

**NEW YORK STATE
PUBLIC SERVICE COMMISSION**

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

Background

There is no justification for a rush to judgment in this proceeding just because Entergy wants a decision by September. To cut off discovery at this early stage is counterproductive. It is Entergy that had all the time to decide how it wanted to structure its new company, how it is going to structure its financing and debt, and when it decided to apply to the regulatory agencies for approval, and still it is making changes. In fact, Entergy continues to make changes to Enexus' proposed corporate structure, make changes in the relationship between the subsidiary corporations, submit various alternative borrowing plans that may saddle the limited liability companies that hold the operating licenses with substantial debt.

REDACTED. Certainly, if an Indian Point facility, burdened with substantial debt, were to cease operations for a substantial period of time, there is no reason to believe that Enexus would not threaten, as Entergy did in New Orleans, to place the facility in bankruptcy and walk away from that entity, leaving the resultant mess to be cleaned up by the host communities. The Village of Buchanan, the Town of Cortlandt, the County of Westchester and the State of New York should not be so burdened. It is unfair and a disservice to the

communities that surround these plants, to the entities to whom Entergy made promises, to rush a decision in this case and limit access to information, especially in light of recent disclosures and changes by Entergy.

The data is in a constant state of flux. In fact, the original series of confidential data, which the County spent two full days reviewing, **REDACTED** In fact, due to the complexity of that information and the fact that it was only provided to the other parties within the last few days additional follow-up questions are required. The other parties to this proceeding should not be penalized due to the change in data.

The Petitioners stated that they projected consummation of the proposed corporate reorganization by the end of the third quarter of 2008 and therefore the Commission should expedite an approval of their request. Entergy's failure to properly plan should not require a truncated proceeding.

The Petitioner has stated that a substantial portion of the financial decisions will not be made until after Enexus receives all approvals. According, Enexus is basically asking for approval on faith – which in effect is what they originally requested the Commission grant, approval without the need for a hearing or any meaningful discovery. Because the answers we have received to date – have been or will be superseded by the changes that Entergy/Enexus will make in the financials of these transactions it is imperative that such relief not be granted. Entergy should not be granted indirectly that which the Commission was not willing to give them directly, approval without review of the financial and other aspects of the transaction

At least twice the alignment of the new company and its subsidiaries has changed. The response to AG 33 showed how the organization would look but then the recently provided supplemental answer to AG -33 shows a new alignment. New entities have been added and some others have disappeared or been renamed. The other parties are left to shoot at a moving target and all of the arrows have been removed from our quiver.

The July 23rd ruling rightfully identified as an important issue the Financial Impacts of the proposed corporate reorganization. As noted on page 9 of that Ruling, “The Commission made it clear in the May 23 Order that the public interest requires a thorough evaluation of the reorganization and financing proposed by Petitioners in order to determine whether those changes will have an impact on the:

Adequacy and security of support for the decommissioning of the New York nuclear facilities; financial sufficiency of the proposed capital structure in supporting continued operation of the facilities; and arrangements for managing, operating and maintaining the facilities.”

The recently provided changes to the **REDACTED**, including those located in New York State requires further analysis and additional discovery.

Even if there were adequate time to review and analyze in depth all of the recent changes so that appropriate questions could be asked of Entergy at our meeting on this Friday, August 1st there is no provision or methodology set forth in any of the Rulings as to how the answers provided by Entergy at the August 1st meeting could be referenced in the respective comments by the parties or otherwise incorporated into the record. It would result in a “he said, she said” situation.

Entergy had control of when it would file its initial Petition with the Commission. It had control over when it would finalize its financing and borrowing for each of the entities transferred to Enexus, it had control over the financing packages, it had control over all aspects of the information. The other parties had to respond to the information that was provided. Discovery responses that were previously provided in response to the questions of the various parties have become outdated, incomplete or inaccurate because of changes made by Entergy. The parties should be provided additional time to review the information and conduct discovery in a manner that will produce clear and up to date answers that can clearly be referenced in the comments. Without this opportunity, the record will not be clear.

In particular, the County would like to point out that Entergy, in response to the Comments of Westchester County¹ stated that “the corporate reorganization is not intended to, and in fact will not, affect commitments made by Michael Kansler”. In response to Westchester’s concerns that Entergy is attempting to avoid the commitments made to the County stated that “Westchester County’s claims are unfounded.” The issue of whether Enexus is bound by or will agree to adopt all of the representations and assurances contained in Michael R. Kansler’s letter of March 16, 2001 to the County were probed by the County in a series of discovery questions. However, Entergy’s responses were for a number of the items vague, non-committal and non-responsive. Accordingly, it appears that Entergy and Enexus do not intend to honor all of those commitments. The County should be given additional time to probe these inconsistencies.

¹ “Case 08-E-077 – Response 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 to Westchester County’s Motion to File Reply, or in the Alternative Strike Entergy’s Response to the Comments of the New York State Attorney General’s Office, Westchester County and Riverkeeper, Inc.”

It is further noted that **REDACTED** Even Petitioner’s counsel is getting confused by the various changes to the transaction. Accordingly, how can the other parties be sure of the exact nature of the transaction – in a limited period of discovery during which the facts, financial arrangements, indebtedness, allocation of indebtedness have changed more than once.

REDACTED

Based on the responses by Entergy to discovery requests of various parties, including the County, it is believed that it is premature to consider a proposed schedule at this time. Entergy has clearly stated that one of the key elements of concern to the Commission and the parties is the identification of any element of proposed transactions that will have an impact on the ability of Enexus to meet the financial obligations currently borne by Entergy Corporation in relation to the Fitzpatrick and Indian Point plants, to attempt to quantify such impact, and provide a basis for their conclusion that such an impact will occur. (Ruling, p. 9) Entergy, in response to WC-2 (EN-87) clearly states that **REDACTED** Accordingly, what Entergy is attempting to do is get an “approval in blank” **REDACTED** In addition, **REDACTED.**

The key issue is that the closing of discovery was premature in light of the many unanswered questions, changes in structure by Entergy, changes and postponement of assignment of debt. In fact, it is believed that the closing of discovery encouraged Entergy to be vague in its last set of responses.

Entergy originally provided documentation showing that **REDACTED**.

We are still receiving revised responses to discovery requests. Entergy is allowed to change its position but it is not clear whether your ruling prevents the other parties from conducting additional discovery to probe these issues. Sometimes a change in information raises other questions which are tangentially related to Entergy's changed position.

As recently as on Friday, July 25 at 9:16 pm Entergy distributed by e-mail a revised corporate ownership structure for Enexus. (AG-33) (EN-52S) It was Entergy that had the time to consider carefully, before seeking approval from the Commission, how it was going to structure Enexus. The fact that it is making last minute changes should not deprive the parties of an adequate opportunity to review the material and to conduct discovery.

It is understood that your Honor questioned whether all parties had submitted timely discovery of their own. However, the discovery process does not entail just the propounding of questions it requires a careful review of the documents provided, including responses to discovery of other parties, so that it does not duplicate effort and can raise and further probe issues. The amount of material produced to date is voluminous, with many items incorporated by reference, thereby requiring searching of other responses or searching through publicly available documents to ascertain the answer to what was a simple question.

Entergy has the right to provide answers by referencing other documents but it sometimes results in a search for a "needle in a haystack" with more hay added for effect and the position of the needle being moved. The County does not believe this is what was intended by the Commission when it set a "minimum" discovery period of 60 days.

The July 23rd Ruling clearly states (P. 12) that the “Parties seeking exemptions from public disclosure bear the burden of proof.” However, to date, it has been the other parties that have borne the burden relating to gaining access to such documents. In fact, the County has identified certain items that it believed should not be subject to confidentiality requirements and has made informal requests to Entergy’s counsel that such documents be made generally available. Such requests have been politely rebuffed.

Scheduling & Process

Accordingly, it is believed that the discovery schedule should be extended at least an additional 30 days for various reasons, including, but not limited to, the fact that the closure of discovery was premature and that substantial changes to the position and information supplied by the Petitioner requires the reopening of discovery to address the issues affected by these changes. In addition, a number of the responses by the Petitioner have been vague or otherwise inadequate.

The County believes that Petitioner should be required to submit its initial comments before the other parties. If all parties are required, as proposed, to submit their comments concurrently, it allows the Petitioner an unfair advantage. As proposed, the primary responsibility of the parties in their initial comments would be to identify any element of the proposed transaction that they believe will have an impact, positive or negative, on the ability of Enexus to meet the financial obligations currently borne by Entergy in relation to Fitzpatrick and Indian Point plants, to attempt to quantify each such impact, and to provide the basis for their conclusions that such an impact will occur. As set forth above, it appears

that the burden has shifted to the other parties to demonstrate why Entergy should not be allowed to proceed and then gives Entergy the last word to comment on and attack the position of the other parties. Since Entergy is the party that has control of the facts, and as clearly demonstrated, has the ability to change those facts at will, it is Entergy that should be required to first set forth its affirmative case with the other parties having a right to comment thereon. Otherwise the Petitioner would just set forth general reasons why it should be allowed to proceed with the reorganization, which improperly results in the shifting of the burden to the other parties.

The Petitioner should be required to submit its Comments first with provision for the other parties to submit their Comments two weeks later, and if deemed necessary by the Petitioner a round of Rebuttal submitted by all parties two weeks thereafter.

In addition, the parties should be given an opportunity to comment on the ALJs' ruling whether, and to what extent, an evidentiary hearing is required.

The ALJs should consider a conference with all the parties after it receives the responses to the Ruling of July 23, 2008 and after the August 1st meeting among the parties. This may help clarify outstanding issues, resolve some confidentiality issues, and address any other outstanding issues identified by the parties to this proceeding.

Scoping & Issues Subject to Comment

The Ruling clearly identifies a number of important issues that the County concurs should be an integral part of this proceeding and should be addressed in the Comments but it

should not be read to constitute a limitation on the issues that can be addressed. The issues of NYPA Revenue Sharing Agreements, the assurances and agreements entered into with municipalities in close proximity to the respective plants, decommissioning issues, economic viability of each of the plants, economic burden on the New York plants, possible impacts on municipalities if Enexus or any of its affiliates default on their obligations are all of paramount concern to the County.

The County has clearly raised issues about commitments previously made to the County as part of the license transfer of Indian Point 3 from NYPA to Entergy. Those issues and the County's concerns have not disappeared. Clearly those issues must be addressed, especially in light of contradictory positions taken by Entergy in this case in relation to those issues. There are other commitments that have been made by Entergy to various entities, both those participating in this proceeding and some that are not directly involved in this proceeding. Those issues should not be allowed to fall by the wayside.

There are also important issues relating to the corporate structure, financing, indebtedness, transfer of assets both from and to Entergy that must be included in this proceeding especially as they may affect the operation and decommissioning of the plants. In particular, there are various contracts between the proposed subsidiary entities that could shift profits and resources from New York plants to other entities or plants outside New York. For example, it appears that there **REDACTED** and the provision of services from a Enexus/Entergy entity. The use of the various servicing companies allows Entergy to game the system – determining which entities should receive profits and which should be left with

the costs. – to the possible detriment of the host communities. This could allow the gaming of resources, including electricity, in New York State. We must also be cognizant of any potential transfer of responsibilities from Enexus to the State of New York or the local host communities even if those events may be remote in time. We are all cognizant of Entergy’s position relative to its bankruptcy of its New Orleans affiliate.

Conclusion

For all of the above reasons, discovery should be extended, Entergy should be required to submit its Comments first and the scope of issues should be expanded as noted above.

Respectfully submitted,

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