RIVERKEEPER®

September 15, 2008

VIA REGULAR MAIL
Hon. Jaclyn A. Brilling
Secretary
New York State
Department of Public Service
Three Empire State Plaza
Albany, New York 12223

Re: Case 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 Secretary Brilling:

Enclosed for filing are the original and five copies of Riverkeeper, Inc.'s Comments in response to the August 14, 2008 Ruling on Discovery, Process, Schedule and Scope of Issues in the above-reference proceeding, in redacted form, pursuant to Judge Lynch's instructions in the August 14 Ruling. Complete and redacted versions of this filing are being served via electronic mail on all active parties, depending upon their status regarding receipt of information claimed exempt.

Thank you for your attention and consideration.

Respectfully,

Phillip Musegaas

Phillip Musegaas, Esq.
Policy Director

828 South Broadway, Tarrytown, NY 10591 • 914.478.4501 • f: 914.478.4527 • www.riverkeeper.org

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September 15, 2008

NEW YORK STATE
PUBLIC SERVICE COMMISSION

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Proposed Corporate Reorganization
of Entergy Corporation, et al.
and Related Debt Financing

PSC Case No. 08-E-0077

ALJ Gerald Lynch

ALJ David Prestemon

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**RIVERKEEPER, INC. COMMENTS IN RESPONSE 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. Summary of Comments

Riverkeeper, Inc. (hereinafter "Riverkeeper") submits the following comments pursuant to the above-referenced Rulings, Sections §69 and §70 of New York's Public Service Law. In the August 14, 2008 Ruling on Discovery, Process, Schedule and Scope of Issues (hereinafter "August 14 Ruling") Your Honors invited comments from the parties in this proceeding on six issues. August 14 Ruling at 30-31. Riverkeeper addresses four of those six issues in the following comments, as well as additional issues currently in dispute in this proceeding. Based on these comments, Your Honors should recommend to the Public Service Commission (hereinafter "Commission") that Entergy's Petition be denied, for the following reasons.

- Enexus will be even less able than Entergy to meet all financial obligations related to the ownership and operation of the Indian Point and Fitzpatrick plants, because Entergy has failed to demonstrate that Enexus will have the resources to fully decommission Indian Point and return the site to

"unrestricted use" as required by Nuclear Regulatory Commission rules and New York State Law. *See* August 14 Ruling at 30, Issue i.

- Entergy has failed to demonstrate that Enexus will have the financial resources to fulfill "other obligations associated with the ownership and operation of the plants," because there is no evidence that Entergy has assessed or included the costs of several large-scale capital improvements to the Indian Point plants, including the construction of cooling towers and the replacement of reactor pressure vessel heads and nozzles. *See* August 14 Ruling at 30, Issue ii.
- The appropriate standard of review for the public interest determination required under PSL §70 is the "positive net benefit" standard recently adopted by the Commission in the *Iberdrola* proceeding. *Iberdrola S.A.,* Case 07-M-0906 (September 9, 2008) (Abbreviated Order). Under this standard, Entergy has failed to show that the corporate reorganization proposed in its Petition would result in a "positive net benefit" for the ratepayers and citizens of New York.

**II. Issue i: If the proposed transaction is approved, will the ability of Enexus to meet all financial obligations related to the ownership and operation of the Fitzpatrick and Indian Point plants differ from that of Entergy, currently, and if so, to what extent?**

**Riverkeeper Response:** Enexus will be even less able than Entergy, under its current corporate structure, to meet all financial obligations related to the ownership and operation of the Indian Point plants, because Entergy has failed to demonstrate that Enexus will have the resources to fully decommission Indian Point and return the site to "unrestricted use" as required by Nuclear Regulatory Commission rules and New York State Law.

Riverkeeper shares the concerns of the New York Attorney General (hereinafter "AG") regarding the reduction in financial resources and increased debt accorded to Enexus and its subsidiaries if the proposed transaction is approved. *See* April 7, 2008 Letter from OAG to the Public Service Commission objecting to Entergy's Petition (hereinafter "April 7 OAG Letter"). In its original Petition and subsequent filings and discovery responses, Entergy acknowledges that Enexus will take on approximately $4.5 billion in debt, without the financial support of the former parent company, Entergy Corporation. *See* AG-25, AG-46. In response, Entergy offers the $700 million Support Agreement, and **BEGIN EXEMPT MATERIAL** **END EXEMPT MATERIAL**, as proof that Enexus will have the financial resources in the future to both operate the plants safely and decommission them properly at the end of their operating life. *See* DPS-14 (EN-45).

However, the $700 million Support Agreement (hereinafter "Agreement") is intended to be used by all six merchant plants, and is based on "an estimate of the amount required to fund the fixed operating costs of all six operating units during an assumed six (6) month outage of all six (6) units." EN-45, Response to DPS-14, Reply June 23, 2008. Entergy goes on to state the following.

> "[T]he *entire $700 million is available to each of the operating LLCs if needed*, maintaining the facilities safely and protecting the public health and safety and to meet NRC requirements. In the ordinary course of business, it would be expected that Enexus will assure that its subsidiaries have adequate working capital through access to credit facilities, or, if necessary, through capital contributions or intra-company loans. For each of the operating companies, it is not expected that the terms of the $700 million Support Agreement would be invoked in the ordinary course of business."

EN-45 (emphasis added). Based on this explanation, the Agreement is intended to provide a finite amount of financial resources for unforeseen costs related to the safe operation of the plants that arise outside the "ordinary course of business." However, Entergy does not explain what would happen if a single plant suffered an extended shutdown of greater than six months. At that point, that facility's allotment of the total, however informal the division is, would be exceeded, thereby diminishing the amount of funds available to the remaining plants. Entergy is taking a calculated risk, assuming that at worst, only one or two plants will suffer extended shutdowns lasting longer than six months, while the remaining plants will operate at peak capacity.

While this level of financial risk allotment may be sufficient for the NRC, it should not be for the Commission, given the fact that the availability of the $700 million in the Agreement is apparently premised on Enexus' future earnings. *See* DPS-10 (EN-41). These future earnings projections are in turn premised upon all six plants operating at peak capacity, without significant unforeseen costs or extended shutdowns. In other words, Enexus is depending on these six plants operating at peak capacity in the future, in order to provide funding for the Agreement that will be available if they don't. Entergy should not be allowed to rely on this circular logic to provide support for a proposed reorganization that, by all appearances, is a house of cards built on a wish and a prayer.

While the Commission may not have the authority under the Public Service Law to impose any additional requirements on Entergy in its current iteration as owner and operator of Indian Point, the Commission does have the authority under $70 of the PSL to ensure that any transfer of ownership is "in the public interest." Given the encumbrance of debt and the inherent

shortcomings of the Support Agreement to address future operational problems, there is no doubt that Entergy has failed to meet this standard.

The risks inherent in Entergy's proposed reorganization are compounded by the fact that, if the proposed transaction is approved, Indian Point will be owned and operated by a corporation that has less resources than the current ownership to ensure that adequate funding exists to properly decommission the site at the end of the plants' operating life. As explained below, **BEGIN EXEMPT MATERIAL***

***END EXEMPT MATERIAL*** Entergy's most recent public disclosure regarding the amount of funds in its decommissioning fund for the Indian Point reactors is contained in a May 8, 2008 letter from Entergy to the NRC. (hereinafter "May 8 Decom Report").[1] Attachments 1, 2 and 3 of the letter are the Decommissioning Fund Status Reports for Indian Point Nuclear Generating Units Nos. 1, 2 and 3, respectively. The following table, entitled Table Rk-1, summarizes the information found in the May 8 Decom Report regarding Indian Point Units 1, 2 and 3.

[1] Letter from John F. McCann, Director, Nuclear Safety and Licensing, Entergy Nuclear Operations to the U.S. Nuclear Regulatory Commission, *Decommissioning Fund Status Report,* May 8, 2008, ADAMS Accession #ML081420032.

TABLE RK-1 Summary of Decommissioning Funding for the Indian Point Reactors

| | Indian Point 1 | Indian Point 2 | Indian Point 3 |
|---|---|---|---|
| Amount of decommissioning funds estimated to be required pursuant to 10 CFR 50.75 (b) and (c). | $317.09 million | $382.83 million | $382.83 million |
| Decommissioning cost estimate escalated at 3.0% per year to the midpoint of decommissioning (December 2016 for IP1 and 2; December 2018 for IP3). | $413.72 million | $499.51 million | $529.93 million |
| Amount accumulated to the end of the calendar year preceding the date of the report (December 31, 2007). | $271.19 million | $347.20 million | $468.32 million |
| Fund balance with 5.0% annual growth to the midpoint of decommissioning (December 2016 for IP1 and 2, December 2018 for IP3). | $420.70 million | $538.62 million | $800.98 million |

As shown above, these funding estimates are based on the assumption that decommissioning is underway by December 2016 for Indian Point 1 and 2, and December 2018 for Indian Point 3. Entergy does not provide any information supporting its use of a projected 5% annual growth rate for the decommissioning funds, or explaining how this rate is calculated.

In response to Discovery Request AG-13, Entergy submitted a decommissioning cost analysis (hereinafter "Decom Analysis") for the Indian Point Energy Center, but designated it as "Confidential Trade Secret Information" available only to ALJs Lynch and Prestemon, and those

parties who had executed Exhibit 2s pursuant to the June 17, 2008 Protective Order as Attachment 1 to AG-13.[2] Riverkeeper executed the proper Exhibit 2s and sent them to Entergy counsel via electronic mail on August 14, 2008. **BEGIN EXEMPT MATERIAL***

[2] **BEGIN EXEMPT MATERIAL*** **END EXEMPT MATERIAL***

***END EXEMPT MATERIAL***On the contrary, Enexus will have diminished financial resources compared to Entergy, based on its assumption of $4.5 billion in debt and its unreasonable reliance on the $700 million Support Agreement to fund unforeseen capital and operating costs.

## III. Issue ii: If the proposed transaction is approved, will the ability of Enexus to fulfill other obligations associated with the ownership and operation of the plants be affected?

**Riverkeeper Response:** Entergy has failed to demonstrate that Enexus will have the financial resources to fulfill "other obligations associated with the ownership and operation of the plants," because there is no evidence that Entergy has assessed or included the costs of several large-scale capital improvements to the Indian Point plants, including the construction of cooling towers and the replacement of reactor pressure vessel heads and nozzles.

The issue of whether Entergy has assessed the costs of designing and constructing a closed-cycle cooling system at Indian Point was raised by the AG and Assemblyman Brodsky in this proceeding. *See* AG-51(EN-76), RB-6 (EN-110). In its response to AG-51, Entergy acknowledges that "forecasts do not include any capital expenditure for constructing cooling towers at Indian Point Energy Center ("IPEC")." EN-76. Entergy goes on to describe the results of a study prepared in 2003 by Enercon, a nuclear engineering firm, estimating the costs of retro-fitting Indian Point with closed-cycle cooling. *Id.* According to Entergy, the Enercon report found that "the capital costs alone, subject to several significant uncertainties, were then estimated at $740 million dollars." *Id.* The additional costs of lost generation would bring the

estimated total cost to over a billion dollars. *Id.* Entergy describes these estimates as "conservative." *Id.* However, Entergy fails to include these cost estimates in any forecasts of future capital expenditures at Indian Point, and offers no explanation for this omission. The inclusion of such cost considerations is critical in this proceeding, because it directly implicates Enexus' future ability, or lack thereof, to comply with future regulatory requirements that result in large capital expenditures.

Entergy's decision to omit this potential capital expenditure from its future financial projections is unreasonable, because it ignores the fact that the State of New York issued a draft SPDES permit in 2003 requiring the installation of closed cycle cooling at Indian Point, if the plant's operating licenses are renewed for an additional twenty year term.[3] Entergy subsequently challenged the draft permit in an administrative proceeding that is still ongoing.[4] Regardless of the outcome of that proceeding at some future date, simple due diligence requires that Entergy, and subsequently Enexus, must consider the costs of a closed-cycle cooling system in their financial projections. This is particularly relevant to this proceeding, considering Entergy's reliance on the $700 million Support Agreement to cover the costs of specifically this type of future regulatory requirement.

Entergy also fails to include any assessment of the cost of replacing the reactor pressure vessel heads and nozzles for Indian Point 2 and 3, a potentially significant future capital expenditure detailed in a May 14, 2008 letter from Entergy to the NRC.[5] The NRC Staff had received information confirming that Doosan Heavy Industries is planning to deliver

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[3] *See Fact Sheet, New York State Pollutant Discharge Elimination System Draft Permit Renewal with Modification,* Indian Point Electric Generating Station, Buchanan, NY- November 2003.

[4] Current information on the status of the Indian Point SPDES proceeding can be found on the DEC website at http://www.dec.ny.gov/permits/40237.html, last accessed September 14, 2008.

[5] Letter from Fred Dacimo, Vice President, Entergy Nuclear Northeast, to U.S. NRC, *Reply to Request for Additional Information Regarding License Renewal Application – Refurbishment*, May 14, 2008.

replacement reactor pressure vessel heads ("RPV") and control rod drive mechanisms for Indian Point 2 and 3 to Entergy in 2011 and 2012, respectively.[6] Entergy responded that a final decision whether to replace the vessel heads would be made based on "economic criteria."[7] The process of replacing the RPVs involves the addition of up to 250 additional workers, the construction of a new storage building for the old RPVs, and the transport of the new RPVs to Indian Point via barges on the Hudson River.[8] The actual replacement of the RPVs would require cutting an opening in the containment structures to allow room for the removal and replacement.[9]

Clearly, the process of replacing the RPVs is a major investment in time, staffing and resources that should be included in Entergy, and Enexus' future projections of capital expenditures at Indian Point. Existing projections of capital expenditures that do not include this potential project are incomplete and should be disregarded by the Commission.

## IV. Issue v: For a transaction of the type proposed in this case, what is the appropriate standard of review for the public interest determination required under PSL § 70?

**Riverkeeper Response:** The appropriate standard of review for the public interest determination required under PSL §70 is the "positive net benefit" standard recently adopted by the Commission in the *Iberdrola* proceeding. *Iberdrola S.A.,* Case 07-M-0906 (September 9, 2008) (Abbreviated Order).

In its May 23, 2008 Order Establishing Further Procedures in the instant proceeding, the Commission declined to apply the Wallkill presumption to the proposed transaction, and set procedures for a "more searching enquiry." Order Establishing Further Procedures, Case 08-E-

[6] *Id.* at 1.
[7] *Id.* at2.
[8] *Id.* at 3-5.
[9] *Id.*

0077, Public Service Commission, May 23, 2008 (hereinafter "May 23 Order"). The Commission found that

> The transfer of nuclear facility ownership and debt issuances that Entergy proposes may affect the public interest. As the commentators point out, the owner of nuclear facilities must retain over the long term the access to financial resources adequate to support the de-commissioning of those facilities. In addition, the owner of these plants should demonstrate it possesses or can obtain the capital necessary to continue operation of the plants if unexpected contingencies are encountered. The owner must also show that the arrangements it has made for maintaining, managing and operating the plants are sufficient to preserve the availability of generation supply.

May 23 Order at 5. The Commission commented on the "potential for substantial impacts on the New York nuclear facilities that are unique in characteristics and of crucial importance to preserving the adequacy of generation service to New York ratepayers." *Id.* at 6.

In their August 14 Ruling, Judges Lynch and Prestemon propose three possible standards of review that could be applied in the instant case.[10] Of the "net positive benefit" standard, the Ruling cites its use in the *Iberdrola* proceeding, which continued the Commission's practice of applying this standard to its evaluation of merger and acquisition cases. August 14 Ruling at 28.

On September 9, the Commission issued an Order in the *Iberdrola* proceeding approving the merger of Iberdrola and EnergyEast, in which the Commission applied the "net positive benefit" standard of review. *Iberdrola S.A.*, Case 07-M-0906, at 2. The Commission weighed the benefits arising from the transaction, such as increased production of renewable generating resources and divestiture of fossil-fuel generating plants, against the potential detriments posed by the financial risks that would result. *Id.* at 8. The Commission noted that "the financial risks

[10] The three proposed standards are "(a) the transaction must generate a net positive benefit for the citizens of the state; (b) the transaction must leave the people of the state no worse off than they were before it was consummated; or (c) the transaction must not jeopardize the ability of the owners of the transferred facilities to meet their public interest obligations to provide safe and reliable service." August 14 Ruling at 27.

in turn pose a threat that the merged companies will have difficulty maintaining appropriate levels of safety, reliability and customer service performance." *Id.* However, the Commission approved the transaction after imposing conditions relating to the company's financial structure, corporate governance and increased regulatory monitoring. *Id.*

Entergy's Petition for reorganization presents similar risks to the ratepayers and citizens of New York. As noted in Section II, the proposed transaction will result in the formation of a new company, Enexus, burdened with $4.5 billion dollars in debt and less financial stability and assets than under the current corporate structure. In addition, there is no indication that Enexus will have adequate financial resources at its disposal to address future large capital expenditures and eventual decommissioning of the Indian Point site. Indeed, **BEGIN EXEMPT MATERIAL*** **END EXEMPT MATERIAL*** should give rise to a higher level of scrutiny from the Commission than merely the "do no harm" standard. *See* August 14 Ruling at 29. Entergy's acknowledged failure to include the significant future costs of installing closed-cycle cooling and other capital expenditures in its future financial projections raises genuine concerns regarding the adequacy of Entergy's proposed reorganization. Just as it did in the *Iberdrola* proceeding, the Commission should apply the high scrutiny of the "net positive benefits" standard in this case, in order to ensure that Entergy/Enexus' post reorganization financial profile and corporate structure are sufficiently robust to not only maintain, but improve, the operation and future decommissioning of the Indian Point plants. The Commission's practice of "balancing of interests between shareholders and ratepayers that is at the core of traditional ratemaking

principles[.]"[11] in cases involving fully-regulated utilities should be extended to this proceeding, in order to provide for a thorough examination of the significant public interest issues arising from Entergy's proposed transaction. Applying this standard would also be consistent with the Commission's decision not to apply the Wallkill presumption in this proceeding, recognizing the fact that "nuclear facilities have a greater impact on the public interest than hydro and fossil facilities" and "will be subject to more requirements under [the PSL] than other forms of generation." May 23 Order at 4, citing Case No. 01-E-0113, *Entergy Nuclear Operations, Inc., et al,* Order Providing for Lightened Regulation of Nuclear Generating Facilities, August 31, 2001.

**V. Riverkeeper Comments on Information Claimed Exempt**

In regards to potential disputes over the status of information claimed exempt by Petitioner, the August 14 Ruling stated that "[T]o the extent a party includes information claimed exempt in its first set of further comments, any arguments about the proper final status of such information should be set forth there." August 14 Ruling at 19. Pursuant to that instruction, Riverkeeper hereby supports the New York AG's September 5, 2008 motion to the Commission requesting the removal of the confidential designation applied by Entergy to documents pertaining to the cost of decommissioning its nuclear power reactors, provided in response to OAG Information Request AG-13, and respectfully requests that the Administrative Law Judges (hereinafter "ALJ") grant the relief requested by OAG and require that the information be made public. *See* Motion by the Office of the Attorney General and Assemblyman Richard Brodsky to Remove Entergy's Provisional Designation of Certain Documents as "Confidential," PSC Case No. 08-E-0077, September 5, 2008 (hereinafter "OAG Motion"). Riverkeeper specifically

[11] August 14 Ruling at 28.

supports the first two prongs of OAG's argument, namely that Entergy did not sustain its burden to support its initial confidentiality claim in June 2008, and that Entergy publicly disclosed a recent decommissioning cost analysis for the Vermont Yankee facility in a proceeding before the State of Vermont Department of Public Service. OAG Motion at 1.

The good faith nature of Entergy's claim of confidentiality for decommissioning cost analyses of all its nuclear plants was belied by the fact that the analysis for the Vermont Yankee plant had already been made public. In fact, Entergy counsel sent a link to an electronic version of the Vermont Yankee decommissioning analysis that is publicly available on the NRC's ADAMS database to all active parties on September 10, 2008 in response to Judge Prestemon's request that the analysis be made available to the parties.[12] Certainly Entergy was aware the Vermont Yankee analysis had been made public on ADAMS, yet it continued to claim confidential status for this information.

Entergy's attempt to distinguish the Vermont Yankee study from the other decommissioning analyses is unpersuasive.[13] Entergy claims that the Vermont Yankee analysis was prepared for compliance with NRC regulations, while the other analyses were prepared "for internal purposes only." Entergy Response to OAG Motion at 2. However, **BEGIN EXEMPT MATERIAL*** **END EXEMPT MATERIAL*** the Vermont Yankee analysis describes eight different scenarios for decommissioning which evaluate "a combination of shutdown dates (scheduled and

[12] *See* e-mail from Greg Nickson, Entergy Counsel to all active parties and ALJs in Case 08-E-0077, *RE: Case 08-E-0077 - Entergy - Ruling concerning disclosure of decommissioning studies,* sent September 10, 2008.
[13] *See* September 9, 2008 Letter from Entergy Counsel to the ALJs and all active parties responding to the OAG Motion of September 5, 2008, at 3 (hereinafter "Entergy Response to OAG Motion"). The letter was sent to parties in complete and redacted forms.

anticipated), decommissioning alternative (prompt or deferred), and expectations of the DOE's performance in transferring spent fuel from the site to a federal repository." Letter from Entergy Nuclear Operations to NRC, *Vermont Yankee Nuclear Power Station License No. DPR-28 (Docket No. 50-271) Report pursuant to 10CFR50.75(f)(3)*, February 6, 2008 at 13 (hereinafter "Vermont Yankee analysis"). **BEGIN EXEMPT MATERIAL***

**END EXEMPT MATERIAL*** For these reasons, the Administrative Law Judges should remove the confidential designation from the Indian Point Decom Analysis, and require Entergy to make it publicly available.

## VI. Conclusion

For the foregoing reasons, Riverkeeper urges the Judges to recommend to the Commission that Entergy's Petition be denied, or in the alternative that an evidentiary hearing be held and the "net positive benefit" standard of review be applied to this transaction pursuant to PSL §70.

Respectfully,

Phillip Musegaas

Phillip Musegaas, Esq.
Riverkeeper, Inc.

Cc: Active Parties List (via Electronic Mail)

September 15, 2008