

September 29, 2008

NEW YORK STATE
PUBLIC SERVICE COMMISSION

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PSC Case No. 08-E-0077
Proposed Corporate Reorganization
of Entergy Corporation, et al.
and Related Debt Financing
ALJ David Prestemon
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ALJ Gerald Lynch

**RIVERKEEPER, INC. RESPONSIVE COMMENTS PURSUANT TO THE AUGUST 14,
2008 RULING ON DISCOVERY, PROCESS, SCHEDULE AND SCOPE OF ISSUES
AND AUGUST 26, 2008 RULING SETTING SCHEDULE FOR FURTHER COMMENTS
IN THIS PROCEEDING**

I. INTRODUCTION

Riverkeeper, Inc. (hereinafter “Riverkeeper”) submits the following comments in response to the initial comments filed by Entergy Corporation and its subsidiaries (hereinafter “Entergy”), Westchester County, the New York State Attorney General (hereinafter “OAG”) and counsel for the New York State Department of Public Service staff (hereinafter “DPS Staff”) on September 15, 2008 pursuant to the above-referenced rulings in this proceeding.

Riverkeeper supports the initial comments of OAG and Westchester County in their entirety, and reiterates its support for the September 5, 2008 Motion by the Office of the Attorney General and Assemblyman Richard Brodsky to Remove Entergy’s Provisional Designation of Certain Documents as “Confidential.”

For the following reasons, Entergy has failed to meet its burden of showing that the proposed transaction will be “in the public interest,” as required by Public Service Law §70 and Public Service Commission (hereinafter “PSC”) caselaw. As a result, the PSC should deny

Entergy's petition, or in the alternative, hold an evidentiary hearing to more fully develop the record in this proceeding.

II. Entergy Fails to Demonstrate that the Proposed Transaction would satisfy the public interest standard of PSL §70.

In the August 14 Ruling on Discovery, Process, Schedule and Scope of Issues (hereinafter "August 14 Ruling"), the Administrative Law Judges (hereinafter "ALJs") requested that all parties discuss what the appropriate standard of review is under PSL §70 for this type of transaction. August 14 Ruling at 31. The ALJs note that the Commission has not specified a fixed standard of review for making a public interest determination, and offer three alternatives for consideration; the "net positive benefit" standard, the "do no harm" standard, and the "no jeopardy" standard. *Id.* at 27-28. The ALJs also allowed parties the option of offering any "well supported variation" in addition to the three standards discussed. *Id.* at 29.

In its Initial Comments, Entergy posits that the Commission's May 23 Order "has clearly defined the public interest considerations relevant to this proceeding." Petitioner's Verified Initial Comments, September 15, 2008 (hereinafter "Petitioner's Comments") at 8. However, Entergy incorrectly conflates the Commission's determination of the *scope* of issues subject to review to the *standard* of review that should be applied by the ALJs and the Commission to determine whether the proposed transaction meets the public interest requirement of PSL §70. In its May 23 Order, the Commission explicitly rejects Entergy's request that it be treated as a lightly regulated entity under the Wallkill Presumption, finding that "a more searching inquiry of the issues the commentators raise, than would be conducted if other types of lightly-regulated generation were at issue, is warranted." Order Establishing Further Procedures, Case 08-E-0077, Public Service Commission, May 23, 2008 (hereinafter "May 23 Order"), at 4.

Despite this decision, Entergy attempts to rely on their earlier status before the Commission as a lightly regulated entity as support for its assertion that the proposed transaction in the instant case be afforded a more lenient review than PSL §70 typically requires. Petitioner Comments at 7-8. This reliance is unfounded, based on both the May 23 Order and the August 14 Ruling, both of which suggest that the Commission and the ALJs have significant discretion in determining what standard of review should be applied to this transaction. The Commission specifically notes that “nuclear generators will be subject to more requirements under [the PSL] than other forms of generation.” May 23 Order at 4, citing Case 01-E-0113, *Entergy Nuclear Operations, Inc., et al*, Order Providing for Lightened Regulation of Nuclear Generating Facilities, August 31, 2001. The Commission also makes a point, in referring to nuclear generating facilities, that “[T]heir large size and unique operational concerns also have significant impacts on the communities where they are located.” May 23 Order at 4. In the August 14 Ruling, the ALJs discuss three different standards of review as potentially applicable to this proposed transaction, noting that the Commission has not specified the standard that should be applied. August 14 Ruling at 27.

Clearly the Commission has the authority to utilize a standard of review that reflects not only the nature of the applicant, but more importantly the nature and complexity of the proposed transaction. Hence, the Commission in the instant proceeding, while noting that wholesale electricity generators are typically afforded a less stringent review, determined that a more stringent review was necessary for this particular transaction, because of two prevailing concerns; the transaction involves nuclear generating facilities, and the encumbrance of Enexus, a newly formed company, with \$6.5 billion in debt. See May 23 Ruling at 5. Entergy’s claim that a more stringent review is “not appropriate for lightly regulated entities like the

Petitioners[.]” is incorrect and at odds with the Commission’s and the ALJs’ interpretation of this issue in this proceeding thus far.¹

In its Initial Comments, Riverkeeper discussed the basis for applying the “positive net benefit” standard to Entergy’s proposed transaction pursuant to PSL 470. See Riverkeeper Initial Comments at 13-15. Riverkeeper reiterates its position here regarding the appropriateness of that standard of review to this proceeding.

III. Entergy Fails to Demonstrate that Enexus will be able to meet all financial obligations related to the ownership and operation of the Indian Point plants.

Entergy’s Initial Comments simply repeat claims already made by the Petitioner regarding Enexus’ future ability to properly decommission the Indian Point site and return it to a “Greenfield” condition in a reasonable time. Entergy makes no attempt to provide additional information as to whether it will have the significant financial resources required to properly remediate the extensive groundwater and soil contamination onsite caused by the continuing spent fuel pool leaks. Instead, Entergy attempts to rely on the Nuclear Regulatory Commission’s approval of its license transfer application as proof that it will properly decommission the sites in the future. Petitioner’s Comments at 19-21. This reliance is unfounded, however, given the fact that Entergy’s own decommissioning fund analyses submitted to the NRC reveal that the NRC’s regulatory funding requirements are deficient. See Riverkeeper Initial Comments at 5-6, Table Rk-1. This table clearly shows that Entergy’s own cost estimates for decommissioning Indian Point are much higher than the minimum required by NRC regulations. *Id.* Riverkeeper’s Initial Comments also cite Information Claimed Exempt to

¹ Petitioner’s Comments at 11. Entergy also incorrectly attempts to distinguish the Commission’s reasoning in the *Iberdrola* case from the facts in the instant proceeding in its Initial Comments on pg. 11. Riverkeeper respectfully directs the ALJs to its discussion of the *Iberdrola* precedent in Riverkeeper’s Initial Comments, at 14-15.

support Riverkeeper's general challenge to the adequacy of Entergy and Enexus' ability to decommission the site. *See* Riverkeeper Initial Comments at 7-10.

IV. Entergy fails to demonstrate that Enexus will be able to fulfill its other obligations associated with the ownership and operation of the Indian Point plants.

Entergy's Initial Comments provide further evidence that the proposed transaction will result in a corporate structure that is poorly capitalized, highly indebted and excessively encumbered with confusing lines of authority. For example, Petitioners state that under the Amended and Restated Operating Agreement between EquaGen and Enexus, "EquaGen must seek an Owner's prior consent for emergency-response actions it proposes to take and before submitting required incident reports to the applicable government agency[.]" Petitioner's Comments at 24. In addition, EquaGen may not "[I]ncur costs for operation or capital expenditures that are in excess of or materially different from those authorized in budgets approved by Owner." *Id.* Given the fact that Entergy Corporation and Enexus have equal authority in overall ownership of the site, this presents significant problems in terms of Enexus' ability to make ownership and operational decisions in a timely manner. At a minimum, the Commission should require Entergy to provide further clarification regarding these provisions of the Operating Agreement.

In addition, Riverkeeper reiterates the arguments made in its Initial Comments regarding Entergy's failure to assess the future costs of several large scale capital improvements to the plants, including the construction of cooling towers and the replacement of reactor pressure vessel heads and nozzles. *See* Riverkeeper Initial Comments at 10-12. The Petitioner's Initial

Comments do not contain any new information that would change Riverkeeper's position regarding this omission.

V. Additional Responsive Comments

In its Initial Comments addressing its agreement with the New York Power Authority (hereinafter "NYPA") regarding the VSAs, Entergy claims that the resolution of its dispute with NYPA provides positive benefits to the State of New York. Petitioner's Comments at 39. The Commission should reject this assertion outright. Entergy cannot in good faith claim that its decision *not* to attempt to evade its contractual obligations to NYPA results in a positive net benefit to New Yorkers. The absence of a negative impact does not equate to a positive impact, especially given the facts of this dispute. This is nothing more than a baldfaced attempt by Entergy to miscast their earlier bad decision in a favorable new light.

VI. Conclusion

For the foregoing reasons, Riverkeeper urges the Commission to deny Entergy's Petition, or in the alternative to hold an evidentiary hearing in order to more fully develop the record in this proceeding.

Respectfully submitted,



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