

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on November 17, 2016

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Gregg C. Sayre
Diane X. Burman

CASE 16-E-0472 - Joint Petition of Entergy Nuclear FitzPatrick, LLC and Exelon Generation Company, LLC Pursuant to Section 70 of the New York Public Service Law for Approval of the Transfer of the James A. FitzPatrick Nuclear Power Plant and Related Assets and for a Declaratory Ruling Continuing Lightened Regulation.

ORDER APPROVING TRANSFER
AND CONTINUING LIGHTENED REGULATION

(Issued and Effective November 17, 2016)

BY THE COMMISSION:

INTRODUCTION

By this order, The Commission approves the August 22, 2016 petition (Joint Petition) submitted jointly by Entergy Nuclear FitzPatrick, LLC (Entergy FitzPatrick) and Exelon Generation Company, LLC (ExGen) (collectively with Entergy FitzPatrick, Joint Petitioners) seeking approval under Section 70 of the New York State Public Service Law (PSL) to transfer the James A. Fitzpatrick Nuclear Power Plant (FitzPatrick Facility) and related assets from Entergy FitzPatrick to ExGen

(the Transfer).¹ The Commission also declares that the lightened regulatory regime applicable to the FitzPatrick Facility and its operator Entergy Nuclear Operations, Inc. (Entergy Operations) will continue unchanged and be applied to ExGen after the Transfer.

BACKGROUND

Entergy FitzPatrick owns the FitzPatrick Facility, a boiling water reactor located in Scriba, New York in Oswego County with a generating capacity of approximately 882 MW. Entergy Operations operates the facility. The FitzPatrick Facility began operations in 1975. Its current operating license issued by the federal Nuclear Regulatory Commission (NRC) expires in 2034. The FitzPatrick Facility sells energy, capacity, and ancillary services in the wholesale markets administered by the New York Independent System Operator, Inc. (NYISO) and through bilateral contracts. On average, the FitzPatrick Facility has generated over 7,000,000 MWh of zero-emission energy annually. The FitzPatrick Facility is operated by approximately 600 full-time workers.

On November 2, 2015, Entergy FitzPatrick filed a Notice of Intent to Retire the FitzPatrick Facility with the Commission.² In its Notice, Entergy FitzPatrick states that

¹ The Joint Petitioners indicate that they are also seeking approvals from other regulatory agencies including the United State Nuclear Regulatory Commission (NRC) and the Federal Energy Regulatory Commission (FERC) and review by the United States Department of Justice.

² See Case 15-E-0640, Petition of Entergy Nuclear FitzPatrick, LLC to Retire the James A. FitzPatrick Nuclear Generating Facility, Notice of Intent to Retire James A. Fitzpatrick Nuclear Generating Facility (filed Nov. 2, 2015) ("Notice"). Entergy FitzPatrick filed a deactivation notice with the NYISO pursuant to tariff revisions pending before the FERC. The NYISO determined the deactivation notice complete on November 13, 2015.

"[l]ow commodity prices, combined with the plant's distance from key load centers and market structure design flaws, including the failure of markets to compensate [Entergy] FitzPatrick for the generation of clean energy, have rendered the facility uneconomic now and for the foreseeable future."

As a result, Entergy FitzPatrick stated in its Notice that it intended to retire the FitzPatrick Facility at the end of its current fuel cycle (Scheduled Shutdown Date).³

On July 13, 2016, Entergy Corporation (Entergy Corp.) announced that it was in discussions with Exelon Corporation (Exelon) for the potential sale of the FitzPatrick Facility and Exelon confirmed that it had entered into such discussions.⁴ Entergy FitzPatrick's comments filed in the Commission's CES Proceeding on July 22, 2016 stated that the company planned to continue on two parallel tracks - ongoing efforts to permanently cease operation of the FitzPatrick Facility on or about the Scheduled Shutdown Date and negotiations for a transfer. At that time, Entergy FitzPatrick reaffirmed the FitzPatrick Facility would be permanently retired absent the Transfer.⁵

³ Id.

⁴ Case 15-E-0302, Proceeding to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Constellation Energy Nuclear Group, LLC, Response to Request for an Extension (filed July 13, 2016), p 3 (citing Entergy Press Release: "Entergy in Discussions for the Potential Sale of the James A. FitzPatrick Nuclear Power Plant to Exelon" (Jul. 13, 2016), <http://www.energynewsroom.com/latest-news/entergy-discussions-potential-sale-jamesfitzpatrick-nuclearpower-plant-exelon/>).

⁵ Case 15-E-0302, supra, Comments of the Entergy Entities on DPS Staff's CES Tier 3 Responsive Proposal (filed July 22, 2016), pp. 5-6.

THE JOINT PETITION

On August 22, 2016, Entergy FitzPatrick and ExGen filed a Joint Petition pursuant to PSL §70 seeking Commission approval of the transfer of the FitzPatrick Facility and related assets. The Joint Petition also requests that the Commission issue a declaratory ruling that the transfer will not alter the regulatory framework currently applicable to the FitzPatrick Facility and Entergy FitzPatrick.

Parties to the Transfer

Entergy FitzPatrick

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

Entergy FitzPatrick, as owner, and Entergy Operations, as operator, are subject to a lightened regulatory regime by the Commission. Entities within a lightened regulation regime remain subject to significant Commission oversight. The Commission has extended, when appropriate, lightened regulation to electric power generators that sell generation into competitive wholesale electric markets managed by the NYISO. Entities subject to lightened regulation remain obligated to make required filings with the Commission that are appropriate to the level of scrutiny applied to such entities and their facilities. Specifically, the operation of the FitzPatrick Facility remains subject to the PSL with respect to matters such

as annual reporting,⁶ enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4.⁷

Because the FitzPatrick Facility is a nuclear power plant, the Commission imposed additional requirements beyond those applicable to lightly regulated fossil-fueled facilities when Entergy FitzPatrick and Entergy Operations were granted lightened regulation. Entergy FitzPatrick and Entergy Operations have operated the FitzPatrick Facility in accordance with these additional requirements.

Exelon

According to the petition, Exelon is ExGen's corporate parent and conducts operations and business activities in 48 states, the District of Columbia, and Canada. Exelon owns Atlantic City Electric Company, Baltimore Gas and Electric Company (BGE), Commonwealth Edison Company, Delmarva Power & Light Company, PECO Energy Company (PECO), and Potomac Electric Power Company (Pepco). Together, Atlantic City Electric, BGE, Delmarva Power, ComEd, PECO, and Pepco own electric transmission and distribution systems that deliver electricity to approximately 10 million customers in the District of Columbia, northern Delaware and the Delmarva Peninsula, southern New Jersey, Northern Illinois, Maryland, and southeastern Pennsylvania. BGE distributes natural gas to over 650,000 customers in central Maryland and also operates a liquefied

⁶ Pursuant to the Order Adopting Annual Reporting Requirements Under Lightened Ratemaking Regulation, issued January 23, 2013 in Case 11-M-0294, the owners of lightly-regulated generation facilities are required to file Annual Reports.

⁷ See Case 00-E-1225, Joint Petition of Entergy Nuclear FitzPatrick, LLC., Entergy Nuclear Indian Point 3, LLC and Entergy Nuclear Operations, Inc. for Declaratory Ruling for Lightened Regulation, Order Providing for Lightened Regulation of Nuclear Generating Facilities (issued August 31, 2001).

natural gas facility for the liquefaction and storage of natural gas as well as associated propane facilities, Delmarva Power distributes natural gas to over 122,000 consumers in northern Delaware, and PECO distributes natural gas to over 500,000 consumers in the suburban Philadelphia area. Exelon does not own any transmission or distribution assets in New York beyond the limited facilities that interconnect its generation assets to the grid.

According to the Joint Petition, ExGen is a large competitive power generator in the United States owning approximately 32,000 MW of capacity in a number of organized markets. ExGen, which owns or co-owns and operates 13 nuclear plants, is the largest licensed nuclear operator in the United States. During 2015 and 2014, respectively, the nuclear generating units operated by ExGen achieved capacity factors of 93.7 percent and 94.3 percent, respectively. The Joint Petition asserts that ExGen will bring significant nuclear operational and management experience, resources, and expertise to the FitzPatrick Facility.

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

The Proposed Transfer

Asset Purchase Agreement

The Joint Petitioners submitted a copy of the Asset Purchase Agreement (APA) between ExGen and Entergy FitzPatrick,

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

The APA also addresses decommissioning the FitzPatrick Facility, including provisions that detail the transfer of decommissioning funds to ExGen. Upon closing, ExGen will assume the decommissioning obligations for the FitzPatrick Facility. ExGen will be obligated to meet the NRC minimum funding assurance requirements once it becomes the licensed owner and operator of the FitzPatrick Facility. According to the terms of the APA, prior to closing the proposed transaction, ExGen will offer employment to substantially all of the Entergy Operation employees at the FitzPatrick Facility.

Interconnection Agreements

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

Public Interest Arguments

The Joint Petitioners state that the Transfer is in the public interest and fully satisfies the requirements for the Commission's standard of review under PSL §70. Specifically,

the Joint Petitioners state that the Transfer does not raise horizontal or vertical market power concerns and will not harm the interests of captive ratepayers. Joint Petitioners contend that ExGen is financially sound and will be capable of operating the FitzPatrick Facility safely upon its transfer. Finally, Joint Petitioners argue that the only alternative to the Transfer is closure of the FitzPatrick Facility, which the Commission has already determined to be against the Public Interest. Joint Petitioners submitted an affidavit from Julie R. Solomon supporting their market power arguments.

Horizontal Market Power

In the wholesale electric markets, horizontal competition is the competition among many power plant owners to satisfy the demand of load serving entities. An entity's horizontal market power relates to its share of power plants (market share) in relation to the total size of power plants participating in the market.

The Joint Petitioners argue that the Transfer does not create the potential for the FitzPatrick Facility's new owner to exercise horizontal market power. According to the Joint Petition, the potential horizontal market power effects of the Transfer are those arising from the combination of the electric generating assets currently owned by ExGen and its affiliates and Entergy FitzPatrick that could enable ExGen or its affiliates to increase prices in relevant electricity markets. The relevant markets for the purpose of conducting this analysis are defined as the New York wholesale markets and the wholesale markets in the two adjoining regions, PJM and ISO-New England.

Joint Petitioners argue that the Transfer will not have an adverse effect on horizontal competition in any relevant wholesale electricity market. ExGen is an electric corporation that owns and operates electric generating facilities and

engages in wholesale power and energy marketing and trading operations in the United States pursuant to FERC-approved market-based rate authority and all of the ownership interests in ExGen are indirectly held by Exelon.

The Joint Petition argues that based on the analysis described in Ms. Solomon's affidavit, the transfer will result in an overall reduction of market concentration as measured by the Herfindahl-Hirschman Index because while the Transfer increases ExGen's affiliated market share (and its contribution to the HHI), it reduces Entergy's affiliated market share (and its contribution to the HHI).

The Joint Petition further explains that Ms. Solomon also performed a second analysis, the Competitive Analysis Screen or Delivered Price Test (DPT), for the NYISO market which also indicates that the market is unconcentrated. The Joint Petitioners further state that the DPT results under the requisite price sensitivities (plus 10 percent and minus 10 percent) are similar, with the screens passed there as well. Moreover, the Joint Petition claims, even under the most conservative results (where CENG's sale to EDF is ignored), the analyses indicate that the market remains unconcentrated, and the HHI change is no more than about 20 points. Ms. Solomon's affidavit indicates that the DPT is readily passed under the Available Economic Capacity (AEC) measure.

Joint Petitioners also argue that the Transfer will not allow Exelon and its affiliates to exercise market power in the adjacent ISO-NE or PJM control areas. The transfer will not change the amount of installed generating capacity Exelon indirectly owns or controls in PJM or ISO-NE. In addition, PJM and ISO-NE market rules and limited transfer capabilities between NYISO and those adjacent control areas further dampen market power concerns. Joint Petitioners also argue that the

total installed capacity owned by Exelon and its affiliates across all three control areas after the Transfer (11.6%) is well below a level that should create horizontal market power concerns.

Vertical Market Power

Vertical market power may arise where a single firm owns both generation and delivery assets, and the delivery assets can be used to give a preference to the affiliated generation assets. The Joint Petitioners claim that the Transfer does not raise the potential for the exercise of vertical market power. According to the petition, neither ExGen nor any of its affiliates owns or controls any transmission and distribution facilities in New York beyond the interconnection facilities specific to their nuclear facilities.

ExGen is affiliated with a power marketer, Constellation, which markets electricity and natural gas and related products in wholesale and retail markets. These businesses serve approximately 2.5 million residential and business customers in various markets throughout the United States. The Joint Petitioners argue that ExGen's affiliation with Constellation does not raise any market power concerns because Constellation does not own or control transmission or distribution assets in New York beyond the limited facilities that interconnect its generation plants to the grid.

Interests of Captive Ratepayers

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

Financial Wellbeing of Transferee

Joint Petitioners argue that ExGen is sufficiently capitalized and is fully qualified to own and manage the FitzPatrick Facility. The Joint Petition indicates that ExGen is the largest licensed nuclear operator in the United States and that it currently owns or co-owns, directly or through a co-owned subsidiary, and operates 13 nuclear plants consisting of 22 units. According to the Joint Petition, the nuclear units operated by ExGen have achieved high capacity factors and that as the largest nuclear fleet operator in the United States, ExGen will bring significant nuclear operational and management experience, resources, and expertise to the FitzPatrick Facility. As a result, the Joint Petition argues, the FitzPatrick Facility will be safely operated following the Transfer.

The Joint Petition posits that ExGen is financially sound and has the financial wherewithal to own and operate the FitzPatrick Facility. According to the Joint Petition, ExGen has an investment grade credit rating and is financially qualified based upon its own revenues and assets. Moody's and Standard and Poor's bond ratings for the past three years are also a demonstration of ExGen's investment-grade bond ratings. Joint Petitioners also point out that historical financial information regarding Exelon and its subsidiaries, including ExGen, is provided in the 2015 Annual Report Exelon filed with the Securities and Exchange Commission.

Alternatives

The Joint Petition highlights that, currently, the only alternative to the Transfer is permanent retirement of the FitzPatrick Facility. Joint Petitioners claim that Entergy FitzPatrick has continued to prepare for decommissioning in an effort to align with its Scheduled Shutdown Date and will revert

to moving forward solely with its decommissioning plans absent the Transfer. Were that to occur, the FitzPatrick Facility's zero-emission attributes would be permanently unavailable to New York State's wholesale markets, beginning in February 2017. Instead, the Joint Petition claims, the Transfer will assist the State in maintaining its carbon reductions secured to date and achieving its 40 percent reduction in carbon emissions end state by 2030.

Lightened Regulation

The Joint Petition also requests that the Commission declare that the lightened regulation regime currently applied to Entergy FitzPatrick and the FitzPatrick Facility will be continued and applied to ExGen. The Joint Petition argues that the transfer will have no effect on the bases for the Commission's prior determination to grant lightened regulation regarding the FitzPatrick Facility.

Legal Authority

Section 70 Transfer of Assets

Under Public Service Law (PSL) §70, no gas or electric corporation may "transfer or lease its franchise, works or system or any part of such franchise, works or system" without first receiving written Commission consent. The Commission uses a public interest standard in its review of proposed transfers under PSL §70. Among the factors the Commission considers in making such a determination are affiliations that might afford opportunities for the exercise of market power or pose the potential for other transactions detrimental to captive ratepayer interests, the financial integrity of the transferee,

and the transferee's ability to render safe, adequate and reliable service.⁸

Lightened Regulatory Regime

In considering requests for lightened regulation by wholesale generators, the Commission employs a realistic appraisal approach.⁹ The first consideration in a realistic appraisal is whether a section of the PSL is inapplicable on its face and if applicable, whether the regulated entity can comply with the requirements of the provision. However, even if compliance is possible, under a realistic appraisal, the Commission must determine whether imposing the requirement is necessary to protect the public interest, or rather would adversely affect the public.¹⁰ Nuclear facilities granted lightened regulation remain subject to additional requirements under PSL Article IV that are not applied to other forms of generation granted lightened regulation. Specifically, and as explained below, nuclear facilities are subject to reporting and monitoring requirements beyond those applicable to non-nuclear generators subject to lightened regulation.

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in the State Register on September 14, 2016 [SAPA No. 16-E-0472SP1]. The time for submission of comments pursuant to the Notice expired on October 31, 2016. The comments received are addressed below.

⁸ See, Case 10-M-0186 et al., Alliance Energy Renewables, LLC, et al., Order Approving Transfers Upon Conditions and Making Other Findings (issued July 23, 2010), p. 17.

⁹ Case 98-E-1670, supra, Carr Street Order, pp. 4-5.

¹⁰ See, e.g., Case 94-E-0952, In the Matter of Competitive Opportunities For Electric Service, Opinion No. 97-17 (issued November 18, 1997), pp. 31-35.

COMMENTS

Alliance for a Green Economy, Citizens' Environmental Coalition and Nuclear Information and Resource Service (jointly AGREE), submitted joint comments opposing the transfer. Two members of the public also commented against the proposed transfer mirroring issues raised by AGREE. Fourteen members of the public and Assemblyman William Barclay submitted comments supporting the transfer. After the deadline for submission of comments passed, approximately 3,200 public comments opposing the transfer or requesting it be delayed for further deliberation and process were submitted.

AGREE claims that key information connected to the transfer is not available to the public. AGREE argues that prior to approving the transfer, the circumstances involving a \$35 million letter of credit offered to Entergy by the New York Power Authority (NYPA) should be available to the public. The majority of the public comments opposing the transfer or seeking its delay, make similar arguments regarding the letter of credit. AGREE also argues that the Environmental Assessment Form ("EAF") submitted by the Joint Petitioners is deficient in that it only includes Part 1 and is missing Part 2 and Part 3.

AGREE voices market power concerns related to the Transfer. According to AGREE, because ExGen has a majority stake in and is the operator of the Nine Mile Point Nuclear Station and the R.E. Ginna generating facilities, shares of those facilities owned by other entities should be included in market share analysis. AGREE also argues that market concentration analysis would be more appropriate if it considered specific load zones, rather than the entire NYISO control area. AGREE also claims that revenue derived from the ZEC program will give ExGen additional advantage to impact markets. AGREE suggests that the Commission should take market

power concerns very seriously because an entity with a large market share could exercise market power, even inadvertently, simply by owning a large portion of the market.

AGREE states that in the event that it approves the transfer, the Commission should impose a number of conditions in order to ensure some public interest outcomes result from the Transfer. AGREE argues that the transfer of a \$707.5 million decommissioning trust fund from NYPA into private hands is against public policy, and although recognizing a potential lack of Commission authority to reverse approval of the transfer, implores the Commission to consider what power it may have to stop the transfer. AGREE believes the transfer of the decommissioning funds eliminates the New York State's ability to have any meaningful input to the decommissioning process. The majority of the public comments opposing the transfer or seeking its delay argued that more information regarding the transfer of the decommissioning funds should be made public prior to Commission action on the Joint Petition.

If the transfer of decommissioning funds cannot be altered, AGREE argues that the Commission should impose conditions on the Transfer related to decommissioning. Specifically, AGREE encourages the Commission to include a condition preventing ExGen from seeking exemptions from the NRC to utilize the decommissioning fund for anything other than decommissioning activities and expenses. AGREE also supports a condition preventing the use of SAFSTOR¹¹ upon the FitzPatrick Facilities retirement. AGREE also suggests conditions related to workforce retention, transfer of radiological waste from fuel

¹¹ According to the NRC, SAFSTOR is a method of decommissioning in which a nuclear facility is placed and maintained in a condition that allows the facility to be safely stored and subsequently decontaminated (deferred decontamination) to levels that permit release of the site for unrestricted use.

pools as soon as possible, and community and state oversight of the decommissioning process

AGREE also argues against continuing the lightened regulatory regime for the FitzPatrick Facility. AGREE states that new issues, including post-Fukushima safety upgrades and the increased age of the facility itself requires additional regulatory safeguards. AGREE argues that since ratepayers are being obligated to invest in upstate nuclear facilities, including the FitzPatrick Facility, the Commission should require more extensive reporting, review and approval of nuclear activities under previous lightened regulation.

AGREE believes that the Commission should include as part of approving the Transfer, a prohibition against seeking funds from the State beyond those available in the ZEC program. AGREE also raises concerns about safety, stating that the FitzPatrick Facility has postponed the installation of a hardened wetwell vent and other post-Fukushima safety improvement directed by the NRC pending transfer of the facility. AGREE further argues that the Commission should require the FitzPatrick workforce brought back to 615 workers and that all of those jobs be preserved for a minimum time period. Finally, AGREE encourages the Commission to create a mechanism by which the state retains the ability to close FitzPatrick Facility for public interest reasons if necessary.

Comments supporting the Transfer frequently cited jobs and economic benefits associated with the facility. Supporting comments also argue that the FitzPatrick Facility is safely managed and operated and provides significant amounts of reliable power with zero greenhouse gas emissions. Assemblyman Barclay notes that the continued operation of the FitzPatrick Facility will play an important role in helping New York State meet its greenhouse gas emission reduction goals. The

Assemblyman also stated that the sale of the FitzPatrick Facility is a positive outcome for the Oswego community in several regards.

DISCUSSION

Environmental Quality Review

The proposed action under review is the transfer of ownership interests in the FitzPatrick Facility and related assets to ExGen. Pursuant to the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law (ECL) and its implementing regulations at 6 NYCRR Part 617 and 16 NYCRR Part 7, the Commission must determine whether the proposed action may have a significant impact on the environment.¹² No other agency is involved in the review of this action, so the Commission is the lead agency for conducting the environmental review. The proposed action is an unlisted action because it does not meet the regulatory criteria for Type I or Type II actions set forth in 6 NYCRR §§617.2, 617.4, 617.5 and 16 NYCRR §7.2.

The Joint Petition includes an EAF attached as an Exhibit with Part I completed.¹³ The EAF describes and discloses the likely environmental impacts of the proposed action. DPS Staff has completed Part II and Part III of the form and the complete EAF is filed or will be filed in the Commission's Document and Matter Management system. The Commission concludes, based on consideration of the criteria for

¹² Joint Petitioners' request for confirmation of lightly-regulated status as an electric corporation is a Type II action pursuant to 6 NYCRR §617.5(c)(31), so no SEQRA review of that action is required.

¹³ AGREE appears to claim that the Joint Petitioners were required to complete Part II and Part III of the EAF, but the SEQRA regulations (6 NYCRR §617.20) require those parts to be completed by the lead agency, not the applicant.

determining significance listed in 6 NYCRR §617.7(c), the information in the EAF and the record, that the proposed action will not have a significant adverse impact on the environment because approval of the Transfer is not expected to have any negative impacts on the environment. To the contrary, the Transfer will facilitate the maintenance of a significant quantity of zero-emission energy attributes that are important to the environmental well-being of the State. The Transfer does not involve any new construction, or other physical modification of the landscape or existing community. Further, approval of the Transfer will not result in the creation of environmental hazards or result in any adverse change to natural resources. To the extent approval of the Transfer results in continued operation of the FitzPatrick Facility, impacts associated with continuing operations have already been contemplated by NRC licensing of the plant through 2034.¹⁴ The Commission therefore adopts a negative declaration pursuant to SEQRA. A Notice of Determination of Significance will be issued in conjunction with this order.

Section 70 Transfer

The Commission's mandate under the statute in reviewing the proposed transaction is to determine whether ExGen's ownership of the FitzPatrick Facility would give ExGen too much market power; whether ExGen has sufficient financial resources to consummate the transaction and ensure long-term sustainability; and whether ExGen has the ability to render safe, adequate and reliable service from the facility. As described below, the Commission finds that the proposed transfer of the FitzPatrick Facility from Entergy FitzPatrick to ExGen is in the public interest and meets the statutory requirements and

¹⁴ See also Case 15-E-0302, supra, Final Supplemental Environmental Impact Statement (filed May 23, 2016).

therefore the Joint Petitioners are entitled under the statute to approval of their Petition, which is hereby approved. The transaction does not pose the potential for the exercise of horizontal or vertical market power or pose the potential for other transactions detrimental to captive ratepayer interests. Moreover, ExGen is financially sound and is fully qualified to own and operate the FitzPatrick Facility.

Market Power

The horizontal market power analysis in the Joint Petition uses the NYISO market as the relevant geographic market. It calculates the change in market concentration as measured by the HHI to be -7, indicating that the acquisition reduces concentration in the NYISO market. The DPT performed as part of the analysis also indicates there is not a horizontal market power issue associated with the acquisition.

AGREE argues that market prices are set by load zone, and therefore ExGen's market share should be calculated for NYISO Load Zone C, or alternatively Load Zones A-C, rather than the entire NYISO control area. This suggestion fails to recognize that during most hours of the year, the transmission constraints to which AGREE refers are not binding, and thus ExGen must compete with generators in other Load Zones; and consumers across New York State benefit from that competition. Moreover, nuclear plants operate as price-takers (typically bidding at \$0 or below and simply accepting whatever prices are set by the NYISO). The prices in Load Zone C are set by other units (typically fossil-fueled), often located in other Load Zones, with which ExGen must compete. This mitigates any concerns about potential market power of nuclear plants in the NYISO's markets. The risk is further reduced by the fact that NYISO routinely monitors bids for potential anti-competitive activity.

AGREE offers no concrete support for its speculation that revenue derived from the ZEC program will give ExGen the ability to manipulate capacity and energy markets. The Commission is not persuaded that any such ability will exist. The ZEC program will properly compensate all qualifying nuclear zero-carbon electric generating facilities for their zero-emissions attributes. In the CES Order, the Commission recognized the essential need for these attributes in New York State. The ZEC program is thus designed to recognize that value, and through appropriate payments, maintain the stream of these essential zero-emissions attributes. Accordingly, ZEC payments will not produce undue market power, but instead will fairly compensate these producers for an environmental attribute that the Commission has found to be essential to achieving the State's clean emissions goals.

The Commission's review of the market power analysis submitted by the Joint Petitioners demonstrates that no horizontal market power concerns exist that are sufficient to warrant disapproving the Transfer. AGREE argues that the market power analysis is incomplete because it should have considered the Long Island Power Authority's 18% ownership share of Nine Mile 2 and the rights to Nine Mile generation owned by EDF. However, the analysis offered in the Joint Petition conservatively attributes all of the capacity owned by EDF through its stake in CENG to ExGen.¹⁵ The exclusion of LIPA's ownership share in the analysis is appropriate because it is separately owned and LIPA owns none of FitzPatrick; thus if ExGen were to withhold FitzPatrick, any benefits to LIPA's share of Nine Mile 2 would not inure to ExGen; and if Nine Mile 2 were

¹⁵ See Joint Petition of Entergy Nuclear FitzPatrick, LLC and Exelon Generation Company, LLC, Affidavit of Julie R. Solomon p. 4, n. 5.

withheld, any benefits to FitzPatrick would not inure to LIPA. The ownership by LIPA of part of Nine Mile 2, therefore, dilutes the market power change from this transfer, as recognized by properly excluding it from the acquirer's basket.

Similarly, the Commission sees no cause for concern regarding vertical market power. ExGen does not own, nor is it affiliated with any transmission and distribution facilities beyond interconnection facilities specific to their generation facilities. This lack of transmission and distribution facilities also prevents ExGen from exercising vertical market power related to its affiliation with Constellation, a power marketer.

Financial and Operational Qualifications

The Commission finds that ExGen is financially sound and is capable of operating the FitzPatrick Facility safely. ExGen is the largest licensed nuclear operator in the United States and currently owns, or co-owns, directly or through subsidiaries and operates 13 nuclear plants consisting of 22 generating units. The units that ExGen operates have consistently achieved high capacity factors and ExGen has significant nuclear operation and management experience, resources, and expertise to bring to the FitzPatrick Facility. Moreover, ExGen has an investment-grade bond rating and has the revenues and assets to be financially qualified.

Other Considerations

The Commission has considered the other concerns brought up in the comments and finds that the concerns are either not relevant to the Commission's review under the statute or are currently being adequately addressed either through Commission requirements or federal requirements, all of which are closely monitored by the DPS Staff and the Commission. AGREE's and others' arguments related to a letter of credit

offered to Entergy FitzPatrick by NYPA are not relevant to whether the transfer to ExGen should be approved. ExGen has not supplied the letter of credit or been offered the proceeds of the letter of credit, therefore the letter of credit does not go to the economic feasibility of the transferee, ExGen. The Commission's statutory responsibility is to consider the economic feasibility of the transferee (ExGen), not the economic feasibility of the transferor (Entergy FitzPatrick) who is the beneficiary of the letter of credit. Similarly, the transfer of decommissioning funds is not directly relevant to Commission consideration of the Transfer. NYPA is not a jurisdictional entity under PSL §70 and NYPA's transfer of decommissioning funds does not require Commission approval or scrutiny. There is no reason to believe that the identity of the trustee of funds earmarked for decommissioning would alter the degree of regulation the NRC will exercise or impact any role the State will play in that effort. Further, even if the Commission wished to force NYPA to remain as trustee of these funds, AGREE acknowledges that the Commission has no authority to block this transfer. The NRC has jurisdiction over the decommissioning process including extensive planning and reporting requirements, as well as deadlines for fuel removal and other decommissioning related activities and public notice and participation requirements.¹⁶ Imposing specific conditions on the decommissioning process separate from the detailed process already established by NRC regulation, as AGREE suggests, is not in the public interest and is beyond the scope of the Commission's review of this transfer involving a wholesale

¹⁶ See 10 CFR 50.82

generator.¹⁷ Therefore, the Commission will not adopt conditions related to the decommissioning process. In any event, as characterized by AGREE, the letter of credit and transfer of decommissioning funds are intended to keep the FitzPatrick Facility operational, a result that the Commission has already concluded is in the public interest.¹⁸

Similarly, although Entergy FitzPatrick had requested a relaxation of the deadline related to NRC's post-Fukushima requirements for hardened containment vents, the company has also indicated that it has resumed work on the project and is committed to completing the project by the original hard-stop NRC date of June 30, 2018.¹⁹ AGREE's insistence that this issue warrants additional regulatory safeguards is unpersuasive and does not cast doubt upon the safety of the facility.

On the issues of oversight and reporting raised by AGREE, much of what AGREE requests is already regulated at the federal level and monitored closely at the state level through existing reporting and notification requirements which will continue after the Transfer as described below and in the attached Appendix. AGREE's request ignores or improperly discounts the quality and completeness of work provided by DPS Staff tasked with monitoring notifications, reports and activities associated with both state and federal requirements and otherwise keeping the Commission informed of all aspects of

¹⁷ Case 91-E-0350, supra, Order Establishing Regulatory Regime (issued April 11, 1994) and Declaratory Ruling on Regulatory Policies Affecting Wallkill Generating Company and Notice Soliciting Comments (issued August 21, 1991)

¹⁸ See Case 15-E-0302, supra, Order Adopting a Clean Energy Standard (issued August 1, 2016).

¹⁹ See NRC Order EA-13-109, Section IV requires that implementation of Phase I (modifications to wetwell vents) shall be implemented no later than startup from the January 2017 refueling outage, or June 30, 2018, whichever comes first.

nuclear generation in New York, including the FitzPatrick Facility. The quality and completeness of this work renders more extensive requirements unnecessary.

The Commission will not adopt AGREE's suggestion that the Transfer be conditioned on rehiring and maintaining a specific number of employees. The lower employee numbers were caused by employees opting to leave when Entergy FitzPatrick announced the plant would retire. Entergy has since actively sought to replace those that left, providing others with jobs. There is no indication that the transfer will ultimately result in reduced staffing in the facility. Moreover, adequate staffing levels, including the types and levels of expertise required to operate the facility safely are governed by federal NRC regulations.²⁰ Additional, specific requirements could result in inconsistent regulations and negatively impact ExGen's ability to effectively manage the facility.

AGREE also argues that the Commission should document that the State will not entertain additional subsidies beyond the ZEC program. The argument is not relevant to the Commission's consideration under §70. The ZEC program itself is designed with an upper limit for attribute compensation as well as other safeguards intended to ensure equity while accomplishing the State's environmental goals and furthering the public interest. AGREE's proposal is contrary to sound regulatory practice and good administrative judgment because it asks the Commission to impose absolute conditions on how unknown future events might be managed. AGREE has not demonstrated that placing hard limits on what can be considered to continue to promote the public interest and solve future policy concerns

²⁰ See 10 CFR 50.54(m) (2) which provides the minimum requirements for on-site staffing of nuclear power units by operators and senior operators licensed under NRC regulations.

regardless of future circumstances is warranted by this transaction.

AGREE argues that the Commission should retain the ability to close the reactor for public interest reasons if necessary. As mentioned above, the Commission has already concluded continued operation of the FitzPatrick Facility is in the public interest. As spelled out in the attached Appendix, the Commission maintains vigorous oversight of operations and safety related requirements and activities, including the right of unescorted access to the facility vital areas. However, approving the Transfer does not negate or otherwise alter any future authority the Commission may have within the limits of Commission jurisdiction under the PSL to further the public interest as it relates to the FitzPatrick Facility.

Lightened Regulation

One of the legislative purposes in enacting the Public Service Law was to ensure that the monopoly electric service providers charged only "just and reasonable" rates for electric services. The Commission has determined that some of those rates are now best achieved through market competition,²¹ and it is no longer necessary or appropriate to apply some of the provisions of the Public Service Law to merchant plants. The concept of lightened regulation is not intended to benefit wholesale generators or any other type of electric service provider, rather it benefits ratepayers. Through its application the Commission is simply recognizing that today many electric service providers are different from traditional electric utility monopoly providers and seeks to impose regulatory obligations in a way that best meets the Commission's statutory directives under the PSL and promotes the public

²¹ Case 99-E-0952, *supra*, Opinion No. 96-12 (issued May 20, 1996).

interest.²² To ensure that the market for electric retail services remains competitive, however, sufficient authority must be retained under the Public Service Law to protect that market from suppliers that might attempt to acquire or exercise market power. Moreover, nuclear facilities granted lightened regulation remain subject to additional requirements under PSL Article IV that are not applied to other forms of generation granted lightened regulation. Nuclear facilities are subject to reporting and monitoring requirements beyond those applicable to non-nuclear generators subject to lightened regulation.

Lightened regulation of the FitzPatrick Facility and ExGen as an electric corporation continues to be appropriate in accordance with the Order in Case 00-E-1225.²³ AGREE argues that additional reporting, review and approval of nuclear plant activities should be required. However, the lightened regulatory regime for nuclear facilities has been considered at great length in early Commission proceedings, and nothing in this transaction, including the approved ZEC program alters the reasoning or circumstances relevant to lightened regulation of the FitzPatrick Facility.

PSL Article 1 will continue to apply to FitzPatrick Facility and ExGen because they meet the definitions of "electric plant" under PSL §2(12) and "electric corporation" under PSL §2(13) and will be engaged in the manufacture of electricity under PSL §5(1)(b). ExGen is therefore subject to provisions such as PSL §§11, 19, 24, 25, and 26 which prevent

²² Case 98-E-1670, Carr Street Generating Station, L.P., Order Providing For Lightened Regulation (issued April 23, 1999) (Carr Street Order); Case 99-E-0148, AES Eastern Energy, L.P., Order Providing For Lightened Regulation (issued April 23, 1999) (AES Order).

²³ See Case 00-E-1225 et al., supra, Order Providing for Lightened Regulation of Nuclear Generating Facilities (issued August 31, 2001).

producers of electricity from taking actions that are contrary to the public interest.

Article 2 is restricted by its terms to provision of service to retail residential customers, and is therefore inapplicable to ExGen or the FitzPatrick Facility. Similarly, those provisions in Article 4 restricted to retail service including: PSL §§66(12), regarding the filing of tariffs (which are required at the Commission's option); 66(21) regarding storm plans (which are submitted by retail service electric corporations); 67, regarding inspection of meters; 72, regarding hearings and rate proceedings; 75, regarding excessive charges; and, 76, regarding rates charged religious bodies and others, are not applicable to ExGen or the FitzPatrick Facility.

The remaining provisions of Article 4 including §§69, 69-a and 70 remain applicable. These provisions help ensure that the market for electric retail services remains competitive, by providing sufficient authority to the Commission to protect markets from suppliers that might attempt to acquire or exercise market power. Further, as a nuclear generation facility, the FitzPatrick Facility and ExGen as operator will remain subject to more requirements under PSL Article 4 than other forms of generation. Specifically, the additional Article 4 reporting and monitoring requirements currently applied to the FitzPatrick Facility will remain in effect.²⁴ Included among those requirements are the obligations to give notice of generation retirements,²⁵ to report personal injury accidents pursuant to 16 NYCRR Part 125 and, where applicable, to conduct

²⁴ Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

²⁵ Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

tests for stray voltage on all publicly accessible electric facilities.²⁶

Those portions of Article 6 pertaining to the rendition of retail service are not applicable. However, PSL §§110(1) and (2), which provide for Commission jurisdiction over affiliated interests, will continue to apply, given that the proposed transaction will not sever its relationship with Constellation, which markets electricity and natural gas and related products to retail customers in New York. PSL §119-b, on the protection of underground facilities from damage by excavators, adheres to all persons, including nuclear wholesale generators.

The August 2001 Order also includes a requirement that Entergy FitzPatrick continue the funding for non-radioactive decommissioning and Public Service Law jurisdiction over reports on and the spending of that fund continues. The August 2001 Order further requires nuclear wholesale generators to file a notice with the Secretary at least 6 months prior to a permanent shutdown of a nuclear unit for economic reasons.²⁷ These requirements will continue unchanged.

The Commission orders:

1. The transfer of ownership interests in the James A. FitzPatrick Nuclear Power Plant (FitzPatrick Facility) and related assets, as described in the Petition filed in this proceeding and in the body of this Order, is approved pursuant to Public Service Law §70.

²⁶ See Case 04-M-0159, Safety of Electric Transmission and Distribution Systems, Order Instituting Safety Standards (issued January 5, 2005) and Order on Petitions for Rehearing and Waiver (issued July 21, 2005).

²⁷ Unless the generator can demonstrate that a shorter period for notice was unavoidable.

2. Upon transfer of the FitzPatrick Facility to Exelon Generation Company, LLC, (ExGen), ExGen and the FitzPatrick Facility shall comply with the Public Service Law (PSL) in conformance with the requirements set forth in the body and in the attached Appendix. Operation of the FitzPatrick Facility remains subject to the Public Service Law with respect to matters such as annual reporting, enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 including PSL §11, 19, 24, 25 and 26. PSL Article 4 provisions not restricted to their terms to retail service are applicable to the FitzPatrick Facility and ExGen upon completion of the Transfer. PSL §§69, 69-a and 70 provide for the review of securities issuances, reorganizations, and transfers and remain applicable. The obligation to file an annual report under PSL §66(6) may be met by duplicating the report required under federal law.

3. Additional reporting and monitoring requirements that the FitzPatrick Facility and ExGen must meet are listed in the attached Appendix.

4. Upon completion of the Transfer, ExGen shall continue the funding for non-radioactive decommissioning and Public Service Law jurisdiction over reports on and the spending of that fund shall continue. ExGen is also required to file a notice with the Secretary at least six months prior to a permanent shutdown of a nuclear unit for economic reasons.

5. Upon completion of the Transfer, ExGen and the FitzPatrick Facility are also subject to PSL §119-b, on the protection of underground facilities from damage by excavators.

6. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
`Secretary

LIGHT REGULATION
REPORTING AND MONITORING REQUIREMENTS FOR
NUCLEAR WHOLESALE GENERATORS

Documentation Review

Business Plans and Monthly Reports
Corrective action program monthly reports (in color)
Operating status reports – monthly when submitted to NRC
Institute of Nuclear Power Operations & World Association of Nuclear Operators
 Draft Reports available for review at facility
 Final Report provided
Submittals to NRC for performance monitoring
Decommissioning fund filings – 10 CFR §50.75(f)(1) (filed every other March 31)
Scheduled outage plans & schedules
Outage progress reports – scheduled and forced
Meeting summaries from Safety Review Boards
 (Safety Review Audit Board/Nuclear Facilities Safety Committee)
Site Newsletters, Bulletins, Press Releases, Emergency Plan mailings
Safety report - monthly
Special reports – i.e., reports to elected officials

Monitoring of Nuclear Station Operations

Notifications

Notification provided within 1 hour

Plant shutdown
Nuclear Emergency - NRC Unusual Event or greater
Fatal accident
Events likely to be reported immediately by news organizations

Notification provided during regular business hours

Significant power reduction of more than 15% (other than normal plant evolutions - i.e, pump swapping) Significant public meetings or community forums, on decommissioning, spent fuel, and other similar topics Impacts and potential impacts affecting the reliability of the facility or the electric transmission and distribution system Accident causing serious injury

Site Access

Unescorted access to facilities, including vital area access, would be afforded to qualified PSC Staff. All site access training, badging and fitness for duty requirements will be adhered to. Escorted access would be provided to PSC Staff, Commissioners, and other appropriate visitors from other New York governmental agencies.

Agreement State

New York State is an Agreement State with the NRC. As such, PSC Staff has served the State's interests through occasional observation of NRC inspections. When this occurs, a Protocol Agreement for State of New York observation of NRC Inspections would be executed.

Support of State Emergency Operations

Cooperation would continue with PSC Staff and State nuclear emergency preparedness efforts.

Special Investigations

Cooperation would continue with special investigations, directed by the Governor and performed by PSC Staff, into specific problems or events at a facility.