

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

---

Joint Petition of Exelon Corporation and Exelon Generation Company, LLC for a Declaratory Ruling Disclaiming Jurisdiction Over or Abstaining from Further Review of the Proposed Transaction or, in the Alternative, an Order Authorizing the Proposed Transaction Pursuant to Section 70 of the New York Public Service Law

---

Case 21-E-0130

**RESPONSIVE COMMENTS OF JOINT PETITIONERS  
TO CLARIFY AND CORRECT RECORD**

Exelon Generation Company, LLC and Exelon Corporation seek Commission action herein on an inter-corporate Transfer pursuant to which Exelon Generation will continue to indirectly own, and be the licensed operator of, the four New York Nuclear Assets post-Transfer as an independent merchant company exclusively focused on its wholesale generation and customer serving businesses.<sup>1</sup> As demonstrated in the Joint Petition, Exelon Generation anticipates an investment grade credit rating and continued access to ample liquidity and will continue to have the financial wherewithal and technical capability to own and operate the New York Nuclear Assets. Supported by these bases, Joint Petitioners have sought a declaratory ruling that no further review of the Transfer is required, or alternatively, a Commission order authorizing the Transfer under New York Public Service Law (“NYPSL”) Section 70.

---

<sup>1</sup> See NYPSC Case 21-E-0130, *supra*, “Joint Petition of Exelon Corporation and Exelon Generation Company, LLC for a Declaratory Ruling Disclaiming Jurisdiction Over or Abstaining from Further Review of the Proposed Transaction, or in the Alternative, an Order Authorizing the Proposed Transaction” (dated February 25, 2021) (hereinafter, “Joint Petition”). Exelon Generation Company, LLC is hereinafter referred to individually as “Exelon Generation” and, together with Exelon Corporation, collectively, as “Joint Petitioners.” The proposed transaction is referred to herein as the “Transfer.” Membership interests are proposed to be transferred in the four remaining nuclear generating facilities in New York, known as Nine Mile Point I and II, FitzPatrick and Ginna and collectively referred to herein as the “New York Nuclear Assets.”

In response to Commission Notices,<sup>2</sup> comments on the Joint Petition were filed by the New York Attorney General, the New York State Energy Research and Development Authority, the Long Island Power Authority, the Alliance for a Green Economy, a consortium of grassroots organizations and EDF, Inc.<sup>3</sup> In these Comments, Commenters have raised limited issues that generally involve the nature of information that must be submitted and reviewed to support, and the standard of review for, Commission action on the Joint Petition.<sup>4</sup>

As established in their Joint Petition, Joint Petitioners remain committed to safe and reliable operations of the New York Nuclear Assets to support the State's nation-leading climate change initiatives in the coming years while responsibly providing for the Assets' future radiological and non-radiological decommissioning. While the Joint Petition demonstrates Exelon Generation's ongoing financial and technical capabilities to own and operate the New York Nuclear Assets post-Transfer and supports a Commission determination that no further review is warranted, Joint Petitioners have carefully reviewed the Comments to identify considerations that

---

<sup>2</sup> The Commission published a notice in the March 24, 2021 State Register under the State Administrative Procedure Act setting a 60-day comment period and, subsequently, the Commission Secretary extended the comment period, providing an additional 15 days for parties to submit comments. (See New York State Register, "Transfer of Ownership Interests and Facilities Associated with Three Nuclear Generating Units, Funds, and Storage Facilities," I.D. No. PSC-12-21-00009-P (dated March 24, 2021) (hereinafter, "SAPA Notice"); see also, NYPSC Case 21-E-0130, *supra*, "Ruling on Extension Request" (dated May 21, 2021) (hereinafter, collectively, "Notices").) The SAPA Notice set forth a detailed list of matters on which the Commission sought comment.

<sup>3</sup> The six parties that submitted comments on June 8, 2021 are hereinafter referred to individually as "NYAG," "NYSERDA," "LIPA," "AGREE," the "NGO Commenters" and "EDF," and, collectively, as "Commenters." (See, e.g., NYPSC Case 21-E-0130, *supra*, "Comments of the Office of the Attorney General" (dated June 8, 2021); NYPSC Case 21-E-0130, *supra*, "Comments of the New York State Energy Research and Development Authority" (dated June 8, 2021); NYPSC Case 21-E-0130, *supra*, "Response of the Long Island Power Authority to the Joint Petition of Exelon Corporation and Exelon Generation" (dated June 8, 2021); NYPSC Case 21-E-0130, *supra*, "Comment By Alliance for a Green Economy" (dated June 8, 2021); NYPSC Case 21-E-0130, *supra*, "Comments of the Citizens' Environmental Coalition, et al." (dated June 8, 2021); and NYPSC Case 21-E-0130, *supra*, "Comments and Request for Hearing of EDF Inc." (dated June 8, 2021).) Reference to their respective comments is cited herein by individual entity name.

<sup>4</sup> As noted in its Comments, LIPA has maintained its 18% interest in Nine Mile Point II. LIPA has effectively requested that the Commission condition authorization of the Transfer on the Commission rewriting LIPA's contract with Nine Mile Point Nuclear Power Station, LLC, the owner of the 82% interest in Nine Mile Point II, and Exelon Generation as the licensed operator of this facility, and thus, its request falls outside the scope of this proceeding.

warrant discussion and will utilize the opportunity established under the Commission's Settlement Guidelines to conduct exploratory discussions with DPS Staff and parties concerning these matters.<sup>5</sup> As evidenced recently by another matter involving nuclear facilities that successfully utilized this approach to resolve matters relevant to an NYPSL Section 70 review in that case,<sup>6</sup> neither an administrative law judge nor evidentiary hearings is required notwithstanding EDF's claims otherwise. To support these exploratory discussions and provide an accurate and clear record for Commission action on the Transfer, Joint Petitioners offer these limited Responsive Comments at this time.<sup>7</sup>

---

<sup>5</sup> See NYPSL Case 90-M-0255, *et al.*, *Proceeding on Motion of the Commission Concerning its Procedures for Settlement and Stipulation Agreements*, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines (issued and effective March 24, 1992) (hereinafter, "Settlement Guidelines"). For example, parties have inquired about reporting mechanisms concerning unit decommissioning that can be considered while certain matters raised by LIPA and EDF that are not justiciable before the Commission will not be addressed.

<sup>6</sup> See NYPSL Case 19-E-0730, *Joint Petition of Entergy Nuclear Indian Point 2, LLC; Entergy Nuclear Indian Point 3, LLC; and Nuclear Asset Management Company, LLC for a Declaratory Ruling Disclaiming Jurisdiction Over or Abstaining from Review of the Proposed Transfers or, in the Alternative, an Order Approving the Proposed Transfers Pursuant to Section 70 of the New York Public Service Law*, Order Asserting Jurisdiction And Approving And Adopting Joint Proposal (issued and effective May 19, 2021) (hereinafter, "IPEC Proceeding" and "IPEC Order," respectively). Notably, in the IPEC Proceeding, a SAPA Notice was issued setting forth a similar list of detailed issues. There were more adverse parties that raised significantly more contentious issues having far more near term effects than matters reflected in the Comments. In that case, DPS Staff and the parties utilized the Settlement Guidelines and reached a settlement agreement that the Commission found met the public interest thereby successfully resolving that matter without the need for formal proceedings.

<sup>7</sup> In contrast to LIPA, EDF points to claimed existing contractual rights to assert that Commission authorization should be conditioned upon closing its pending transaction with Exelon Generation discussed in the Joint Petition and *infra*. Because matters of rights and obligations under existing commercial contracts equally fall outside the scope of the Commission's jurisdiction, these claims also are not addressed herein. To provide the Commission with complete information, however, the flaws inherent in EDF's position were addressed by Joint Petitioners in a separate letter filed with the Commission on July 23, 2021. (See NYPSL Case 21-E-0130, *supra*, Letter Regarding EDF, Inc. SAPA Comments (dated July 23, 2021).) Of further note, EDF made similar claims in the companion NRC license transfer application proceeding which were refuted by the Exelon Entities that commenced the NRC Proceeding. (See NRC Docket STN-50-456, *et al.*, Exelon Generation Company, *et al.*, "Exelon's Answer Opposing Petition of EDF Inc. for Leave To Intervene and Request for a Hearing" (dated July 12, 2021) (hereinafter, "NRC Response" and "NRC Proceeding," respectively). Exelon Generation; Exelon Corporation; Exelon FitzPatrick, LLC; Nine Mile Point Nuclear Station, LLC; R.E. Ginna Nuclear Power Plant, LLC; and Calvert Cliffs Nuclear Power Plant, LLC are the Exelon entities that commenced the NRC Proceeding and are referred to herein as "Exelon Entities."

## I. COMMENTS

### A. The Commission Should Continue To Apply Its Longstanding Precedent and Address the Transfer Under the *Wallkill* Presumption Using Its Established Three-Prong Merchant Transaction Test

The Joint Petition filed herein and the Put Petition filed jointly by Exelon Generation and EDF in the Put Proceeding last year both establish the Commission has consistently held for the past 20 years that merchant transactions warrant a more narrowly targeted public interest assessment than the regulated utility transactions it assesses.<sup>8</sup> The Commission has made its bases clear -- Merchant generators own and operate facilities, including the New York Nuclear Assets, without any guarantee of a return of, or on, their investments from any ratepayer, and thus, the Commission need not balance the interests of their shareholders and ratepayers as the Commission must for utility transactions under cost of service ratemaking principles.<sup>9</sup>

Notwithstanding the submission it verified just a year ago in which it urged the Commission to continue to apply the merchant standard, EDF alone now urges the Commission in

---

<sup>8</sup> See NYPSC Case 20-E-0371, *Joint Petition of Exelon Generation Company, LLC, EDF, Inc., Constellation Energy Nuclear Group, LLC, Nine Mile Point Nuclear Station, LLC and R.E. Ginna Nuclear Power Plant, LLC for a Declaratory Ruling Disclaiming Jurisdiction over the Proposed Transaction or Finding the Proposed Transaction Requires No Further Review or, in the Alternative, an Order Approving the Proposed Transaction Pursuant to Section 70 of the New York Public Service Law*, “Joint Petition of Exelon Generation Company, LLC, EDF, Inc., Constellation Energy Nuclear Group, LLC, Nine Mile Point Nuclear Station, LLC and R.E. Ginna Nuclear Power Plant, LLC” (dated July 23, 2020) (hereinafter, “Put Proceeding,” “Put Petition” and “Put Transaction,” respectively) at 9-12 (citing series of Commission orders establishing standard of review applied to merchant transactions); *see also* Joint Petition at 17-19 (same).

<sup>9</sup> See NYPSC Case 08-E-0077, *Petition of Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear Operations, Inc, NewCo and Entergy Corporation for a Declaratory Ruling Regarding a Corporate Reorganization or, in the Alternative, an Order Approving the Transaction and an Order Approving Debt Financings*, Order Closing Proceeding and Instituting New Proceeding (issued and effective August 19, 2010) (hereinafter, “Enexus Proceeding” and “Enexus Order,” respectively) at 10, establishing the “net positive benefit” test must be applied to regulated utility transfers to balance the interests of utility shareholders and the ratepayers in their respective service territory that bear the obligation to fund utility investments and finding “Unlike our review of transactions where we have required a demonstration of net positive benefits to ratepayers, the transactions proposed by the Petitioners here concerned only the transfer of ownership for competitive wholesale generators and did not involve any facilities used to provide cost of service regulated monopoly services.”

its Comments here to apply a standard to the Transfer that it has coined the “no net harm” test and argues this test requires Joint Petitioners to provide “some demonstration” of ratepayer benefit (*i.e.*, effectively, the regulated utility “net positive benefit” test).<sup>10</sup> EDF further asserts Joint Petitioners must demonstrate that Exelon Generation will be “at least as strong” post-Transfer as its current financial position to meet this test.<sup>11</sup> EDF’s attempted “standard-shopping” cannot be countenanced particularly where, as here, its newly proposed approach ignores two decades of Commission precedent.

As Joint Petitioners detailed at length in their Joint Petition, the Commission has consistently applied the *Wallkill* Presumption and its associated three-prong test to merchant transactions given the fundamental difference between merchant and regulated utility transfers.<sup>12</sup> In most cases, including in earlier proceedings involving the transfer of upstream interests in the Ginna and Nine Mile facilities, the Commission has found that it was not required to conduct further review of the subject transaction.<sup>13</sup> While the Commission did determine earlier this year

---

<sup>10</sup> See EDF Comments at 13-14. As reflected in the Put Proceeding, EDF is the current 49.99% owner of the membership interests in Constellation Energy Nuclear Group, LLC (“CENG”), the indirect owner of the Nine Mile Point and Ginna facilities. EDF has triggered its contractual right to sell, and is actively seeking to complete the sale of, its entire ownership interest in CENG and these three facilities to Exelon Generation. (See Put Petition at 7). The Commission has issued the requisite order permitting the transaction to be completed. (See NYPSC Case 20-E-0371, *supra*, Order Approving Transfer and Making Other Findings (issued and effective April 15, 2021) (hereinafter, “Put Order”). Closing the Put will not result in a transfer of control, as the direct owners and the licensed operator (Exelon Generation) of the facilities will not change and NRC approval is not required. (See Letter from J. Bradley Fewell, Exelon Generation, and Michael Hill, EDF Inc., to NRC Document Control Desk, “Constellation Energy Nuclear Group, LLC Notification of Change in Indirect Ownership, dated April 24, 2020 (Accession No. ML20115E609), <https://adams.nrc.gov/wba/view>.)

<sup>11</sup> *Id.* at 13.

<sup>12</sup> See Joint Petition at 17-19.

<sup>13</sup> See NYPSC Case 09-E-0055, *Constellation Energy Nuclear Group LLC, Nine Mile Point Nuclear LLC, R.E. Ginna Nuclear Power Plant LLC and EDF Development, Inc.*, Declaratory Ruling on Review of a Transfer Transaction (issued and effective April 23, 2009) (ruling that the *Wallkill* Presumption applied to EDF’s acquisition of a 49.99% interest in CENG); see also NYPSC Case 11-E-0245, *Exelon Corporation, Constellation Energy Group, Inc., Constellation Energy Nuclear Group LLC, Nine Mile Point Nuclear LLC, and R.E. Ginna Nuclear Power Plant LLC – Joint Petition for a Declaratory Ruling Regarding a Stock Transaction or, In the Alternative, An Order Approving the Stock Transaction*, Declaratory Ruling on Review of a Stock Transfer Transaction (issued and effective December 20, 2011) (making similar determination concerning 50.01% membership interest transaction).

that the issues before it in two nuclear facility transfer cases warranted review under NYPSL Section 70, the Commission, pertinent hereto, continued to differentiate between merchant and regulated utility transactions and did not impose a net positive benefits test as EDF has proposed here.<sup>14</sup>

Indeed, EDF correctly asserted in its Put Petition just last June that the Commission should apply the very same standard of review to its Put Transaction as Joint Petitioners have established here.<sup>15</sup> In fact, relying exclusively on Exelon Generation's financial standing to address the financial wherewithal requirement in that proceeding, EDF asserted the Put Transaction did not warrant the Commission's further review under NYPSL Section 70 and urged the Commission to dispense with the entire matter by declaratory ruling.<sup>16</sup>

Obviously, as is true of this case, the Put Proceeding involved the indirect transfer of interests in nuclear generating facilities – in fact, a subset of the *same* nuclear generating facilities addressed herein. EDF provides no explanation to support its change in position here concerning the applicable legal standard for merchant transfers. Nor can one be found.

Likewise, EDF's newly fashioned version of a “must be as good as” standard fundamentally misapplies Commission precedent. Specifically, EDF attempts to argue that the Commission voted to deny the petition in the Enexus Proceeding because Enexus's *credit rating* would not be as good as the credit rating of the then existing owner.<sup>17</sup> However, as the Commission

---

<sup>14</sup> See, e.g., Put Order at 10-12.

<sup>15</sup> See Put Petition at 9-12.

<sup>16</sup> *Id.* (citing Commission recent confirmation in order authorizing transfer of FitzPatrick facility to Exelon Generation and stating, “[Exelon Generation] – as the largest nuclear operator in the United States – is both financially sound and will continue to bring significant nuclear operational and management experience and expertise to the operation of the Facilities.”) (citation omitted).

<sup>17</sup> See EDF Comments at 13-15, citing NYPSC Case 08-E-0077, *supra*. Notably, DPS Staff proposed a hedging agreement for the Commission's consideration in the Enexus Proceeding. As addressed *infra*, however, the

explained in its order closing the Enexus Proceeding, its findings were based on the fact Enexus had proposed financial mechanisms that had no real possibility of either allowing it to achieve *any* investment grade rating *or* ensuring it could otherwise adequately meet the financial needs of the facilities.<sup>18</sup> In short, the Commission found Enexus was not – and could not become – a financially sound entity post-transaction. The Commission acted on this basis alone.<sup>19</sup>

In stark contrast, Exelon Generation is an investment grade rated company with a long-established, unparalleled merchant generation record. The Joint Petition documents Exelon Generation’s disciplined efforts to seek to ensure it would maintain an investment grade rating. Indeed, even EDF itself acknowledges – as it must – Exelon Generation’s expected investment grade rating post-Transfer.<sup>20</sup>

In addition to addressing credit rating considerations, the Joint Petition also provides extensive additional evidence supported by the affidavit of Mr. Bryan Wright, Exelon Generation’s Senior Vice President and Chief Financial Officer, and the attachments thereto, clearly establishing Exelon Generation’s financial wherewithal to continue to own and operate the New York Nuclear Assets.<sup>21</sup> The core question before the Commission here is whether Exelon Generation will have the financial wherewithal to own and operate the New York Nuclear Assets. Joint Petitioners have demonstrated in the Joint Petition that the answer is yes. Given this body of evidence, here, too, EDF’s claims warrant no consideration.

---

Commission never endorsed this proposal or otherwise considered it as a component of its analyses when it considered the facts and circumstances of that case.

<sup>18</sup> See Enexus Order at 12.

<sup>19</sup> *Id.* at 12-13.

<sup>20</sup> See EDF Comments at 15 (conceding Exelon Generation is expected to secure a rating post-Transfer “that is nonetheless investment grade” and defaulting to the argument that being “less creditworthy” was dispositive to the Commission’s financial wherewithal determination).

<sup>21</sup> See Joint Petition at 25-29; *see also* Joint Petition, Attachment 3, Affidavit of Bryan P. Wright (dated February 25, 2021) (hereinafter, “Wright Affidavit”), *passim*.

Contrary to EDF's claims, the Commission has not departed from its longstanding principle that it must review whether merchant transactions will harm captive ratepayers to meet the requirements of NYPSSL Section 70. There continues to be no basis for it to do so here.

**B. Joint Petitioners Have Demonstrated Exelon Generation's Financial Wherewithal To Own and Operate the New York Nuclear Assets Post-Transfer**

In their attempts to challenge Joint Petitioners' demonstration that Exelon Generation possesses the financial wherewithal to own and operate the New York Nuclear Assets post-Transfer, intervenors either confuse the issue by focusing on the wrong corporate entity or ignore record evidence in the Joint Petition. EDF, in particular, attempts to confuse the issue by suggesting that the financial wherewithal test must concentrate on the financial condition of the "yet-to-be-created SpinCo."<sup>22</sup> AGREE asserts that the Joint Petition provided "scant details" and its claims of Exelon Generation being well-capitalized were not accompanied by detailed financial evidence other than the affidavit of Mr. Bryan Wright.<sup>23</sup> In addition, EDF and the NGO Commenters claim that future changes to the support agreements for the facilities could have consequences.<sup>24</sup> Their claims, however, are addressed by evidence already provided in the Joint Petition.

---

<sup>22</sup> See EDF Comments at 6-9. "SpinCo" is Exelon Generation. EDF's fundamental misunderstanding pervaded its comments in the NRC Proceeding as well where EDF also sought to conflate entities and direct emphasis away from the fact that Exelon Generation is a financially strong company that is anticipated to maintain an investment grade rating post-Transfer. (See, e.g., NRC Response at 17-18.)

<sup>23</sup> See AGREE Comments at 6. AGREE also questions whether the New York ZEC payments demonstrated proof of financial strength, suggesting these payments "beg [ ] the question, will New York's nuclear subsidies be used to provide financial support for other struggling reactors in SpinCo's fleet?" (*Id.* at 7.) However, the Joint Petition clearly established Exelon Generation will retire uneconomic assets. (See Joint Petition, Wright Affidavit at PP 40-44.)

<sup>24</sup> See EDF Comments at 5-6 (replacing current support agreements adds risk and could reduce the support for nuclear operations); NGO Commenters Comments at 2 (replacing current support agreements could impact ability to maintain safety conditions).



Notwithstanding EDF's effort to confuse the record, the entity that is the focus of the Commission's financial wherewithal evaluation is Exelon Generation and not "a yet to be created SpinCo." As reflected in the Joint Petition, Exelon Generation, not the holding company, will carry the investment grade rating and will continue to underwrite business operations going forward. Exelon Generation, post-separation, will continue as a well-established, large and diverse merchant generation and customer serving business, and Exelon Generation has long independently maintained its own investment grade rating. As set forth in the Joint Petition, Joint Petitioners will create a new C-corporation holding company to sit above Exelon Generation (an LLC) in the corporate structure to address corporate and tax considerations. This is a common legal structure in which a C-corporation holding company is the publicly traded company sitting above an operating company that itself has the financial responsibility for its respective business operations.

Based on Joint Petitioners' efforts pre-filing, Exelon Generation anticipates retaining an investment grade rating and continued access to ample liquidity post-Transfer.<sup>25</sup> Joint Petitioners provided ample evidence in the Joint Petition to support their position, the Exelon Entities recently reiterated these factors in the NRC Response and Joint Petitioners reaffirm them here.<sup>26</sup>

In fact, EDF itself relied on that very same financial strength just a year ago when it sought Commission authorization of its own Put Transaction. As noted *supra*, EDF explicitly endorsed a finding of ExGen's financial qualifications based on the Commission's consideration of Exelon Generation on a stand-alone basis and verified in the Put Petition that Exelon Generation "is both

---

<sup>25</sup> As established, *supra*, neither Enexus nor any other entity in that corporate line had an investment grade rating or was otherwise offered as having adequate financial standing, the sole basis on which the Commission voted against authorizing that transaction.

<sup>26</sup> See NRC Response at 17-19. Furthermore, neither Exelon Generation's investment grade rating nor its overall financial wherewithal to own and operate the New York Nuclear Assets has changed in any material way since the Joint Petitioners filed the Joint Petition with the Commission.

financially sound and will continue to bring significant nuclear operational and management experience and expertise to the operation of the [three of the New York Nuclear Assets.]”<sup>27</sup> The Put Petition signed by EDF and Exelon Generation also stated:

ExGen is financially sound. ... It is financially qualified *based on its own revenues and assets*. ExGen continues to maintain its longstanding investment-grade bond rating. ... ExGen thus has the financial wherewithal to own 100% of the membership interests in CENG and continue operating the Facilities effectively. Because ExGen continues to be a financially robust company that is capable of indirectly supporting the Facilities through CENG, the Commission should thus find the financial wherewithal prong has been satisfied.<sup>28</sup>

EDF, jointly with Exelon Generation, thus asserted that the Commission could forego further review of the Put Transaction or, alternatively, find it “is in the public interest and fully satisfies the Commission’s three-prong merchant test under NYPSL Section 70.”<sup>29</sup>

EDF has not pointed to any material change in Exelon Generation’s financial qualifications in its Comments. Nor could it. Given its unqualified assurances to the Commission that Exelon Generation’s financial wherewithal was sound and supported a declaratory ruling that no further review of its acquisition of EDF’s 49.99% CENG membership interests was required, its newly found concerns here merit no consideration.

Moreover, while the actual financial information filed as part of the Joint Petition was, by necessity, required to be redacted given its trade secret and confidential commercial content, the comprehensive scope and nature of information that accompanied the Joint Petition can be gleaned from specific details provided therein. For example, the Joint Petition, as further extrapolated in the Wright Affidavit, clearly conveyed extensive financial information had been filed under seal,

---

<sup>27</sup> See Put Petition at 10-11.

<sup>28</sup> *Id.* at 20 (emphasis added).

<sup>29</sup> *Id.* at 10-13.

including balance sheet, cash flow and other key financial metrics for a five-year period.<sup>30</sup> Consistent with the structure that applies to this type of proceeding, designated members of the Staff of the Department of Public Service (“DPS Staff”) will review this information, use its expertise to assess its adequacy and make its recommendations to the Commission concerning these matters. Commission action, in turn, will reflect this analysis.

Lastly, EDF and the NGO Commenters are correct that the Transfer will include the reissuance of support agreements for the New York Nuclear Assets, with the support transferring from Exelon Corporation to Exelon Generation. This fact was also disclosed to the Nuclear Regulatory Commission (“NRC”) in a notice concerning the Put Transaction jointly submitted by Exelon Generation and EDF, and thus, EDF has long been aware of, and understood, this fact.<sup>31</sup> As Joint Petitioners established in the Joint Petition and as also established in the NRC Proceeding, the level of financial support included in the support agreements that are put into place post-Transfer must – and will – continue to satisfy NRC’s requirements.<sup>32</sup>

Formula-based, the support agreements are expressly designed by NRC regulation to provide the funds necessary to maintain operations while protecting public health and safety by, *inter alia*, taking into account simultaneous outages.<sup>33</sup> Thus, while there will be a new set of

---

<sup>30</sup> See, e.g., Joint Petition, Wright Affidavit at PP 45-50.

<sup>31</sup> April 24, 2020 letter to NRC, *supra* n. 10, Attachment, p. 10, n. 23. Currently, Exelon Corporation provides a Support Agreement and a Guaranty to the CENG facilities, including Nine Mile Point and Ginna. In the April 24, 2020 notice concerning the Put Transaction provided to the NRC in a document jointly signed by Exelon Generation and EDF, the NRC was notified that Exelon Generation would “separately provide at a later date a written submission to the NRC seeking consent to transfer the support obligation from Exelon Corporation to [Exelon Generation]. That request for consent will not impact the timing of the sale of EDF Inc.’s interest in CENG or the closing of the [Put Transaction].” As established by the Joint Petition and explained herein, replacing the support agreements is not new information nor does it present any material issue. Indeed, just a year ago, EDF itself signed a letter to the NRC providing notice of this very change. As the Exelon Entities established in the NRC Response and Joint Petitioners reveal here, EDF’s new-found concerns to the contrary are clearly a red herring.

<sup>32</sup> See, e.g., Joint Petition at 29.

<sup>33</sup> See Wright Affidavit at P 59.

support agreements post-Transfer, the financial wherewithal of the four operating New York Nuclear Assets will be maintained. Safety, reliability and facility operations will not be compromised.

**C. Joint Petitioners Remain Committed To Account for the Future  
Decommissioning of the New York Nuclear Assets While  
Effectively Balancing the Needs of Their Ongoing Operations**

Commenters generally posit each facility's nuclear decommissioning trust fund ("NDT") must be adequate to complete radiological decommissioning, spent fuel management and site restoration.<sup>34</sup> For example, noting determinations cannot yet be made about the NDTs given the number of years that each New York Nuclear Asset will continue operations, the NYAG states "the Commission should consider whether conditions may be necessary to approve the Exelon spinoff."<sup>35</sup> The NYAG also points to the IPEC Order to provide examples of "various safeguards" that could be used for financial assurance purposes.<sup>36</sup> Other parties have also cited to mechanisms set forth in the IPEC Order.<sup>37</sup>

Joint Petitioners fully agree that funds must be available to complete radiological decommissioning, spent fuel management and site restoration, as applicable, at each site. Reviewing the issues raised and anticipating the resolution of the IPEC Proceeding, Joint Petitioners elected to offer several significant commitments in their Joint Petition that would address these imperatives while effectively taking into account the continued operation of the New

---

<sup>34</sup> As reflected in the Joint Petition, each facility's NDT is maintained pursuant to the NRC's regulations and encompasses all radiological decommissioning as well as spent fuel management and site restoration funds, as applicable. A trustee administers these funds pursuant to, and in accordance with, NRC regulations. (See Joint Petition at 13-14.)

<sup>35</sup> See NYAG Comments at 7.

<sup>36</sup> *Id.* at 7-8; see also *id.* at 2-3 (referencing "further specific financial and reporting safeguards to protect the public interest").

<sup>37</sup> See, e.g., AGREE Comments at 10; NYSERDA Comments at 8.

York Nuclear Assets. In addition, Joint Petitioners are prepared to engage in exploratory discussions to consider potential additional methods of addressing the future decommissioning of the New York Nuclear Assets to the degree such matters are within State jurisdiction. However, it is neither practical nor prudent for the New York Nuclear Assets to simply adopt the exact decommissioning measures agreed to in the IPEC Proceeding.

To begin, a crucial distinction between these matters is that the plants at issue in the IPEC Proceeding were permanently retired at the time of transfer. In addition, the Holtec entities involved therein had sought to purchase the Indian Point facility to implement their prompt decommissioning plan and, accordingly, had already filed a detailed post-shutdown activity report (“PSDAR”) and associated decommissioning cost estimate (“DCE”) with the NRC. These documents provided a detailed scope of the work to be completed at the site together with the associated costs and the required timeline to complete these efforts. At the time the Joint Proposal in the IPEC Proceeding was executed, the parties also had updated information that allowed them to define the NDT fund level at the start of decommissioning.

As a result, financial assurance mechanisms could be – and were – structured to effectively monitor the progress of decommissioning efforts at the IPEC site and keep sufficient funds in place throughout the projected, predefined 15-year period to partial site release and beyond.<sup>38</sup> However, here, it will be at least eight years before any New York Nuclear Asset reaches the end of its current licensed operating life.<sup>39</sup> As a result of this fundamental difference in the circumstances before

---

<sup>38</sup> See IPEC Order at 29-31 (citing to available information concerning trust fund balances at start of decommissioning and nature and scope of available decommissioning plan details); *see also* Commission Session Transcript (DPS Staff stated support to approve Joint Petition as augmented by Joint Proposal without modification).

<sup>39</sup> As reflected in the Joint Petition, in contrast, the current operating licenses for two of the New York Nuclear Assets authorize operations until at least 2029 and the existing Nine Mile Point II license does not end until 2046. Equally pertinent, while the Nine Mile Point I operating license is one of the operating licenses that is currently scheduled to expire in 2029, the Unit’s decommissioning plan is likely to take into account the fact that Nine Mile Point II’s license continues for an additional 15 years. Exelon Generation will continue to submit required decommissioning status

the Commission here, the same detailed documents do not – indeed, cannot -- exist for the New York Nuclear Assets at this time.

Joint Petitioners appreciate that some Commenters that were also actively involved in the IPEC Proceeding noted this important distinction. For example, in its Comments, NYSERDA, the State Liaison to the NRC, stated, “It is way too early to opine on the adequacy of cost estimates and decommissioning plans, as the Facilities may be in operation for a number of decades to come, and no such decommissioning or site restoration plans have been put forth.”<sup>40</sup> In short, until the PSDAR and associated DCE are completed for each unit, cost information cannot be known with the same precision, a fact highlighted by the NYAG who was also actively involved in both the NYPSC and NRC proceedings concerning the IPEC transaction.<sup>41</sup>

As established in the Joint Petition, Exelon Generation complies with NRC regulations at this time by submitting the required NDT reports for each unit biennially.<sup>42</sup> DPS Staff and NYSERDA receive a copy of these reports. Each report establishes that radioactive decommissioning requirements are met and provide sufficient information to identify the additional funding available to address spent fuel management and site restoration issues, as applicable.

Taking into account the concerns raised by parties in the IPEC Proceeding, however, Joint Petitioners nevertheless sought to identify avenues in their Joint Petition to provide supplemental

---

reports in accordance with NRC regulations which at this stage of operations are formulaic in nature and do not yet contain detailed, site-specific parameters or timelines.

<sup>40</sup> See NYSERDA Comments at 8; see also NYAG Comments at 7. NYSERDA, the State Liaison to the NRC and a party in the IPEC Proceeding, has supported granting the Joint Petition based on “the limited impact of the proposed transaction on the public interest and the additional measures discussed in the [Joint] Petition” and urged the Commission to codify these provisions as regulatory requirements in its order. (*Id.* at 9.)

<sup>41</sup> See NYAG Comments at 6-7 (noting that full decommissioning and site restoration costs will not be known until full site characterizations are performed).

<sup>42</sup> See Joint Petition at 32-34.

information that would address these matters well before retirement and any associated decommissioning period began for the New York Nuclear Assets. As detailed in the Joint Petition, Exelon Generation has offered to provide DPS Staff with comprehensive, forward-looking, site-specific NDT reports annually to complement the NRC reports it currently receives.<sup>43</sup> For example, these reports will, among other things, provide an analysis of the adequacy of the respective NDT funds to address all decommissioning cost categories—including radiological decommissioning, site restoration, and spent fuel management, as applicable.

Exelon Generation has reviewed the reporting mechanisms established in the IPEC Joint Proposal. Its proposed reporting structure set forth in the Joint Petition closely parallels the IPEC mechanisms after accounting for the differences in circumstances and is an important complement to Exelon Generation's existing NRC reporting efforts. While Exelon Generation designed these reports to provide the Commission with additional insight and transparency into the status of the New York Nuclear Assets' estimated NDTs and decommissioning costs, it is also prepared to further discuss the specifics of the proposed, enhanced NDT reports.

Likewise, Exelon Generation has carefully reviewed the Comments and understands the intervenors' interests in site restoration issues which fall within the State's jurisdiction. Notably, the Joint Petitioners offered to accept the same site restoration standard for the FitzPatrick plant that is currently in place for the Ginna unit.<sup>44</sup> In addition, the information that is provided in the NRC biennial reports supports that there is funding available in the NDT for each unit that could be used for site restoration work.

---

<sup>43</sup> *Id.* at 33-34. NYSERDA has requested that these reports also be shared with NYSERDA, the NYAG and the New York Department of Environmental Conservation. (See NYSERDA Comments at 9, expressing NYSERDA's appreciation of Exelon Generation's willingness to offer additional measures in its Joint Petition, including decommissioning reporting mechanisms). Subject to establishing necessary confidentiality protections, Exelon Generation confirms it will provide this information to these parties as well.

<sup>44</sup> See Joint Petition at 34-35.

At the same time, imposing overly conservative decommissioning-related obligations on Exelon Generation's New York Nuclear Assets years in advance of shutdown based on the end of their current respective license life ultimately may not be a practical solution. Exelon Generation will continue to operate its facilities in New York and execute on its business plans to support the State's public policy objectives for many years to come. Given the time horizon for continued operation, it is imperative that the outcome of this proceeding does not adversely affect Exelon Generation's ability to meet its obligations to all of its stakeholders, including customers, employees, the State, and the NRC.

As Exelon Generation established in the Joint Petition, it is committed to effectively balancing all of these important interests while also meeting its obligations to the State of New York, which is the focus of the matters before the Commission here. With its enhanced reporting proposal set forth in the Joint Petition laying important foundation, Exelon Generation welcomes exploratory discussions to identify potential additional mechanisms that align with the facts and circumstances of the New York Nuclear Assets. It stands ready to consider the site restoration and other State-based decommissioning concerns raised by parties in their Comments against this backdrop.

#### **D. Full Proceedings Are Not Warranted**

While EDF argues for further proceedings here, the facts and circumstances specific to the Transfer do not raise any issues for the Commission to depart from its typical process of addressing merchant transfers on the papers.<sup>45</sup> Indeed, even should any matter raised in the Comments require

---

<sup>45</sup> See EDF Comments at 13-14.



further consideration, the Commission's Settlement Guidelines allow parties to engage in exploratory settlement discussions and gauge the potential for settling any such issue.<sup>46</sup>

Exploratory settlement discussions can, and often do, set the stage to effectively resolve open issues in merchant transactions without the need for full proceedings even when petitions have prompted lengthy and generally contentious comments. For example, while the IPEC Proceeding engendered hundreds of pages of comments raising a significant number of issues, the parties successfully reached resolution and entered into a comprehensive settlement agreement in that proceeding without initiating any formal process.<sup>47</sup>

Given the comparatively limited issues raised in the Comments to the Joint Petition, it is certainly reasonable to expect that the same process could be successfully employed here. Accordingly, full proceedings are not warranted on these facts, and thus, EDF's requests for formal discovery, the assignment of an administrative law judge, and evidentiary hearings should all be rejected.

---

<sup>46</sup> Settlement Guidelines at 14-15.

<sup>47</sup> See IPEC Order at 17-18; 38; *see also* Commission Session Transcript, *passim* (DPS Staff and all Commissioners voicing support for Commission authorization of IPEC transfer based on evidence in joint petition as augmented by joint proposal filed in that case).

## II. CONCLUSION

As established in the Joint Petition and further evidenced herein, Joint Petitioners have demonstrated that the Transfer is in the public interest. Thus, Joint Petitioners reiterate their request that the Commission issue a declaratory ruling finding no further review of the Joint Petition is warranted or, alternatively, an order authorizing the Transfer under NYPSL Section 70 by no later than its December 16, 2021 session.

Dated: July 26, 2021  
Albany, New York

Respectfully submitted,

**GREENBERG TRAURIG, LLP**



Doreen U. Saia  
Kelly L. McNamee  
54 State Street, 6<sup>th</sup> Floor  
Albany, New York 12207  
(518) 689-1400

*Attorneys for Exelon Corporation and Exelon  
Generation Company, LLC*