



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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DIVISION OF SOCIAL JUSTICE
Environmental Protection Bureau

July 14, 2008

SENT ELECTRONICALLY

Honorable Gerald L. Lynch
Honorable David L. Prestemon
Administrative Law Judges
New York State Department of Law
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Albany, NY 12223

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Re: PSC Case No. 08-E-0077 - Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 2 LLC, Entergy Nuclear Indian Point 3 LLC, Entergy Nuclear Operations, Inc., NewCo, and Entergy Corporation - 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:

The Office of the New York State Attorney General (OAG) submits this letter in response to the questions set forth in Your Honors' July 3, 2008 letter to the parties other than the petitioners or the Department of Public Service staff. OAG understands that the tasks for this Office are to report: (1) on the status of OAG's discovery requests; (2) when OAG expects discovery to be complete; (3) whether this Office will need discovery beyond July 22, 2008, and if so, why discovery could not have been completed by July 22, 2008; (4) the portions of the filings to be considered on the relevance of the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law ("ECL") §§ 8-0101 *et seq.*; and (5) any additional arguments concerning SEQRA's relevance.

Status, and Expected Completion Date, of Attorney General's Office Discovery This Office has diligently pursued its discovery rights and has reviewed Entergy's responses as they become available. Within hours of the Commission's May 23, 2008 Order initiating this proceeding, OAG submitted its first set of information requests. A Ruling and Protective Order specifying the control of documents was issued on June 17, 2008. To date, OAG has submitted 56 information requests, and has received responses to 43 of those. This Office currently is awaiting responses to 13 information requests, and has about an equal number of additional

information requests under development. It may be that review of documents to be produced by Entergy over the next few weeks will result in additional information requests.

Review of responses already provided but designated confidential is ongoing, but not complete. This review began on July 2, 2008 when the documents were made available at the New York City office of Entergy's counsel. It is possible that review of the extensive amount of documentation designated confidential in this matter will require additional time beyond the July 22, 2008 control date; the need for additional time results from the breadth and complexity of information exchanged in this matter. Accordingly, OAG respectfully requests that it be permitted to submit all of its information requests by August 8, 2008. After all of the documents have been exchanged and OAG has completed its review, OAG will be in a better position to propose whether this matter could be resolved through either a formal evidentiary proceeding or in a summary fashion. Therefore, OAG respectfully requests that the Commission extend the July 22 control date until August 18 (10 days after the proposed date for the submission of all OAG information requests).

Filings to be considered on the relevance of the State Environmental Quality Review Act OAG respectfully refers Your Honors to its April 7, 2008 filing entitled *Objections to Entergy's Petition for Approval of Corporate Reorganization and Financing, and Motion Urging Rejection of Entergy's Petition or, in the Alternative, a Full Hearing with Discovery*, in its entirety and in particular pages 26 - 29, for discussion of the relevance of the State Environmental Quality Review Act.

Additional arguments concerning the relevance of the State Environmental Quality Review Act At this juncture it is premature to brief definitively whether an environmental impact statement would be required pursuant to the State Environmental Quality Review Act (SEQRA), as discovery has not yet concluded. However, as discussed below, SEQRA plainly applies here.

SEQRA requires agencies to confront the possible environmental effects of a discretionary action before taking that action and to minimize negative environmental effects. Under SEQRA, the lead agency "having principal responsibility for carrying out or approving" an action regulated under the statute must determine if the action "may have a significant effect on the environment." ECL § 8-0111(6). If so, the agency must prepare a draft environmental impact statement, which is subject to comment and review before being finalized. ECL § 8-0109(5). If not, the agency's environmental review is complete after it determines the action will not have a significant environmental impact (or that the action is otherwise precluded from environmental review).

In its *Order* of May 23, 2008, the Commission found that "[t]he public interest ... requires a more thorough review of this transaction than would be conducted under the Wallkill Presumption" and overrode the Presumption. PSC Case 08-E-0077, *Order Establishing Further Procedures* (issued and effective May 23, 2008) at 6. In the absence of lightened regulation, there is no question but that the Commission is compelled to comply fully with SEQRA. Under

SEQRA the standard for requiring an environmental impact statement is whether a proposed State action may have a significant impact on the environment, not whether an action is certain or likely to have an impact. ECL § 8-0109(2); *see, e.g., Onondaga Landfill Systems, Inc. v. Flacke*, 81 A.D.2d 1022, 440 N.Y.S.2d 788 (4th Dept. 1981).

The State of New York has a substantial interest in ensuring compliance with SEQRA, in the full consideration of environmental effects before projects move forward, and in the mitigation of those effects in order to preserve the State's environment. One concern that the State of New York has here is the possibility of inadequate funds to remediate and/or decommission Indian Point's three reactors and subsurface contamination. On top of the formulaic, non-site specific financial assurances Entergy is required to make under the Nuclear Regulatory Commission's regulations, the amount of which is currently approximately \$1 billion, a well-documented subsurface plume of radioactive contamination – which is leaching into the Hudson River – will likely raise Indian Point's decommissioning costs to an unprecedented amount. Indeed, actual decontamination costs have already gone far beyond estimates at other facilities: Connecticut Yankee's owner began the plant's decommissioning in 1996 with \$427 million set aside for the job, but found that unforeseen work, in particular the unanticipated need to remove a significant quantity of soil contaminated with radioactivity, *more than doubled* the decommissioning costs.¹ The public has the right to know that Entergy (or Enexus) recognizes how much this decommissioning and decontamination might cost, and that it is prepared to shoulder that cost; moreover, the public may be entitled to an analysis of the possible environmental consequences if Entergy or Enexus is not able to shoulder those costs. If a plant owner goes bankrupt, the Nuclear Regulatory Commission is without the authority to order decommissioning payments to be made.²

Any claim that full SEQRA review is not appropriate here ignores both the adverse impacts of the proposed reorganization and debt issue on the financial resources and the revenue available to mitigate the environmental and safety risk of operating Entergy's New York nuclear power plants, and the alternatives that might further mitigate the environmental and safety risk of operating Indian Point.

Moreover, Enexus' total reliance on revenue from its nuclear plants could threaten the financial resources needed to mitigate the environmental and safety risk of operating Indian Point. In contrast, as presently configured, Entergy can draw revenue from merchant nuclear

¹ The Connecticut Yankee Post Shutdown Decommissioning Activities Report is available at <http://www.connyankee.com/assets/pdfs/Document1.pdf> and the Haddam Neck Plant License Termination Plan in the Nuclear Regulatory Commission's electronic files, accessible at <http://www.nrc.gov/reading-rm/adams.html>, at ML063390404.

²*See* David Schlissel, Paul Peterson, and Bruce Biewald, Financial Insecurity: The Increasing Use of Limited Liability Companies and Multi-Tiered Holding Companies to Own Nuclear Power Plants (Aug. 7, 2002) at 28 (available at <http://www.riverkeeper.org/dyn-content/documents/9233d4ee9a39c579.pdf>).

plants, regulated utility nuclear plants, non-nuclear plants, power transmission and retail electric service. As this Commission has noted, “the owner of these plants should demonstrate it possesses or can obtain the capital necessary to continue operation of the plants if unexpected contingencies arise.” PSC Case 08-E-0077, *Order Establishing Further Procedures* (issued and effective May 23, 2008) at 5. A major disruption in the operation of one or more of Enexus’ plants would both make a large demand on Enexus’ finances and significantly reduce the power sales and operating company revenue providing those finances. Other than one contract to operate another entity’s plant in Nebraska, the proposed nuclear operating company that Enexus would half-own would dependent on fees from operating Enexus plants. In contrast, as part of Entergy, Indian Point would have access to the dividend revenue Entergy receives from its regulated utility subsidiaries, as well as its revenue from merchant plants and plant operation services. SEQRA requires the Commission to take all of this information into account in determining whether this action may have a significant environmental impact.

Furthermore, allowing Entergy to deprive the New York Power Authority of significant financial payments could well have a significant environmental impact. As Entergy has made crystal clear to the SEC and to the PSC, the proposed corporate “reorganization” will result in the termination of substantial cash payments to the New York Power Authority. See Entergy 2007 Statement to Shareholders at p. 85; Enexus May 12, 2008 Form 10 Filing and Information Statement Attachment with the Securities and Exchange Commission, at p. 69. Initially, the cut-off of such financial payments likely will impede NYPA’s ability to comply with the energy efficiency and renewable energy objectives contained in New York State’s initiative to reduce energy consumption by 15 percent by 2015 (the “15 x 15 Initiative”).³ Moreover, NYPA’s mandate includes providing clean energy and fostering energy efficiency. Currently, NYPA is pursuing various energy efficiency and renewable energy initiatives, including, by way of example:

- Energy Services Programs (“ESP”) that form the centerpiece of the Authority’s conservation efforts,
- the Authority’s program to replace old, polluting coal-fired furnaces at public schools around the New York State,
- Authority-sponsored “energy-saving projects at local, county and state government facilities, public schools and state university campuses,”
- the Authority’s “refrigerator replacement program, which helps municipalities provide energy efficient refrigerators to public housing residents,”

³Indeed, the PSC has recognized that the 15 x 15 Initiative imposes obligations upon NYPA. See PSC Proceeding No. 07-M-0548 - Energy Efficiency Portfolio Standard, *Order Establishing Energy Efficiency Portfolio Standard and Approving Programs*, issued June 23, 2008, at p. 9, n. 6.

- the Authority’s “program providing for the design, engineering and installation of various types of energy-efficient chillers.”⁴

The Power Authority “works with facility managers to identify, design and install new lighting and motors, as well as upgrades to heating, ventilation and air-conditioning systems.” *Id.* The Authority also is pursuing “efforts to develop innovative technologies for the generation and transmission of electricity.”⁵ For example, “[w]ith 27 photovoltaic (PV) projects under [NYPA’s] belt thus far, and a combined capacity of 662 kw, [NYPA is] responsible for 40 percent of the solar installations in New York City.” *Id.* The State Environmental Quality Review Act compels the PSC to thoroughly review the environmental impacts that could flow from the cut off of Entergy’s financial payments to NYPA.

The situation at hand is not suitable for the “short-form” Environmental Assessment without public notice and opportunity to comment that the PSC has accepted in matters involving transfer of owner interest in corporations and other entities with title to small fossil, biomass or hydroelectric generating facilities. *See, e.g.*, Case 07-E-0300 - Rensselaer Cogeneration LLC, Bison Power LLC, and Rensselaer Holdings LLC, *Order Approving Transfer and Providing For Lightened Regulation* (issued and effective May 21, 2007) (79.4 MW gas fired plant); Cases 06-E-1301- WPS Empire State, Inc., WPS Niagara Generating LLC and USRG Niagara Biomass LLC & 06-E-1307 - USRG Biomass LLC - *Order Approving Transfer and Financing* (issued and effective January 22, 2007)(53 MW solid fuel plant); and Case 04-E-0789, Orion Power Holdings, Inc. and Great Lakes Power, Inc., *Order Approving Transfers and Financing and Making Other Findings* (issued and effective September 22, 2004)(72 hydroelectric facilities with a combined capacity of 674 MW and a 102 MW combined-cycle cogeneration plant). The potential environmental impacts from a problem at the Indian Point nuclear power plants – which inevitably face extensive decommissioning and decontamination costs under any ownership scenario – are significantly greater than at smaller hydroelectric plants. With so much at risk, a summary look at the potential environmental consequences of the proposed reorganization is not appropriate.⁶

⁴See NYPA website: <http://www.nypa.gov/services/esp.htm> (last visited July 14, 2008).

⁵See NYPA website: <http://www.nypa.gov/services/newtechnology.htm> (last visited July 14, 2008).

⁶ Moreover, it does not appear that “short-form” SEQRA review is appropriate for transfers of the owner interest in entities with title to non-nuclear facilities either. *See Niagara Mohawk Power Corp. v. Green Island Power Auth.*, 265 A.D.2d 711, 712 (3d Dep’t 1999), *appeal dismissed*, 94 N.Y.2d 891 (2000)(in which the court found that while ownership of a power facility would ostensibly result in operation of the plant in the same manner under a proposed new owner, the new owner questionable ability to safely run the plant required a “hard look” under SEQRA and “‘a reasoned elaboration’ of the basis for [the PSC’s] determination”).

Thank you for attention and consideration.

Respectfully submitted,

L/S

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cc: Service list