

Chapter 5: Prior Regulatory Commitments of ENVY and Entergy

In conjunction with its purchase of VYNPS, ENVY and its Entergy affiliates made numerous regulatory commitments for the benefit of Vermont ratepayers. Subsequent to its purchase of VYNPS, ENVY and its Entergy affiliates made additional commitments for the benefit of Vermont ratepayers. A summary of these commitments is provided in Attachment 1. However, many of these previous commitments apply only during the period of the current VYNPS operating license from the Nuclear Regulatory Commission, which expires March 21, 2012. In addition, while important for other reasons, a number of these commitments are essentially procedural or informational in character and not readily susceptible to economic evaluation. Accordingly, the purpose of this Chapter of the Report is to review those previous ENVY commitments which are susceptible to economic evaluation and would apply during any license extension period beyond March 21, 2012.

A. ENVY Economic Commitments Extending Beyond March 21, 2012

These ENVY commitments may be grouped into three general categories: Purchased Power; Termination of Commercial Operations and Decommissioning; and Spent Fuel and Other Nuclear Waste.

1. Purchased Power

The previous ENVY commitments extending beyond March 21, 2012, with perhaps the most immediate economic implications for Vermont ratepayers are those relating to the purchase of power from VYNPS during an extension of the plant's NRC operating license.

ENVY's prior commitments do not obligate the Company to sell VYNPC any power from VYNPS during an extension of the plant's NRC license. Instead, ENVY is committed only to provide VYNPC with reasonable notice of the availability of energy and capacity as result of license extension and to provide VYNPC with a commercially reasonable opportunity to negotiate on an exclusive basis for 30 days to purchase available energy and capacity. The only ENVY obligations to VYNPC regarding this negotiating opportunity are notice and good faith bargaining; otherwise, ENVY is free to sell VYNPS power during license extension to any

purchaser on any terms (including at any price).¹

Even though ENVY's prior commitments do not obligate the Company to sell VYNPC any power from VYNPS during an extension of the plant's NRC license, ENVY is obligated to share revenues from the sale of VYNPS power during a license extension, whether the power is sold to VYNPC, another PPA customer, or the market. In particular, ENVY is committed to share fifty percent (50%) of any "Excess Revenues" with VYNPC for ten years commencing March 13, 2012. The term "Excess Revenues" means the difference between VYNPS's average price (in \$/MWh) during a fiscal year and the "Strike Price" (also in \$/MWh) for the fiscal year times the total MWh sold from VYNPS by ENVY during the fiscal year. The "Strike Price" is \$61/mWh escalated on March 13, 2013 and each March 13 thereafter by an annual "Escalation Factor" calculated based on the weighting of the increases in three cost indices: Employment Cost Index (ECI), weighted 60%; Gross Domestic Product Implicit Price Deflator (GPD-IPD), weighted 25%; and Nuclear Fuel Market Index (NFMI), weighted 15%.²

2. Termination of Commercial Operations and Decommissioning

The previous ENVY commitments extending beyond March 21, 2012, with perhaps the most long-term economic implications for Vermont ratepayers are those relating to the termination of commercial operations and eventual decommissioning of VYNPS following the expiration of an extension of the plant's NRC operating license. Of course, ENVY's principal obligations with respect to the decommissioning of VYNPS are established in general terms by federal law and defined in specific detail by NRC regulations. However, there are five additional commitments previously made by ENVY with economic implications for Vermont ratepayers which extend beyond March 21, 2012.

First, throughout any license extension period and thereafter until decommissioning of the VYNPS has been completed, ENVY will be responsible for all costs of security for VYNPS. However, during decommissioning, ENVY will have the right to use funds from the VYNPS

¹ See Docket 6545, Sale Memorandum of Understanding, March 4, 2002, ¶ 1(a) [hereafter Sale MOU].

² See Sale MOU, *supra* note 1, ¶ 4.

Decommissioning Trusts to pay for such security.³ Additionally, ENVY will not file any action or petition based on or otherwise seek, claim, defend, or rely on the doctrine of federal preemption to prevent enforcement of this obligation.⁴

Second, at the time VYNPS is to be removed from commercial operation, ENVY shall provide enhanced financial security in the form of a specified Entergy Corporation guarantee and an EIHL-ENVY Intercompany Credit Agreement in an amount not less than \$60 million to assure funds will be available to it prior to decommissioning funds becoming available.⁵

Third, at the time of the evaluation of the VYNPS decommissioning funds in connection with submission to the NRC of the post-shutdown decommissioning activities report for the plant, ENVY is committed to provide additional funds or other acceptable financial assurance as needed to ensure that funding will be sufficient to accomplish decommissioning, including site restoration and spent fuel management to the extent committed in the Sale Docket.⁶

Fourth, in the event that “Completion of Decommissioning” is delayed beyond March 31, 2022, any “Excess Funds” remaining in the decommissioning trust funds transferred from VYNPC to ENVY at the closing of the sale of VYNPS (including any gains, losses or fees on the funds while owned by ENVY) shall be shared between ENVY and Vermont electric consumers. “Completion of Decommissioning” includes dismantlement and decontamination but excludes spent fuel management and site restoration. “Excess Funds” means any funds remaining in the trust funds following “Completion of Decommissioning,” except for funds required for spent fuel management and site restoration costs not otherwise paid by the federal government. Vermont consumers’ share of “Excess Funds” would be fifty-five percent (55%), with that share distributed pro rata among customers of VYNPC owners in proportion to their ownership shares. Sharing of “Excess Funds” shall occur upon the occurrence of the earlier of (a) ENVY’s completion of its VYNPS spent fuel management and site restoration obligations, or (b)

³ See Docket 7082, Dry Cask Memorandum of Understanding, June 21, 2005, ¶ 10 [hereafter Dry Cask MOU].

⁴ See Dry Cask MOU, *supra* note 3, ¶ 12.

⁵ See Sale MOU, *supra* note 1, ¶ 13, Exhibits A, B.

⁶ See *id.*, ¶ 9.

settlement, final adjudication, or satisfactory performance of DOE's spent fuel management obligations with respect to VYNPS.⁷

Fifth and finally, ENVY is committed to perform "site restoration" once the VYNPS site is no longer used for nuclear purposes or non-nuclear commercial, industrial or other similar uses. "Site restoration" means removal of all structures and, if appropriate, regrading and reseeded of the land.⁸

3. Spent Fuel and Other Nuclear Waste

The previous ENVY commitments extending beyond March 21, 2012, with perhaps the most uncertain economic implications for Vermont ratepayers are those associated with spent nuclear fuel (SNF) and other nuclear waste. As with decommissioning, ENVY's principal obligations with respect to the spent fuel and other nuclear waste are established in general terms by federal law and defined in specific detail by NRC regulations. However, there are four additional commitments previously made by ENVY with economic implications for Vermont ratepayers which extend beyond March 21, 2012:

a. ENVY will use its commercial best efforts to assure that spent fuel is removed from the VYNPS site in a reasonable manner and as quickly as possible rather than being stored at VYNPS.⁹

b. ENVY will not store nuclear waste generated outside of the State of Vermont at VYNPS.¹⁰

c. ENVY will configure the spent-fuel pool so that high-decay-heat assemblies of SNF are surrounded by low-decay-heat assemblies of SNF.¹¹

⁷ See *id.*, ¶ 3, as modified in Docket 6545, PSB Final Order, Jun. 13, 2002, at 11-12.

⁸ See *id.*, ¶¶ 9, 3.

⁹ See *id.*, ¶ 11; see also Dry Cask MOU, *supra* note 3, ¶ 8.

¹⁰ See Dry Cask MOU, *supra* note 3, ¶ 7.

¹¹ See *id.*, ¶ 9.

d. ENVY will not file an action or petition based on or otherwise seek, claim, defend, or rely on the doctrine of federal preemption to prevent enforcement of these three nuclear waste obligations.¹²

B. ENVY's Ability to Meet Its Commitments Extending Beyond March 21, 2012

ENVY is a limited liability company (LLC) with only one significant asset, VYNPS. It is also a low-level subsidiary within a multi-tier holding company structure. *See* Attachment 2. As a result, the prospect of a twenty-year license extension for VYNPS raises once again for Vermont stakeholders the future ability of ENVY, in view of its corporate structure, to meet its previous commitments for the benefit of Vermont ratepayers which extend beyond March 21, 2012.¹³

Specifically, ENVY's current corporate structure presents the "particular concern" where a parent corporation inserts several layers of LLCs between itself and the entity operating a high risk business. Each of those intervening LLCs can act as a barrier to extending liability to the parent corporation that contains most of the assets. . . . If a nuclear plant was unable to cover its liabilities, it might require several separate litigations, or a very large and complex single litigation, to pierce all the corporate veils back to the parent corporation with the bulk of the assets.¹⁴

This "particular concern" may have special relevance to ENVY because it is a limited liability subsidiary of Entergy Corporation which was a pioneer in establishing separate corporate entities to own and operate nuclear power plants and today owns and operates eleven nuclear units through an extensive network of wholly-owned subsidiaries.¹⁵

Entergy explained its reasons for ENVY's current corporate structure in the course of the PSB proceedings on the original sale of the plant:

Entergy Nuclear Holding Company, a first tier of Entergy Corporation, has been

¹² *See id.*, ¶ 12.

¹³ *See, e.g.*, David Schlissel, Paul Peterson & Bruce Biewald, *Financial Insecurity: The Increasing Use of Limited Liability Companies and Multi-Tiered Holding Companies to Own Nuclear Power Plants*, Synapse Energy Economics, August 7, 2002, available at www.synapse-energy.com.

¹⁴ *Id.*, at 12.

¹⁵ *Id.*, at 7. The Synapse report references only ten nuclear plants owned or operated by Entergy. However, Entergy acquired the Palisades Nuclear Plant in Michigan as its eleventh plant following publication of the Synapse report in August, 2002.

established with the intent that it will ultimately hold all the subsidiaries associated with Entergy's nuclear operations. This will consolidate all of Entergy's unregulated nuclear operations under a single holding company, while still supporting the operational and financing demands of the individual plants. The use of holding companies below Entergy Nuclear Holding Company allows Entergy to segregate various types of financing, investment and business activities, and by doing so, enables Entergy to better manage and control risks associated with these activities.¹⁶

In this context, it must be noted that the implications of ENVY's current corporate structure for not only its additional commitments but its overall ability to own and operate VYNPS were previously considered by the PSB in its Final Order in the Sale Docket.¹⁷ In particular, it must be noted that the Board concluded that, on balance, ENVY's current corporate structure is an advantage rather than a disadvantage to Vermont compared to ownership by an entity such as VYNPC.¹⁸

In addition, it is important to remember that ENVY's principal obligations with respect to termination of commercial operations and decommissioning for VYNPS are established in general terms by federal law and defined in detail by NRC regulations. The same is true with respect to ENVY's principal obligations with respect to spent nuclear fuel and other high-level nuclear waste generated and stored at VYNPS. As a result, ENVY is required to meet these obligations as an NRC licensee in the manner required by NRC regulations independent of the additional commitments it has previously made for the benefit of Vermont ratepayers which would continue to apply after March 21, 2012. By the same token, the means available to the NRC for enforcing ENVY's principal obligations with respect to these matters do not apply to the additional commitments which ENVY has made for the benefit of Vermont ratepayers. ENVY's ability to meet – and the NRC's ability to enforce – the Company's principal obligations under federal law and NRC regulations with respect to decommissioning and spent fuel and other high-level nuclear waste are addressed in Chapters 6 and 7.

¹⁶ Rebuttal Testimony of ENVY witness Connie Wells, Docket No. 6545, dated February 25, 2002, at 9.

¹⁷ See Final Order, Docket No. 6545, dated June 13, 2002, at 109-112.

¹⁸ See *id.*, at 112.

In addition, it must be noted that ENVY's corporate structure today has not yet been changed by Entergy's Enexus spin-off proposal and any effects on ENVY's prior commitments of that proposal are necessarily speculative at this time. Effectively, the Enexus spin-off proposal would transfer the ultimate ownership and control of VYNPS through ENVY from Entergy to Enexus. As such, it requires the approval of both the NRC and the PSB. The implications of this transfer, if it occurs at all, will not be foreseeable until the pending Enexus spin-off proceedings before the NRC and PSB have concluded and the terms and conditions of any approval of the Enexus structure are known. Of course, if the proposed Enexus structure is not approved by either the NRC or the PSB, any effects it might have would be moot.

The effect on ENVY's commitments of any future filing of a bankruptcy petition would be somewhat less speculative but still very uncertain because of the fact-sensitive complexities of federal bankruptcy law with respect to the determination and enforcement by government agencies of ongoing regulatory obligations, especially but not exclusively depending on whether the obligations in question involve protection of public health and safety or only pecuniary interests or advantages. Generally speaking, commitments which do not specifically call for the payment of money by ENVY to VYNPC, another private entity, or the State of Vermont in its capacity as a creditor would likely be unaffected by a bankruptcy filing, even if they require the expenditure of money by ENVY to be performed. On the other hand, those commitments which do specify the payment of money by ENVY to VYNPC, another private entity, or the State of Vermont in its capacity as a creditor would very likely be subject to stay, reduction, and discharge in a bankruptcy proceeding even though they arose in the course of a state regulatory proceeding.¹⁹ Moreover, while the risks of bankruptcy to the commitments would be extended along with the commitments themselves, those risks would not be changed by a license extension

¹⁹ See, e.g., *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3d Cir.1993), cert. denied, 511 U.S. 1046 (1994); *In re Chateaugay Corp.*, 944 F.2d 997 (2nd Cir. 1991); *In re Coporacion de Servicios Medicos Hospitalarios de Fajardo*, 805 F.2d 440 (1st Cir. 1986); *Penn Terra, Ltd. v. Department of Envt'l Resources, Comm. of Pa.*, 733 F.2d 267 (3d Cir.1984); *New York v. Mirant New York, Inc.*, 300 B.R. 174 (S.D.N.Y.2003); *In re Gandy*, 327 B.R. 796 (Bankr. S.D.Tex. 2005); and *In re Psychotherapy and Counseling Center, Inc.*, 195 B.R. 522, 36 Collier Bankr.Cas.2d 1, 50 Soc.Sec.Rep.Serv. 836, Med & Med GD (CCH) P 44,417 (Bankr. D.D.C.

in and of itself.

Thus, this Chapter of the Report is limited to evaluating whether license extension itself, or any new understanding regarding the additional commitments themselves, appears likely to affect ENVY's ability to meet those commitments during a license extension beyond March 21, 2012, in view of its structure as a limited liability company with a single significant asset which is also a low-level subsidiary of the multi-tier holding company, Entergy Corporation.

1. Purchase Power Commitments

In the absence of a license extension, ENVY will have no power to sell from VYNPS and the purchase power commitments described in this chapter would simply not be applicable. Assuming a license extension, however, both of the purchase power commitments described in Chapter 5 would apply.

2. Commitment to Negotiate in Good Faith for Purchase Power Agreement

The ENVY commitment to negotiate in good faith exclusively with VYNPC for 30 days with respect to a purchase power agreement clearly applies only after a license renewal has occurred and ENVY determines that it has VYNPS power available to sell.

Plainly, ENVY has no obligation to conclude a purchase power agreement with VYNPC even if it has energy and capacity available from VYNPS as a result of a license extension. And, ENVY would not breach its commitment to negotiate in good faith for thirty days simply because it failed to conclude a purchase power agreement with VYNPC during that time period, or ever, for that matter.

Following license renewal, the language of the ENVY commitment would appear to present no bar to ENVY conducting a Request for Proposals process and soliciting bids from other prospective purchasers prior to initiating exclusive negotiations for 30 days with VYNPC. All ENVY would have an obligation to do would be to make a good faith attempt to negotiate its best deal with VYNPC. If VYNPC does not offer ENVY its best deal for VYNPS power, ENVY is not obligated to accept the VYNPC offer.

Prior to license renewal, the language of the ENVY commitment would not appear to

preclude ENVY from conducting a Request for Proposals process, soliciting bids from any prospective purchasers including VYNPC, and negotiating power purchase agreements with any prospective purchasers including VYNPC. In this scenario, the language of the ENVY commitment would not seem to require ENVY to engage in good faith negotiations exclusively with VYNPC, for 30 days or otherwise.

The current ENVY corporate structure would likely affect any future negotiations regarding VYNPS purchase power because Entergy's power marketing subsidiary would presumably be conducting or directing the negotiations and doing so with a view to optimizing from an Entergy corporate perspective all deals being made within the same approximate period of time as any VYNPS deals.

3. Commitment to Share Excess Revenues from VYNPS Power Sales

The ENVY commitment to share "Excess Revenues" from VYNPS power sales clearly would apply only after a license renewal has occurred and ENVY actually sells VYNPS power. However, the commitment would apply irrespective of the purchaser of the power, whether VYNPS, another power purchaser, or the market.

The definition of "Excess Revenues" included in this ENVY commitment appears to be reasonably precise. However, the value of the associated commitment to Vermont ratepayers would appear to depend entirely on ENVY's revenues from its sales from VYNPS and the prices at which those sales occur. In addition, the Sale MOU specifies only that any "Excess Revenues" will be shared with VYNPC.²⁰

The current ENVY corporate structure, *per se*, would not likely affect this commitment, but the existence and terms of any agreement between ENVY and any Entergy power marketing affiliate could do so. Because ENVY is not rate-regulated, there would appear to be no bar to ENVY selling VYNPS power to an Entergy power marketing affiliate at cost-based prices and that affiliate in turn selling the power at market prices to VYNPC, other power purchasers, or the market. In such a scenario, there would likely be no "Excess Revenues" for ENVY to share with VYNPC or for VYNPC to share with anyone else.

²⁰ See Sale MOU, *supra* note 1, ¶ 4.

4. Commitments relating to Termination of Commercial Operations and Decommissioning

ENVY's commitments relating to termination of commercial operations and decommissioning for VYNPS will apply whether a license extension is approved for the plant or not. However, the timing of the performance of those commitments is likely to be later if a license extension is approved than if it is not.

a. Commitment to Pay Costs of Security

ENVY's commitment to pay the costs of security for VYNPS would apply after March 21, 2012, whether the plant's NRC license is extended or not. During a license extension and the period following termination of commercial operations prior to commencement of decommissioning, these costs would be payable by ENVY. Once decommissioning commenced, these costs would be payable by the VYNPS decommissioning funds.

ENVY's current corporate structure could affect this commitment if the security contract covering VYNPS also covered other plants operated by ENOI and some or all of the associated costs for VYNPS are allocated rather than directly assigned to the plant.

b. Commitment to Provide Inter-Company Credit Agreement and Parental Guarantee

This commitment to provide enhanced financial security in the form of an EIHL-ENVY Intercompany Credit Agreement and an Entergy Corporation guarantee in an amount not less than \$60 million to assure the availability of funds to ENVY prior to decommissioning funds becoming available would apply whether or not the VYNPS license is extended. However, Entergy's performance of its parental guarantee would not be assured until such time as VYNPS commercial operations have actually terminated and the need for enhanced financial security has actually been established, presumably in March, 2032. Furthermore, a downgrade of Entergy's credit rating below investment grade would not be the best time to arrange a third-party letter of credit in lieu of the parental guarantee.

The current corporate structure of ENVY clearly motivated this commitment. Of particular concern is that, upon termination of VYNPS commercial operations, ENVY will have no ongoing source of revenue prior to initiating decommissioning and gaining access to the

VYNPS decommissioning funds. The Board determined in 2002 that the credit agreement and parental guarantee in an amount not less than \$60 million would be sufficient to address ENVY's financial needs between termination of commercial operations and decommissioning funding becoming available.²¹ However, due to the passage of time, changes in circumstances, and the declining time value of a fixed sum of money, the sufficiency of this commitment would clearly require re-evaluation in the context of a license renewal until 2032.

c. Commitment to Provide Additional Financial Assurance

ENVY's commitment to provide additional funds or other acceptable financial assurance to accomplish decommissioning, including site restoration and spent fuel management to the extent committed in Docket 6545, would apply whether or not the VYNPS license is extended. However, it would not become applicable until ENVY's submission to the NRC of its post-shutdown activities report for the plant and the additional funding or assurance required is not specified.

Plainly, however, this commitment was motivated by the current corporate structure of ENVY. The obvious concern underlying this commitment is that ENVY, even taking into consideration the availability of funds in the VYNPS decommissioning trusts, might not have sufficient funds to complete decommissioning as defined in NRC regulations, as well as to perform the spent fuel management and site restoration obligations to which it committed in Docket 6545 (which are not included in decommissioning as defined in NRC regulations). Presumably, then, the commitment would be to fund – or provide assurance of funding – for any shortfall in funding available for those spent fuel management and site restoration activities not included in decommissioning as that term is defined in NRC regulations. However, the wording of this commitment does not require ENVY to provide additional funds in order to decommission the VYNPS by any particular date. Indeed, the most likely (because the least expensive) means for ENVY to assure the necessary funds would be simply to defer decommissioning under the SAFSTOR methodology for some additional period of time in the expectation that the investment returns on the VYNPS decommissioning funds would outpace

²¹ See Final Order, *supra* note 17, at 113-117.

the growth in its decommissioning costs until the required funding level was achieved.²²

d. Commitment to Share “Excess Decommissioning Funds”

ENVY’s commitment to share “Excess Decommissioning Funds” would apply whether or not the NRC license for VYNPS is extended. However, the extension of the license would make it virtually certain that one of the preconditions for such sharing would occur, namely that “Completion of Decommissioning” would not occur by March 31, 2022. On the other hand, extension of the license would also make it much more likely that any sharing of “Excess Funds” would be delayed because there will be additional spent fuel generated during the license extension which would have to be managed for some time after “Completion of Decommissioning.” See Chapter 7 of this Report, *infra*.

The current corporate structure of ENVY will almost certainly affect this commitment, with respect to both its value and the timing of its performance. Because ENVY is part of a larger holding company structure which owns multiple nuclear plants, there will necessarily be a complex economic, technical, and legal calculus by which the decommissioning of those plants will be sequenced. As a result, the timing of the VYNPS decommissioning will almost certainly be affected to some extent by such considerations relating to the other Entergy nuclear plants. However, the primary considerations regarding the timing of any sharing will be the timing of VYNPS decommissioning in view of the availability of sufficient decommissioning funding and the timing of the removal of VYNPS spent fuel and other nuclear waste in view of the availability of both high- and low-level waste disposal sites.

e. Commitment to Perform “Site Restoration”

ENVY’s commitment to perform “site restoration” would apply whether or not NRC license extension were to occur for VYNPS. However, extension of the license would also make it much more likely that any “site restoration” would be delayed because there will be additional spent fuel generated during the license extension which will have to be managed for a period of

²² See, e.g., John Dillon, *Legislature Considers Decommissioning Fund*, Vermont Public Radio, Feb. 11, 2008 (quoting ENVY executive Jay Thayer that completion of VYNPS decommissioning might be deferred for as long as 60 years after plant shutdown).

time after “Completion of Decommissioning” that will be longer than it would have been in the absence of license extension. *See* Chapters 7 and 8 of this Report, *infra*.

The current corporate structure of ENVY will almost certainly affect this commitment, at least with respect to the timing of its performance. Because ENVY is part of a larger holding company structure which owns multiple nuclear plants, there will necessarily be a complex economic, technical, and legal calculus by which the decommissioning of those plants and the disposal of spent fuel from those plants will be sequenced. As discussed above, the timing of VYNPS decommissioning and spent fuel removal will almost certainly be affected by such considerations relating to the other Entergy nuclear plants as well as VYNPS itself. However, the primary considerations regarding the timing of site restoration will again be the timing of VYNPS decommissioning in view of the availability of sufficient decommissioning funding and the timing of the removal of VYNPS spent fuel and other nuclear waste in view of the availability of both high- and low-level waste disposal sites.

3. Commitments Regarding Spent Fuel and Other Nuclear Waste

ENVY’s commitments regarding spent fuel and other nuclear waste at VYNPS will apply whether a license extension is approved for the plant or not. However, the timing of the performance of those commitments is likely to be later if a license extension is approved than if it is not.

a. Timely Removal of Spent Fuel from VYNPS

ENVY’s commitment to make commercially reasonable efforts to remove spent fuel from VYNPS would apply whether or not NRC license extension were to occur. However, extension of the license would also make it much more likely that completion of removal of spent fuel would be delayed because there will be additional spent fuel generated during the license extension which will need to be managed for some time period longer than would have been the case absent license extension. *See* Chapter 8 of this Report, *infra*.

The current corporate structure of ENVY will almost certainly affect this commitment, at least with respect to the timing of its performance. Because ENVY is part of a larger holding

company structure which owns multiple nuclear plants, there will necessarily be a complex economic, technical, and legal calculus by which the removal of spent fuel from those plants will be sequenced. As a result, the timing of VYNPS spent fuel removal will almost certainly be affected by such considerations relating to the other Entergy nuclear plants, as well as VYNPS itself. In this context, the term “commercially reasonable” may well mean something quite different to ENVY executives than it does to Vermont public officials.

b. No Storage of Nuclear Waste Generated from Outside Vermont

ENVY’s commitment not to store nuclear waste generated outside the State of Vermont at VYNPS would apply whether or not the plant’s NRC license is extended. Moreover, license extension would not adversely affect ENVY’s ability to keep this commitment because the additional waste likely to be generated as a result of license extension will be generated within the State of Vermont.

The current corporate structure of ENVY would not affect its ability to perform this commitment. However, this corporate structure could affect its motivation to perform this commitment. Because ENVY is part of a larger holding company structure which owns multiple nuclear plants, there could well be circumstances under which it would be advantageous to that larger structure to store out-of-state waste at VYNPS, either temporarily or indefinitely. As a result, ENVY’s current corporate structure could provide an incentive for ENVY to seek to modify this commitment.

c. Commitment Regarding Spent Fuel Pool Configuration

ENVY’s commitment to configure the spent-fuel pool so that high-decay-heat assemblies are surrounded by low-decay-heat assemblies would apply whether or not the VYNPS license is extended. However, the commitment would plainly apply for a longer period of time with than it would without license extension because the spent fuel pool would necessarily remain in use for approximately five years after the termination of commercial operations under the extended license.

The current corporate structure of ENVY will not affect this commitment in any foreseeable manner. Whether ENVY is part of a larger holding company structure which owns multiple nuclear plants would not seem to have any implications for configuration of the VYNPS

spent fuel pool.

d. Commitment Not to Seek to Invalidate Other Nuclear Waste Commitments on Grounds of Federal Preemption.

ENVY's commitment not file an action or petition based on or otherwise seek, claim, defend, or rely on the doctrine of federal preemption to prevent enforcement of the three preceding nuclear waste obligations would apply whether or not the VYNPS license is extended. However, the commitment would apply for a longer period of time with than it would without license extension because the related nuclear waste commitments would apply longer.

The current corporate structure of ENVY would not affect its ability to keep this commitment in any foreseeable manner. However, this corporate structure could affect its motivation to keep this commitment. Because ENVY is part of a larger holding company structure which owns multiple nuclear plants, there could well be circumstances under which it would be advantageous to invalidate site-specific limitations on the holding company's nuclear operations. As a result, ENVY's current corporate structure could provide an incentive for ENVY to seek to modify or moot this commitment, *e.g.*, by sale or transfer of the plant, inter-affiliate operating agreement, etc.

4. Additional Commitments Generally

Entergy Nuclear Holding Company #3, Entergy Vermont Investment Company, and ENVY are all limited liability companies. This fact appears to have been known to and considered by the PSB in its evaluation of the ENVY corporate structure in its Sale Final Order.²³ However, the Board did not seem to assign any significance to ENVY being a limited liability company rather than a traditional corporation. It is also less than certain whether the Board expressly considered any implications (even though it apparently knew) of the fact that all three entities are *Delaware* not Vermont limited liability companies.

Delaware has aggressively sought to be a leader among the states in providing alternatives to the traditional corporation. One example of this aggressive leadership is the Delaware Limited Liability Company Act, which governs the formation and operation of a

²³ See *id.*, at 109-110.

Delaware limited liability company (“DLLC”). The DLLC can provide not only tax but business advantages over the traditional corporation. A DLLC may pursue almost any lawful business activity, or combination of business activities, including manufacturing, services, holding and developing real estate, and holding and managing intangible property such as securities and other investments.²⁴

It is not traditional articles of incorporation but instead an operating agreement which is the key governance document for any LLC, including a DLLC. An operating agreement is a private contract and not a public document. Moreover, under the DLLC Act the identity of a DLLC's owners and managers, and the terms of their relationships, can remain confidential. The DLLC Act does not specify any minimum capital investment. Non-U.S. businesses and individuals generally are free to form and operate DLLCs because the DLLC Act does not require an owner or manager of a DLLC to be a natural person or a citizen or resident of the United States. There is no requirement that a DLLC carry on business activities or establish or maintain any place of business (other than a registered agent and registered office) in Delaware. Additionally, a DLLC's records need not be located in Delaware. They may be located wherever is most convenient for the parties, including any jurisdiction outside the United States. Furthermore, such records may be maintained in electronic or other non-written form.²⁵

The principal advantages of a DLLC are double income taxation avoidance, highly adaptable business combination capability, unfettered management authority, unlimited contractual flexibility, and limited liability. A DLLC may be structured in virtually any manner that best suits the business needs of its owners. This flexibility can make the DLLC preferable to the traditional corporation and, in many cases, to other alternative business entities such as limited partnerships or general partnerships. Two well-respected Delaware corporation lawyers, one of whom co-authored the DLLC Act, have explained these advantages in more detail, as follows:

²⁴ See, e.g., Robert L. Symonds Jr. & Matthew J. O'Toole, *Delaware: Preferred Gateway to the U.S. Marketplace*, Corporation Service Co., Dec. 2004, available at <http://www.incspot.com/public/c13-01a.html>

²⁵ See *id.*

Limited Liability

The DLLC Act generally refers to owners of a DLLC as "members," and to persons designated to manage the business and affairs of the entity as "managers." The DLLC Act permits a DLLC to be managed by its members, without requiring such members to be managers. The DLLC Act provides that no member or manager is liable personally for any debt, obligation, or liability of a DLLC solely by virtue of such party's status as a member or manager. In addition, the DLLC Act expressly empowers a DLLC to "indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever." This limitation on personal liability and the broad scope of permissible indemnification compare favorably with the corresponding protections enjoyed by stockholders, officers, and directors of a Delaware corporation.

Contractual Flexibility

The basic approach of the DLLC Act is to let the parties define their business relationship in the limited liability company agreement, and to provide rules only for those matters on which the parties have failed to agree. A stated policy of the DLLC Act is to give maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements. This important policy means that the parties can predictably create and maintain the relationships that best suit their business needs. For instance, in their limited liability company agreement, the parties may provide for various classes of members (with each class enjoying different rights, powers, and duties, including separate voting rights and economic rights). In fact, the parties may by agreement determine nearly all aspects of their relationship with one another. To the extent that a member or manager has duties (including fiduciary duties) to the DLLC or to another member or manager, the DLLC Act provides that the limited liability company agreement may expand or restrict or eliminate such duties (other than the implied contractual covenant of good faith and fair dealing). This flexibility arises from Delaware's longstanding policy favoring freedom of contract.

Management Flexibility

The principle of contractual freedom manifests itself particularly in management flexibility, a cornerstone of the DLLC Act. The parties can select the management arrangement that works best for them. Under the DLLC Act, members of a DLLC can participate in management without jeopardizing their limited liability, or they may elect to have the DLLC managed by someone else, or fashion a blend of these two approaches. The limited liability company agreement may provide for different classes of managers, each having such rights, powers, and duties as are

provided therein. The limited liability company agreement also may contain provisions relating to the exercise of voting rights, including provisions relating to notice of the time, place, or purpose of any meeting at which any matter is to be voted on, waiver of any such notice, action by consent without a meeting, quorum requirements, and rules for voting in person or by proxy. Members and managers of a DLLC generally are free to transact business with the DLLC.

Business Combination Flexibility

In addition to flexibility at the creation and operational stages of a DLLC's existence, the DLLC Act offers the parties a number of ways to restructure the DLLC. For example, under the DLLC Act, a DLLC may merge or consolidate with another DLLC, or with an "other business entity" (including, but not limited to, corporations, statutory trusts, and partnerships), whether any such other business entity is formed or organized under the laws of Delaware or another jurisdiction. Delaware offers additional flexibility by permitting reorganization of a DLLC by way of asset sales, "conversions," "transfers," and "domestications."

Avoidance of Double Taxation

As a matter of U.S. federal income tax law, a DLLC may be structured so that it will not be subject to tax at the business organization level. Therefore from a tax perspective the DLLC offers a very attractive alternative to the corporation, which typically is taxed at the organization level. The members of a DLLC may specifically agree to such tax treatment in their limited liability company agreement. Of course, the contractual freedom afforded by the DLLC Act enables the members to agree to other tax treatment if they so desire.²⁶

Effectively, then, a DLLC is a legal entity whose true identity, purpose, structure, financing, and business activities are revealed only by its operating agreement and other contracts in force at any given time and any related documents – documents which are not publicly available for ENVY and which have not been provided or reviewed subject to a confidentiality agreement in the course of the preparation of this Report. Thus, this evaluation of ENVY's ability to meet its additional commitments is necessarily limited by this lack of information.

5. Recommendations

In view of the foregoing discussion of the potential effects of ENVY's current corporate structure on its ability to meet its additional obligations for the benefit of Vermont ratepayers after March 21, 2012, the following recommendations would appear to be in order:

a. Serious consideration should be given to negotiation with ENVY of a successor purchased power agreement which would become effective if and when the NRC approved license extension and the Board issued a certificate of public good for continued operation of VYNPS;

b. The ambiguities and uncertainties in the ENVY commitment to share excess revenues from VYNPS power sales in the event of a license extension and continued operation should be resolved;

c. Additional information should be obtained in order to determine how ENVY's security costs for VYNPS are calculated, especially whether they are directly incurred and assigned or indirectly incurred and allocated in accordance with an affiliate services agreement;

d. The dollar amounts of the EIHL-ENVY Intercompany Credit Agreement and Entergy Corporation guarantee should be re-evaluated for likely increases due to expected changes in circumstances and the time value of money foreseeable by 2032; in addition, the substitution of a third-party letter of credit for the parental guarantee should be seriously considered independent of the current contingency of a downgrade of Entergy's security rating;

e. ENVY's commitment to provide additional funds or other acceptable financial assurance to accomplish decommissioning, including site restoration and spent fuel management to the extent committed in Docket 6545, should be clarified and quantified;

f. The principal alternative scenarios and timetables for the decommissioning and removal of spent fuel at VYNPS should be identified, evaluated, and quantified with respect to the ENVY commitment to share excess decommissioning funds;

g. The principal alternative scenarios and timetables for the performance of Entergy's commitment to VYNPS site restoration should be identified and evaluated;

h. The term "commercially reasonable" as it relates to ENVY's commitment regarding

²⁶ *Id.*

removal of spent fuel should be clarified and articulated in a more definite manner, especially in relation to the principal alternative scenarios and timetables associated with future spent fuel generation and management at VYNPS;

i. ENVY's commitment to no storage at VYNPS of nuclear waste generated from out of state should be expressly renewed in conjunction with any extension of the plant's operations;

j. ENVY's commitment regarding the configuration of the VYNPS spent fuel pool should be defined with more particularity in the context of the principal alternative scenarios and timetables associated with spent fuel generation, management, and removal;

k. ENVY's commitment not to seek to have its other additional commitments pre-empted should be expressly renewed in conjunction with any extension of the plant's operations;

l. All of ENVY's additional commitments should be expressly extended to any successor or assign in conjunction with any extension of the plant's operations; and

m. All of the key non-public documents which define ENVY in detail as a Delaware limited liability company should be obtained and reviewed with respect to their implications for the Company's additional commitments for the benefit of Vermont ratepayers in any docket established to consider extension of VYNPS' operations.