STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Petition of Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point, 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.	Case 08-E-0077

REPLY COMMENTS OF THE

NEW YORK STATE CONSUMER PROTECTION BOARD

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REPLY COMMENTS OF THE NEW YORK STATE CONSUMER PROTECTION BOARD

The New York State Consumer Protection Board ("CPB") submits these reply comments regarding the proposed transfer of ownership of Entergy Corporation's ("Entergy") nuclear generation facilities located in New York to Enexus Energy Corporation ("Enexus"), a separate new corporation. As explained herein, the proposed transaction would substantially reduce the financial power of the owner of those nuclear plants. Thus, the CPB recommends that the Public Service Commission ("PSC" or "Commission") reject the transaction as it has been proposed, since it is not in the public interest. Alternatively, the PSC could approve the transaction subject to conditions that will help ensure the financial strength of the owners of nuclear plants in New York, as described herein.

By Ruling dated August 26, 2008, the Administrative Law Judges ("ALJs") invited comment on issues including the appropriate standard for review of the proposed transaction and its effect on the financial and management obligations

of the nuclear plant owners. The CPB has reviewed the initial comments filed by Entergy and its affiliates (collectively, "Petitioners"), Staff of the Department of Public Service ("DPS Staff"), the New York State Office of the Attorney General ("OAG"), the County of Westchester, Riverkeeper Inc. ("Riverkeeper"), and the International Brotherhood of Electrical Workers Local 97, and hereby responds to those submissions.

Standard of Review

The proposed transfer of the ownership of nuclear generation plants located in New York requires approval under Public Service Law ("PSL") §70, which states that "no consent shall be given by the commission to the acquisition of any stock in accordance with this section unless it shall have been shown that such acquisition is in the public interest." Petitioners also propose that Enexus issue up to $4.5 billion in debt, which requires approval under §69 of the PSL, a provision that confers authority on the PSC to approve the issuance of bonds by a regulated entity upon a finding that the debt is necessary for a statutory purpose and in the public interest.

The PSL, however, does not specify the criteria to be used to determine whether the public interest provisions of Sections 69 and 70 are satisfied. The ALJs identified three possible standards: (1) the transaction results in a net positive benefit; (2) it does no harm to ratepayers; and, (3) it does not jeopardize the ability of the owners of the transferred facilities to meet their public interest

obligations.[1] The OAG, County of Westchester and Riverkeeper argue that the transaction can only be approved if there is a net positive benefit to New Yorkers. DPS Staff advocates for the application of the "no harm" standard to this transaction, based on a review of PSC Orders applicable to lightly regulated generators. Although Petitioners recite the same PSC Orders as DPS Staff, they conclude that the third, and weakest standard identified by the ALJs, is applicable.

Petitioners' position on this matter cannot be reconciled with PSC decisions in cases involving lightly regulated generators, which have consistently concluded that the "no harm to ratepayers" standard should be used to assess whether the public interest has been satisfied.[2] Petitioners offer no reason why Commission precedent on this matter should be ignored and a new precedent set that weakens consumer protections to the possible detriment of New Yorkers.

Indeed, the Commission has already concluded that nuclear facilities have a greater impact on the public interest than generation plants using other forms of energy, and therefore, nuclear generators are to be subject to more requirements than other forms of generation.[3] For that reason, the PSC directed that a full review of the proposed transaction be conducted, rather than the relatively abbreviated examination under PSL §§69 and 70 that is typically applicable to transactions involving other forms of generation. Just as the

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1 Case 08-E-0077, Ruling Setting Scheduled for Further Comments, August 26, 2008, pp. 26-27.

2 See, e.g., DPS Staff Initial Comments, pp. 21 – 23.

3 Case 08-E-0077, Order Establishing Further Procedures, May 23, 2008.

Commission used its substantial discretion to order a thorough review of this matter, the PSC has ample authority to use the more stringent positive benefit standard in this proceeding. The CPB recommends that it do so, for the same reasons that led the Commission to decide that a transaction involving nuclear facilities should be broader than one involving other forms of generation.

The Commission's recent decision to approve the proposed acquisition of Energy East Corporation by Iberdrola subject to conditions, is also instructive on this point. In that case, the PSC found that "the financial risks in turn pose a threat that the merged companies will have difficulty maintaining appropriate levels of safety..."[4] and imposed conditions designed to ensure a net positive benefit to ratepayers. As demonstrated below, the transaction under consideration in this proceeding would also result in financial risks that may pose a threat to safety, as well as public welfare. In consideration of the importance of this issue to New Yorkers, the Commission should assess the proposed transaction using the positive benefit standard.[5]

Financial and Operational Obligations

Under PSL §70, the Commission can only approve a change in the ownership of a regulated entity upon a finding that the new owner can successfully operate the facility it is acquiring. In the case of a nuclear plant, this

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[4] Case 07-M-0906, Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Ibderdrola, S.A., Abbreviated Order Authorizing Acquisition Subject to Conditions, September 9, 2008, p. 8.

[5] The CPB notes that as currently structured, the proposed transaction fails to meet either the positive benefit, or the no harm to ratepayers standards.

also includes a requirement that the owner can comply with all regulatory obligations and decommission the plants at the end of their useful lives.

Under the proposed transaction, the owner of the nuclear plants in New York State will be substantially weaker financially, than the current owner. Entergy has approximately $35 billion assets that can be used to meet the needs of the nuclear plants in New York. The proposed transaction would create a barrier between the nuclear plants and the vast majority of those assets, thereby exposing the nuclear plants to substantial financial risks. As explained below, significant questions exist as to whether the proposed transaction provides Enexus with sufficient financial resources to satisfy its obligations, thereby potentially imposing risks on the well being of New Yorkers.

Enexus' Financial Forecasts

In support of its claims that it has ample financial resources to operate its plants safely and reliably, Petitioners provide forecasts of Enexus' profit margin which purport to show that its profitability will increase in the future as forward contracts for the output of its nuclear plants are replaced by new contracts which reflect higher wholesale electricity prices as a result of significant increases in the price of natural gas.[6]

Although precise information on the impact of natural gas prices on Enexus' profitability has not been reviewed by the CPB, it is apparent that Petitioners' optimism is overstated. Natural gas prices have been extremely volatile in the last several years, so financial projections which assume that those

[6] Petitioners' Initial Comments, pp. 12-13.

prices will remain at a high level, have a low degree of confidence. For instance, natural gas prices decreased from $12.30/mmBTU in July 2008, to $8.79/mmBTU in August 2008, a decrease of approximately 29% in one month. That change alone would have a substantial impact on forecasts of Enexus' profit margins, a point not recognized in Petitioners' Initial Comments.

Petitioners further maintain that Enexus will have a robust cash flow that will be able to withstand unanticipated events including a substantial decrease in the market prices of electricity. For example, they analyzed a "stress scenario" in which projected electricity prices are reduced by $25/MWh and proudly state that Enexus will remain financially sound in that circumstance.[7] Once again, however, Petitioners' claims are not convincing. Market prices of electricity, like the price of gas, are very volatile, and can drop by almost twice the amount modeled by Enexus in a single month. For example, Locational Based Marginal Prices in New York dropped from $131.33/MWh in July 2008 to $85.60/MWh in August 2008, a reduction of approximately $45.73/MWh in a single month. Since Petitioners' Initial Comments do not include an analysis of real world "stress scenarios," there is substantial doubt about the ability of Enexus to maintain financial strength in an unpredictable economy.

Ability to Raise Additional Capital

The proposed corporate restructuring is also troubling because of its potential impact on the ability of the owner of nuclear plants in New York to

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[7] Id., pp. 13-14.

obtain additional financial resources. In particular, the proposal would shift the ultimate responsibility of New York's nuclear plants from Entergy, which is rated BBB, an "investment grade," by Standard & Poor's, to Exenus, which Petitioners believe would have a non-investment grade rating.[8] Further, as explained by DPS Staff, Enexus projects a positive equity balance of $64.5 million and total liabilities and equity of more than $9 billion by year end 2010, resulting in an equity ratio of 0.7%.[9] Companies financed in this manner have very high financial risk. Non-investment grade companies are considered riskier than investment grade companies and must pay higher interest rates to secure funds. This would be true in normal times, however, in these extremely turbulent financial markets that we have witnessed during the last few weeks, it would be even more difficult to raise funds.

Petitioners attempt to justify the likely non-investment grade rating (BB) for Enexus by insisting that unlike regulated utilities that maintain an investment grade rating, it is appropriate for merchant power generation to have a non-investment grade rating. They further declare that in comparison to other merchant generation companies, Enexus is expected to have a higher rating than most comparable companies.[10] Although some merchant power plants may be rated below investment grade, we do not believe that this holds true for most owners of nuclear power plants. Nuclear power plants because of the nature of

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8 Id., p. 14.

9 DPS Staff Initial Comments, p. 8.

10 Petitioners' Initial Comments, p. 14.

their operation and the need to ensure that the plants operate in a safe and reliable manner, must be operated by companies with sound financial positions. According to the testimony of the Vermont Department of Public Service, almost all owners of nuclear power plant have investment grade corporate or issuer credit rating. In fact, they show that from a list of 27 companies owning nuclear plants, only two had non-investment grade ratings.[11]

As explained above, an investment grade company would be in a better position than a non-investment grade company to raise capital. Shifting assets from an investment grade entity to a non-investment grade entity as proposed by Entergy is clearly not in the public interest.

Availability of Funds to Comply with Regulatory Requirements

There is substantial doubt that the new owner will have sufficient financial resources to comply with all future regulatory requirements. Entergy claims that a $700 million Support Agreement is sufficient to cover those costs.[12] The funds in that Agreement are available to meet United States Nuclear Regulatory Commission ("NRC") requirements and operating expenses of any of the six

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[11] State of Vermont, Public Service Board, Docket No. 7404, Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for Approval of an Indirect Transfer of Control of Each Company, Consent to Pledge Assets, Guarantees and Assignment of Contracts by Entergy Nuclear Vermont Yankee, LLC, and Amendment to the CPG of Entergy Nuclear Operations, Inc. to Reflect a Name Change, Replacement of $60 Million Guarantee with $60 Million Letter of Credit and Substitution of $700 Million Support Agreement for Two Inter-Company Credit Facilities, Prefiled Testimony of Seth G. Parker on behalf of the Vermont Department of Public Service, May 29, 2008, p. 12.

[12] Petitioners' Initial Comments, pp. 15-18.

nuclear plants that will be owned by Enexus, including three plants outside of New York.

Initial Comments by other parties demonstrate that Enexus may not be able to comply with future regulatory requirements necessitating large capital expenditures. For example, Entergy's financial forecasts do not include capital expenditures for constructing cooling towers at Indian Point Energy Center.[13] The State of New York, however, has issued a draft permit, currently being challenged by Entergy, that requires the installation of closed cycle cooling at Indian Point in the event that the plant's operating licenses are renewed for an additional twenty years. Those costs alone were estimated in 2003 to be $740 million, projections that Entergy characterized as "conservative."

Similarly, Entergy has not included an assessment of the cost of replacing reactor pressure vessel heads and nozzles for Indian Point 2 and 3. That project is likely to require considerable resources that have not been reflected in Enexus' projections of capital expenditures at Indian Point.

Thus, the financial resources to meet these requirements would have to come from additional cash flows from Enexus' operations, or from additional capital. For the reasons explained above, there is substantial doubt whether such funds will be available.

Decommissioning Costs

Nuclear plant owners are required to comply with NRC requirements for decommissioning radioactive plant components, as well as PSL requirements for

[13] Initial Comments by OAG, pp. 32-33; Initial Comments by Riverkeeper, pp. 10-11.

decommissioning non-radioactive components. The latter requires nuclear plant operators to restore nuclear plant sites to an unrestricted and natural state. Significant questions remain as to whether Enexus will have sufficient funds to fully and thoroughly decontaminate and decommission the large Indian Point site in Westchester County.

Several parties state that extensive decontamination efforts will be required at both Indian Point 1 and 2, to address subsurface radioactive plumes.[14] As of the end of 2006, decommissioning funds for Indian Point 1 and 2 were approximately $254 million and $303 million, respectively. Those funds are invested so as to mirror the performance of broad market indices, which have declined significantly, however, in recent months. Further, there is ample reason for concern that decommissioning costs will greatly exceed available funds. For example, decommission costs for Entergy's Vermont Yankee plant were estimated by the Company in January 2007 to be as high as $991 million, more than twice the amount set aside by Entergy in 1996.[15]

Again, it appears that Enexus will have to raise additional capital to meet its obligations. For the reasons explained above, Entergy is in a far better position to do so than Enexus. Thus, the proposed transaction would create additional risks which must be ameliorated before it can be approved by the Commission.

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14 E.g., OAG Initial Comments, pp. 37–38.

15 Id.

Potential Conditions to Remedy These Financial Concerns

To provide adequate assurance that Enexus will be able to meet its financial obligations, DPS Staff proposed that one of two conditions be applicable to PSC approval of the transaction: (1) that Enexus capitalize itself to achieve an investment grade bond rating, and not pay dividends to its parent or repurchase common equity if its rating falls below investment grade; or (2) that the Company maintain $1.0 billion in a trust fund set aside to remedy any reliability or non-safety related concerns at the nuclear plants.[16] These proposals are a step in the right direction, although it is not apparent at this time that they are sufficient to obviate the concerns that have been identified. For example, the costs of regulatory requirements and decommissioning for the six nuclear plants may exceed available funds by more than $1.0 billion. DPS Staff's Initial Comments do not contain any explanation of the derivation of the $1.0 billion figure, nor do they provide any basis to demonstrate to the Commission and the public that such funding will be sufficient. Accordingly, the CPB recommends that the ALJs continue to develop a record on the adequacy of potential remedies to address the financial risks of the proposed transaction that have been identified.

[16] DPS Staff Initial Comments, pp. 12-14.

CONCLUSION

For the reasons explained herein, the New York State Consumer Protection Board recommends that in the public interest, the Public Service Commission reject the proposed transaction, or approve it only if accompanied by conditions to help ensure the financial viability of the owners of the nuclear plants in New York. A further record should be developed to determine the adequacy of the financial conditions proposed by DPS Staff.

Respectfully submitted,

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