposed this transfer. The ability of major companies to borrow funds has caused a major disruption in the economy. It is front page news every day. It is therefore incredulous that Petitioner has not acknowledged this change in circumstance and still asserts that a company below investment grade will still have access to vast sums of capital at the very time it would appear least likely to be able to repay those funds.

ENEXUS IS NOT PROPERLY FUNDED TO FULFILL ALL OF ITS OBLIGATIONS

Instead of repeating its arguments here, Westchester refers your honors to its Initial Comments. However, it should be noted that the Petitioner states that the NRC has reviewed the financial and technical qualifications and therefore the Commission need not consider these issues. (Petitioner’s Initial Comments, p. 17) This is nothing more than an argument that the Commission should concede its authority in this matter and rubber stamp the actions of the NRC irrespective of the fact that the Commission has additional issues to consider, including, but not

limited to, the restoration of the sites to Greenfield condition and the impact on the local communities and the State of New York if Enexus and its affiliates are unable to fulfill their obligations.

DECOMMISSIONING

Petitioner intentionally tries to confuse the issues relating to decommissioning. There is more than one standard to be applied. The NRC sets a minimum standard, which Petitioner asserts Enexus will be able to comply with. Those commitments require sufficient funds, based on a formula, [10 C.F.C. §§50.75(c)(1) and (2)] to ensure sufficient funds exist to safely decommission the plant and that decommissioning costs are not shifted to the state, the local community or other stakeholders. But those are minimum standards for “decommissioning” as defined by the NRC. However, there were independent and additional commitments made by Entergy in furtherance of its acquisition of Indian Point 2 and 3 that require a higher level of restoration of the sites of those facilities. Petitioner acknowledges that “ENIP2 and ENIP3 will return the Indian Point facilities to greenfield status” (Petitioner’s Initial Comments, p. 21) but it conveniently and has consistently failed to reiterate the prior commitments “to decommission all three units at the same time *after the last facility stops operating* . (*emphasis added*) (Kansler letter of March 16, 2001) The Indian Point Unit 1, 2 and 3 facilities and the surrounding sites are supposed to be restored to a “Greenfield” condition” in a prompt time frame. Instead Petitioner leaves open the possibility of postponing decommissioning for up to 60 years, the maximum allowed Safestor period under NRC regulations. Since all the plants are of relative similar age, there is a good possibility that the “cash flow” that Petitioner keeps referring to will have ceased

when it comes time to decommission the Indian Point plants in 2095.¹ The Support Agreement would most likely have longed expired before then. Even if it had not, it is unlikely Enexus will determine it is “economic” to advance funds from the Support Agreement to meet any deficiency necessary to restore the site to Greenfield. This may be a long time off, and the temptation may be to avoid the issue due to the fact that those involved in this case will not be around to be responsible for any shortcomings, but we owe it to future generations to assure that they are not left to pay for the failure to address this issue now.

THE PETITIONER FAILED TO MEET ITS BURDEN

Petitioner admits that the focus of the public interest inquiry is on Enexus’ ability to own, operate and decommission the New York Facilities. (p. 12) Even if you accept the position of the Petitioner that the proceeding is limited to the adequacy and security of support for the decommissioning”, including complete restoration to a Greenfield condition and “the financial sufficiency of the proposed capital structure in supporting continued operation of the facilities” (Petitioners, Initial Comments, p. 7) the Petitioner has failed to meet its burden as it relates to both of these issues as noted above.

It failed to affirmatively state that the Indian Point facilities will be restored to Greenfield conditions in a reasonable period of time after cessation of operations, rather than after a Safestor period of up to 60 years as permitted under NRC regulations. In addition, there has been no showing that there will be sufficient funds available to so restore the premises, either in the near term or at the end of a twenty-year license extension.

¹ Assuming operation of IP3 for the full 20 years of a license extension, IP 3 would cease operations in December 2035 with Safestor ending in 2095.

The Support Agreement, as previously discussed in the County's Initial Comments and as discussed by other parties to this proceeding, fails to provide the necessary support for the restoration of the site. In addition, as acknowledged by the Petitioner the new entity will not be investment grade. The issues this raises has been pointed out by Westchester, the Attorney General and the Staff in their Initial Comments.

CONCLUSION

Since Petitioner has not been able to affirmatively resolve the issues raised above, it has failed to establish that the relief requested in its Petition would result in a "positive net benefit" for the residents and businesses in New York State. Accordingly, the Petition should be denied.

Respectfully submitted,

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Parties that Executed Confidentiality Agreement