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July 30, 2008

## VIA E-MAIL

Honorable Gerald L. Lynch  
Honorable David L. Prestemon  
Administrative Law Judge  
New York State  
Department of Public Service  
Three Empire State Plaza  
Albany, NY 12223-1350

Re: Case 08-E-0077 – Entergy Corporation, et al. - Joint Petition For a Declaratory Ruling Regarding a Corporate Reorganization, or, in the Alternative, an Order Approving the Transaction and an Order Approving Debt Financing

Dear Judges Lynch and Prestemon:

On behalf 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 (collectively, the "Petitioners"), the undersigned counsel hereby respectfully submit this letter in response to Your Honors' request for comments on the Ruling Concerning Discovery and Seeking Comments on a Proposed Process and Schedule, dated July 23, 2008 (the "Ruling").

As an initial matter, the Petitioners are disappointed that, despite our diligent efforts to respond to very extensive discovery requests, the proposed process will not facilitate New York Public Service Commission ("Commission") decision in September. However, the Petitioners recognize that the Ruling attempts to both establish a fair and balanced process for the parties to address the relevant issues in this proceeding in a timely fashion, and to provide the Commission sufficient information to review and make a decision in this case. Petitioners, however, do have a significant concern with the Ruling, which is the consideration in this proceeding of issues related to the Value Sharing Agreements (the "Value Sharing Agreements" or "VSAs") entered into by Entergy Nuclear FitzPatrick, LLC ("FitzPatrick") and Entergy

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Nuclear Indian Point 3, LLC ("IP3") and the New York Power Authority ("NYPA"). The Petitioners also suggest a modest revision to the proposed comment period.

### **Value Sharing Agreements Between FitzPatrick and IP3 and NYPA**

Your Honors stated in the Ruling that a potential loss to NYPA of payments under the VSAs should not be excluded from the public interest assessment in this case.<sup>1</sup> Accordingly, Your Honors invited parties to address in their comments the extent to which such revenues will or will not be lost. In particular, Your Honors requested the Petitioners state whether there is any change in their previous statements that they will not make future payments under the VSAs if the reorganization is authorized. The Petitioners respectfully request that Your Honors refrain from making a determination on this issue at this point, and continue to consider Petitioners' contention that, in fact, the VSAs between FitzPatrick and NYPA and between IP3 and NYPA are part of complex asset transfer agreements entered into in 2000 that were, and remain, outside the Commission's jurisdiction, and should not be considered by the Commission in this proceeding.

In 2000, Entergy acquired FitzPatrick and IP3 from NYPA. As part of the sale transaction, the parties entered into value sharing agreements in which FitzPatrick and IP3 would make payments to NYPA under certain circumstances. It is important to note that the original VSAs included a provision for the termination of payments if FitzPatrick or IP3 were no longer owned by Seller or an affiliate. In October 2007, Entergy and NYPA amended and restated the value sharing agreements to clarify and amend certain provisions of the original terms. Under the amended VSAs, Entergy's non-utility nuclear business agreed to make guaranteed value sharing payments to NYPA for the years 2007 and 2008 in the amount of \$144 million even if one or both of the plants ceased to be owned by Entergy or an affiliate. For subsequent years, however, each agreement provided that payments would terminate if the plant ceased to be owned by Entergy or an affiliate.

The termination provision is one element of a complex commercial agreement entered into by parties in an arm's length transaction, which provided economic benefit to both parties. The VSA termination clause was a negotiated term in the contracts, and was accepted by NYPA based on its determination that the total transaction was in its best interests, a determination that was within NYPA's sole purview. It is not reasonably possible to take one term of a complex, negotiated agreement and consider it in isolation. Petitioners bargained for this provision in the VSAs in 2007 and NYPA decided that the total transaction, including this provision, was in its best interests. It would be unreasonable for the Petitioners' exercise of their

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<sup>1</sup> Ruling at 12.

contractual rights under the VSAs to adversely affect their petition in an unrelated proceeding for Commission approval to organize the ownership of the nuclear assets more effectively.

As Your Honors' noted in the Ruling, "it is undeniably true that the Commission does not regulate [NYPA] and has no jurisdiction to abrogate or modify a contract freely entered into by that entity." However, Commission reliance on the potential effect of the corporate reorganization on the terms of the VSAs as part of its public interest analysis under Sections 69 and/or 70 of the New York State Public Service Law, would amount to the Commission interfering in a contractual agreement. Should the Commission use the termination provision as a basis for denying the corporate reorganization, or alternatively condition approval on continued payments under the VSAs, the Commission would effectively be voiding one term in contracts that were freely entered into by the parties and, in effect, it would be modifying the contracts by preventing Entergy from enjoying the benefit of its bargain, while NYPA retains all of the benefits it received under the agreements.

Such interference in a contractual agreement would also contravene Commissioner precedent. In Case 92-E-0032, the Commission found that "requests to arbitrate disputes over breach of contract issues are simply beyond our jurisdiction, in most cases", explaining that contract disputes between businesses are "better resolved according to commercial law principles, through negotiation, arbitration or the courts."<sup>2</sup> The Commission has consistently applied this policy to commercial disputes when there is nothing about such disputes that is unique to utility regulation or to utility consumer protection.<sup>3</sup> Furthermore, NYPA has publicly stated that it disagrees with the Petitioners' interpretation of the VSAs and may contest a termination of payments under the VSAs subsequent to the reorganization. The VSAs contain dispute resolution provisions which include good faith negotiations between the parties and arbitration, if necessary. It is important to note that NYPA does not seek to invalidate the termination provisions, but rather has asserted that the particular form of reorganization proposed by the Petitioners does not meet the criteria established in the VSAs for termination. The source for those criteria is a statute administered by the Securities Exchange Commission and the long

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<sup>2</sup> Case 92-E-0032 - Erie Energy Associates - Petitioner for a Declaratory Ruling That Its Power Purchase Contract with New York State Electric & Gas Corporation Remains in Effect, Declaratory Ruling at 7-9 (Mar. 4, 1992).

<sup>3</sup> See e.g., Case 95-E-1081 - Seneca Falls Development Corporation - Complaint Against Niagara Mohawk Power Corporation Concerning the Status of the Existing Power Purchase Agreement Between Niagara Mohawk and Kings Falls Power Corporation, Order Denying Petition (Mar. 20, 1996); Case 96-E-0131 - New York State Electric & Gas Corporation - Petition for an Order Requiring Firm Security for Certain Power Purchase Agreements or, Alternatively, Permitting the Cancellation of Such Power Purchase Agreements, Case 95-E-1162 - Niagara Mohawk Power Corporation - Petition for an Order Requiring Firm Security for Certain Power Purchase Agreements or, Alternatively, Cancelling such Agreements, Order Closing Proceedings (Feb. 5, 2002).

line of cases under that statute. Petitioners submit that NYPA is fully capable of protecting its contractual rights and that the proper forum for the resolution of any contractual issue between NYPA and the Petitioners is the dispute resolution process under the VSAs, and not this proceeding.<sup>4</sup> As the Commission has stated, such disputes are "better resolved according to commercial law principles, through negotiation, arbitration or the courts."<sup>5</sup>

In addition, interference with commercial transactions by the Commission would set a very bad precedent. Parties subject to the Commission's jurisdiction, which includes virtually all participants in the wholesale electricity market, should be free to enter into commercial agreements with NYPA and LIPA without concern that the Commission will exercise its jurisdiction in an unrelated proceeding to deprive them of the benefits of their agreement.

Moreover, the Commission's recent consideration of the Long Island Power Authority ("LIPA") agreement in the National Grid/KeySpan merger proceeding does not support the consideration of the VSAs in this proceeding. Unlike this matter, the agreement reached between LIPA and National Grid was directly related to and contingent upon the Commission's authorization of the proposed merger between National Grid and KeySpan. Since 1998, LIPA and KeySpan had been working together under a set of agreements that allowed KeySpan to operate and maintain LIPA's transmission and distribution ("T&D") system and supply LIPA with a substantial portion of its electric power needs. Shortly before National Grid and KeySpan announced their plans to merge, LIPA and KeySpan entered into a new set of agreements to amend and restructure the agreements by which KeySpan operates LIPA's T&D system. Importantly, under the new agreements, in the event KeySpan was acquired by another company (such as National Grid), LIPA had the right to terminate its agreements with KeySpan under which KeySpan operates and maintains the LIPA T&D System, supplies electricity to LIPA's customers and purchases and manages the fuel and energy supply. Therefore, the agreement that was reached between National Grid and LIPA was a direct result of the National Grid/KeySpan merger. Consequently, it was appropriate for the Commission to consider the benefits received by LIPA under its agreement with National Grid since that agreement was directly related to the proposed merger. The relationship between the VSAs and this proceeding, however, is entirely different. As noted, the VSAs were part of complex transactions entered into in 2000, unrelated to the proposed corporate reorganization and this proceeding. The consideration in this proceeding of an unrelated and long-standing commercial transaction would not be justified and is not comparable to the Commission's recognition of the benefits related to the LIPA and National Grid agreement.

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<sup>4</sup> Notably, NYPA has elected not to be a party to this proceeding.

<sup>5</sup> Supra, n.2.

Finally, in its Order Establishing Further Procedures issued in Case 08-E-0077, the Commission clearly set forth the scope of the issues to be considered in this proceeding. Specifically, the Commission stated that "the scope of discovery is tightly bounded by the public interest inquiry relevant to this proceeding; namely, 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."<sup>6</sup> The Value Sharing Agreements do not concern decommissioning, the financial viability of Enexus or the arrangements for managing, operating or maintaining the New York non-utility nuclear plants. Importantly, the Attorney General raised the VSA termination provisions in its Objections to Entergy's Petition, dated April 7, 2008. The Commission, therefore, was aware of this issue prior to the issuance of its Order Establishing Further Procedures. Yet, the Commission specifically stated that matters other than those listed above "will not be litigated here."<sup>7</sup>

In response to the questions posed by Your Honors, the Petitioners have not changed their position with respect to the VSAs, and consider the revenues to which NYPA would be entitled to under the VSAs to be uncertain.

Based on the foregoing, Petitioners respectfully request that Your Honors refrain from making any determination at this point as to whether the potential impact of the reorganization on the Value Sharing Arguments with NYPA is an appropriate matter for consideration in this proceeding.

#### **Length of the Comment Period**

The Petitioners continue to request that this case be decided as expeditiously as possible. The corporate reorganization process is extremely arduous, expensive and time consuming. A delay in obtaining the Commission's approval could burden the Petitioners with significant unnecessary expense. Given that the sixty day discovery period has been extended, the Petitioners respectfully request that the initial comment period be reduced from three weeks to two weeks. The Petitioners believe that two weeks is more than adequate for the initial comment period since the two week period has not yet begun, and the parties have had since July 23 (the date the Ruling was issued) to consider the comments they intend to make.

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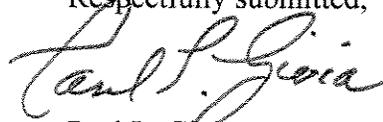
<sup>6</sup> Case 08-E-0077 - Entergy Corporation, et al. - Joint Petition For a Declaratory Ruling Regarding a Corporate Reorganization, or, in the Alternative, an Order Approving the Transaction and an Order Approving Debt Financing, Order Establishing Further Procedures at 6, n.9 (May 23, 2008).

<sup>7</sup> Id.

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Your consideration of these comments is appreciated.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Paul L. Gioia".

Paul L. Gioia  
Gregory G. Nickson

PLG:gn (99935)

cc: Honorable Jaclyn A. Brillling (via hand delivery)  
Active Party List (via e-mail)