

125 FERC ¶ 61,143  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Entegra Power Group LLC  
Gila River Power, L.P.  
Union Power Partners, L.P.

Docket No. EC08-87-000

Harbinger Capital Partners Master Fund I, Ltd.  
Harbinger Capital Partners Special Situations Fund, L.P.

ORDER CONDITIONALLY AUTHORIZING ACQUISITION AND DISPOSITION  
OF JURISDICTIONAL FACILITIES UNDER SECTION 203 OF THE  
FEDERAL POWER ACT

(Issued November 5, 2008)

1. Entegra Power Group LLC (Entegra), Gila River Power, L.P., Union Power Partners, L.P., Harbinger Capital Partners Master Fund I, Ltd. (Harbinger Master Fund) and Harbinger Capital Partners Special Situations Fund, L.P. (Harbinger Special Situations Fund) (collectively with Harbinger Master Fund, Harbinger) (collectively, Applicants) filed an application seeking authorization under section 203 of the Federal Power Act (FPA)<sup>1</sup> for Entegra to transfer and Harbinger to acquire between ten and twenty percent of Entegra's outstanding voting securities (Proposed Transaction). Applicants state that the jurisdictional facilities associated with the Proposed Transaction include generator-interconnection facilities, wholesale power contracts, rates schedules, and books and records associated with Entegra's generating facilities.

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<sup>1</sup> 16 U.S.C. § 824b (2006).

2. The Commission has reviewed the Proposed Transaction under the Merger Policy Statement.<sup>2</sup> As discussed below, we will authorize the Proposed Transaction with conditions under section 203(a)(1), as we find that, with those conditions, it is consistent with the public interest. Although Applicants do not specifically state whether they are seeking authorization under section 203(a)(1) or 203(a)(2), in the instant order the Commission is asserting jurisdiction under section 203(a)(1). However, we note that authorization under section 203(a)(2) is granted pursuant to the blanket authorization granted in section 33.1(c)(8) of the Commission's regulations. We remind applicants that when they submit an application seeking authorization under section 203 of the FPA, they must specify the subsection(s) of section 203 under which they are seeking authorization.

## **I. Background**

### **A. Description of the Parties**

#### **1. Entegra and Related Entities**

3. Entegra is a Delaware limited liability company that holds indirectly all of the equity interests in Gila River Power, L.P. (Gila River) and Union Power Partners, L.P. (Union Power) (collectively, Project Companies). The Project Companies are wholly owned by EPG LLC (EPG), which in turn, is wholly owned by Entegra TC LLC (Entegra TC), and the Blocker Entities. The Blocker Entities are wholly owned by Entegra TC which, in turn, is wholly owned by Entegra. Each current owner of the equity interests in Entegra is a bank, institutional investor, financial institution, investment company or related entity that is not primarily engaged in energy-related business activities. The equity ownership interests are frequently traded in secondary market transactions. By virtue of its ownership interests in the Project Companies, Entegra is a holding company, as defined under the Public Utility Holding Company Act of 2005 (PUHCA 2005).<sup>3</sup>

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<sup>2</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

<sup>3</sup> Application at 5-6 (citing 42 U.S.C. § 16451 *et seq.*).

Entegra states that it is a holding company only in relation to exempt wholesale generators (EWGs), qualifying facilities (QFs), or foreign utility companies (FUCOs).<sup>4</sup>

4. Gila River owns and operates a 2,200 megawatts (MW) natural gas-fired generating facility located in Arizona (Gila River Facility) that is interconnected to the transmission system of Arizona Public Service Company (APS). Gila River sells wholesale power at market-based rates in the APS/Salt River Project balancing authority area, which is in the Western Electricity Coordinating Council region.<sup>5</sup>

5. Union Power owns and operates a 2,200 MW natural gas-fired generating facility located in Arkansas (Union Power Facility) that is interconnected with the transmission system of Entergy Arkansas, Inc., an operating company of Entergy Corporation (Entergy). Union Power sells wholesale power within the Entergy balancing authority area at market-based rates.<sup>6</sup>

6. Entegra also has a wholly-owned subsidiary, Trans-Union Interstate Pipeline, L.P. (Trans-Union), which is a natural gas company as defined by the Natural Gas Act (NGA)<sup>7</sup> and is subject to the Commission's jurisdiction. Trans-Union owns and operates a natural gas transmission system that extends from interconnections with Texas Gas Transmission, an interstate natural gas pipeline, and Regency Intrastate Gas LLC, an intrastate pipeline near Sharon, Louisiana, and that traverses through Louisiana and Arkansas to its sole delivery point at the Union Power Partners gas-fired electric generator three miles northeast of El Dorado, Arkansas. Trans-Union transports natural gas for shippers in interstate commerce on a firm and interruptible basis.

## 2. Harbinger and Related Entities

7. Harbinger Master Fund and Harbinger Special Situations Fund are hedge funds. They are separate investment funds but are under common control. Each invests

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<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.* at 4 (citing *Panda Gila River, L.P.*, Docket No. ER01-931-000 (Mar. 13, 2001) (unpublished letter order) (granting market-based rate authority); *Gila River Power, L.P. and Union Power Partners, L.P.*, Docket No. ER05-1178-000, *et al.* (Oct. 28, 2005) (unpublished letter order) (accepting revised tariff sheets and change in status notice).

<sup>6</sup> *Id.* at 4 (citing *Union Power Partners, L.P.*, Docket No. ER01-930-000 *et al.* (Mar. 20, 2001) (unpublished letter order) (granting market-based rate authority).

<sup>7</sup> 15 U.S.C. § 717-717w (2006).

primarily in distressed/high yield debt securities, special situation equities, and private loans and notes, including the securities of financially-distressed generation companies.<sup>8</sup>

8. According to the Application, Harbinger owns approximately 21 percent of the outstanding voting shares of Calpine Corporation (Calpine).<sup>9</sup> Calpine owns two generating facilities in the Entergy balancing authority area. These facilities are owned by Pine Bluff Energy, LLC and Carville Energy LLC. Harbinger also currently owns approximately ten percent of the outstanding voting securities of Mirant Corporation (Mirant). Harbinger states that Mirant does not have any generating facilities located in balancing authority areas that are pertinent to the Proposed Transaction. In separate orders issued concurrently with this order, we grant Harbinger's requests for approval

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<sup>8</sup> Application at 6. Harbinger notes that there are several other separate private investment funds or investment vehicles comprised of institutional and private investors that invest in energy-related assets trade using the "Harbinger" or "Harbert" names. These include Harbert Management & Investment, Inc., Harbinger Independent Power Fund I, LLC, Harbinger Independent Power Fund II, LLC and Harbinger Independent Power Fund III, LLC. Harbinger states that the assets these funds hold are not discussed in the Application because the funds do not fall within the definition of an affiliate set forth in 18 C.F.R. § 366.1 (2008).

<sup>9</sup> Harbinger received authorization to hold up to 40 percent of Calpine in connection with Calpine's emergence from bankruptcy proceedings. *Calpine Corp. and Its Public Utility Subsidiaries*, 121 FERC ¶ 62,223 (2007). In their application seeking authorization to acquire Calpine, the applicants (Calpine Corporation, SPO Partners II, L.P. and Harbinger) performed an analysis based on the potential competitive effects of Harbinger acquiring more than 10 percent of Calpine. The applicants stated that the balancing authority areas of Entergy Services, Inc. and the Tennessee Valley Authority were the only two relevant geographic markets in which both Calpine and Harbinger own and control generation, and in each case the extent of business operations in the same geographic market is *de minimis*. The applicants thus argued that the transaction presented no horizontal market power concerns. *See* Calpine November 16, 2007 Application, Docket No. EC08-15-000 at 28-30. The Commission authorized the transaction, but did not make any findings on the issue of whether Harbinger controls Calpine. Harbinger states that it owns approximately 24 percent of the outstanding voting securities of Calpine in its July 28, 2008 filing in Docket No. EC08-59-000. Harbinger July 28, 2008 Response to Deficiency Letter, Docket No. EC08-59-000, at Aff. ¶ 3.

under section 203 to increase its ownership of Mirant securities to up to 25 percent,<sup>10</sup> and to acquire up to 20 percent of the outstanding voting securities of Sunoco, Inc.<sup>11</sup>

9. Harbinger Master Fund and Harbinger Special Situations Fund are holding companies with respect to one or more EWGs, QFs, and FUCOs. Harbinger owns 100 percent of Kelson Holdings, LLC (Kelson), which indirectly owns four large EWGs in the southern and western United States.<sup>12</sup> Specifically, Kelson owns Cottonwood Energy Company LP, which owns a 1,233 MW natural gas-fired generation facility in the Entergy balancing authority area, Dogwood Energy LLC, which leases a 620 MW natural gas-fired generation facility in the Aquila Missouri Public Service Division balancing authority area, Magnolia Energy LP, which owns a 807 MW natural-gas fired generation facility in the Tennessee Valley Authority balancing authority area, and Redbud Energy LP,<sup>13</sup> which owns a 1,194 MW natural gas-fired generation facility in the Oklahoma Gas and Electric Company balancing authority area.<sup>14</sup>

10. Harbinger owns interests in two FUCOs that operate in Canada, and it owns King City, L.P., which owns a QF and leases it to Calpine King City Cogeneration, LLC. In addition, Harbinger owns Kelson Energy III LLC, which recently obtained market-based rate authority.<sup>15</sup> An affiliate of Harbinger owns less than ten percent of Horsehead

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<sup>10</sup> *Harbinger Capital Partners Master Fund I, Ltd.*, 125 FERC ¶ 61,145 (2008).

<sup>11</sup> *Harbinger Capital Partners Master Fund I, Ltd.*, 125 FERC ¶ 61,144 (2008).

<sup>12</sup> Harbinger Master Fund owns a two-thirds interest in Kelson, and Harbinger Special Situations Fund owns a one-third interest in Kelson.

<sup>13</sup> Since the filing of this Application, Redbud Energy LP has been sold to Oklahoma Gas and Electric Company. *Oklahoma Gas and Electric Co.*, 124 FERC ¶ 61,239 (2008). *See also* Oklahoma Gas and Electric Co. October 3, 2008 Notice of Consummation, Docket No. EC08-58-000.

<sup>14</sup> Application at 7. Harbinger's March 21, 2008 Application submitted in Docket No. EC08-59-000 provides different values for the plant capacity of each of the four EWGs owned by Kelson. It states that the plant capacity for Cottonwood Energy Company LP is 1,230 MW, the plant capacity for Dogwood Energy LLC is 610 MW, the plant capacity for Magnolia Energy LP is 925 MW, and the plant capacity for Redbud Energy LP is 1,230 MW. *Id.* at 4.

<sup>15</sup> After Harbinger submitted the instant Application, Kelson Energy III LLC requested that the Commission cancel its market-based rate tariff. *Kelson Energy III LLP*, 123 FERC ¶ 61,303 (2008) (accepting Kelson's notice of cancellation).

Corporation, a manufacturing company that owns two 55 MW generating facilities that it uses for self-supply and that may make wholesale sales at market-based rates. Harbinger also owns less than 10 percent of the Class A (non-voting) shares of U.S. Power Generating Company (US PowerGen).<sup>16</sup>

11. Applicants state that Harbinger has recently acquired securities of Entegra totaling less than five percent of the outstanding voting securities of Entegra, and may close on up to 9.99 percent of those securities while this application is pending. Applicants state that these acquisitions are authorized under the blanket authorization set forth in 18 C.F.R. § 33.1(c)(2), and the transfer of the shares is authorized under 18 C.F.R. § 33.1(c)(12).<sup>17</sup> Applicants note that Entegra has a Commission order that permits certain transfers of its securities, but the Proposed Transaction does not meet the requirements of that authorization.<sup>18</sup>

### **B. Description of the Transaction**

12. In the Proposed Transaction, Harbinger will acquire from third parties between ten percent and twenty percent of the outstanding voting securities (Class A Units) of Entegra. Harbinger anticipates that it will acquire less than thirteen percent of Entegra upon receipt of Commission authorization, and it may purchase additional shares up to the approved twenty percent limit from time to time. Harbinger states that it may hold the shares or transfer them to Kelson or another subsidiary. It therefore requests any approvals that may be necessary for subsequent transfers to a subsidiary.<sup>19</sup> According to

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<sup>16</sup> Application at 9. Harbinger notes that US PowerGen's Class A (non-voting) shares will convert to voting shares upon the occurrence of certain events as discussed by the Commission in Docket No. EC07-67-000. *Id.* at n.25 (citing *EGB Holdings LLC*, 119 FERC ¶ 61,172 (2007)).

<sup>17</sup> *Id.* at 10-11.

<sup>18</sup> *Id.* at 12. See *Entegra Power Group LLC*, 123 FERC ¶ 61,006, at P 5 (2008) (extending for a three-year period until April 10, 2011 blanket authority for transfers of Entegra Units to an acquiring party that: (i) is a financial institution or related entity that is not primarily engaged in energy-related activities and is not affiliated with a traditional utility with captive customers; (ii) does not individually, or collectively with affiliates, own five percent or more of the voting interests in any public utility that has interests in any generating facilities or engages in jurisdictional activities within the Entergy and APS and Salt River Project control areas; and (iii) will hold twenty percent or less of the Entegra Units).

<sup>19</sup> Application at n.29.

Applicants, the Commission has found that transfers of equity interests in Entegra do not qualify as secondary market transactions that do not require prior authorization under section 203(a)(1) and, therefore, specific prior authorization under section 203(a)(1) is required.<sup>20</sup>

13. Applicants state that the Proposed Transaction involves the acquisition by two holding companies of shares of another holding company. All of these holding companies own only EWG, QF and FUCO assets. Applicants state that the Commission has confirmed that the blanket authorization found in section 33.1(c)(8) of the Commission's regulations applies to this type of acquisition as well as to direct acquisitions of EWGs, QFs and FUCOs. Applicants therefore argue that Harbinger's acquisition of the shares of Entegra should not require separate approval. They state that Harbinger has joined this application out of an abundance of caution, and it seeks any approvals necessary to proceed.<sup>21</sup>

14. On July 29, 2008, Harbinger filed a copy of a Schedule 13G filing it made with the Securities and Exchange Commission (SEC) on July 25, 2008 (Schedule 13G Filing). This filing reports Harbinger's aggregate 6.6 percent interest in the outstanding voting securities of Sunoco, Inc.<sup>22</sup>

## **II. Notice of Filing and Responsive Pleadings**

15. Notice of the Application was published in the *Federal Register*, 73 Fed. Reg. 31,855 (2008), with interventions and protests due on or before May 30, 2008. Calpine filed a timely motion to intervene and conditional protest. On June 16, 2008, Harbinger filed an answer to Calpine's protest.

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<sup>20</sup> *Id.* at 11 (quoting *FPA section 203 Supplemental Policy Statement*, 122 FERC ¶ 61,157, at P 3-6 (2008)).

<sup>21</sup> *Id.* at 12-13.

<sup>22</sup> We note that pursuant to 18 C.F.R. § 33.1(c)(4) “[a] holding company granted blanket authorizations in paragraph (c)(2) of this section shall provide the Commission copies of any Schedule 13D, Schedule 13G and Form 13F, at the same time and on the same basis, as filed with the Securities and Exchange Commission in connection with any securities purchased, acquired or taken pursuant to this section.” While Harbinger filed a copy of a Schedule 13G filing it made with the SEC reporting its aggregate 6.6 percent interest in the outstanding voting securities of Sunoco, Inc., pursuant to section 33.1(c)(4), Harbinger is required to submit at the Commission copies of any Schedule 13D, Schedule 13G or Form 13F for any other securities it has purchased, acquired or taken pursuant to the blanket authorizations granted in 18 C.F.R. § 33.1(c)(2).

### A. Protest

16. In its conditional protest, Calpine asserts that to approve the Application as filed, the Commission would either need (1) to agree with the Applicants that Harbinger does not control Calpine for FPA section 203 purposes, or (2) to find that the Entergy balancing authority area is sufficiently competitive to justify approval, notwithstanding horizontal market power screen failures that result if Harbinger is assumed to control Calpine. Calpine states that it does not object to the Commission authorizing the Proposed Transaction, provided the Commission makes clear that any findings made in its order will apply equally in the market-based rate setting.<sup>23</sup>

17. Calpine explains that Harbinger currently owns approximately 21 percent of its common stock, and that the Commission has authorized Harbinger under section 203 to acquire between ten and forty percent of Calpine's common stock through distributions under Calpine's bankruptcy reorganization plan and subsequent secondary market purchases.<sup>24</sup> Calpine states that for purposes of the application that sought this authorization,<sup>25</sup> Harbinger and Calpine assumed, but did not concede, that Harbinger would control Calpine because of the 10 percent ownership interest, and as a result assumed that their generation assets should be treated as being under common control.<sup>26</sup>

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<sup>23</sup> Calpine May 30, 2008 Protest at 1-2.

<sup>24</sup> *Id.* at 3 (citing *Calpine Corp.*, 121 FERC ¶ 62,223 (2007)). Unlike Calpine, Entegra does not issue common stock, and instead issues membership interests. Therefore, this order uses the term "common stock" when referring to ownership interests in Calpine and the term "voting securities" when referring to ownership interests in Entegra.

<sup>25</sup> *Id.* (citing Calpine November 16, 2007 Application, Docket No. EC08-15-000 at 28-30). The Commission authorized the transaction, but it did not make any findings on the issue of whether Harbinger controls Calpine.

<sup>26</sup> Calpine also explains that the same assumption regarding Harbinger's control over Calpine, as well as similarly conservative assumptions concerning affiliation and control between and among Calpine, LS Power Development, LLC (LSP Development), Luminus Management, LLC (Luminus), and Dynegy Inc. was reflected in a January 31, 2008 notification of change in status filed by Calpine's indirect subsidiaries with market-based rate authority relating to the Harbinger/Calpine transaction, as well as certain other developments affecting matters the Commission relied on in authorizing the Calpine market-based rate sellers to sell electricity at market-based rates. *Id.* at 3-4.



18. Calpine protests the Application to the extent that consummating the Proposed Transaction would jeopardize the ability of the Calpine market-based rate sellers to retain their market-based rate authority in the Entergy balancing authority area. Calpine argues that approving the Application without clarifying that any findings made would apply equally in the market-based rate setting would be inconsistent with the public interest because it would jeopardize the Calpine market-based rate sellers' authorizations and thus adversely impact competition.<sup>27</sup> It could have significant consequences for Calpine's business because Entegra owns and controls generation assets located outside organized markets where there is no Commission-approved market mitigation or market monitor. Calpine explains that while its market-based rate sellers would benefit from the rebuttable presumption of the efficacy of market monitoring and mitigation in a Regional Transmission Organization or Independent System Operator region, no rebuttable presumption would attach with respect to any market power issues arising out of the Proposed Transaction.<sup>28</sup>

19. Calpine contends that Harbinger does not exert control over it despite a twenty-one percent ownership stake. Calpine maintains that its protest of the Application itself provides evidence that Harbinger does not control Calpine.<sup>29</sup> If the Commission concludes that the Entergy balancing authority area is sufficiently competitive to allow the Commission to disregard the screen failures even if Harbinger controls Calpine, Calpine requests that the Commission confirm that this conclusion applies to the market power tests for market-based rate sellers also.<sup>30</sup>

#### **B. Harbinger's Answer**

20. In its answer, Harbinger agrees with Calpine's assertion that Harbinger's ownership interest in Calpine's publicly traded shares does not convey to it control over Calpine's subsidiaries.<sup>31</sup> Harbinger notes that the Commission has defined control as encompassing decisions on where, when and how wholesale power sales are made or

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<sup>27</sup> *Id.* at 6 (citing 16 U.S.C. § 823b(a)(4) (2006)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 7.

<sup>30</sup> *Id.*

<sup>31</sup> Harbinger June 16, 2008 Answer at 4 (citing Harbinger March 21, 2008 Application for Approval Under section 203 of the Federal Power Act, Docket No. EC08-59-000, at 11-12).

jurisdictional activity is conducted.<sup>32</sup> But Harbinger argues that Calpine's protest seeks to conflate the analysis under section 203 and under section 205. Harbinger views these two issues as distinct and maintains that issues arising under section 205 do not need to be addressed here.

### **III. Discussion**

#### **A. Procedural Issues**

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motion to intervene of Calpine serves to make it a party to this proceeding.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Harbinger's answer because it has provided information that assisted us in our decision-making process.

#### **B. Standard of Review Under Section 203**

23. Section 203(a)(4) requires the Commission to approve a transaction if it determines that it will be consistent with the public interest.<sup>33</sup> The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>34</sup> Section 203 also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."<sup>35</sup> The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.<sup>36</sup>

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<sup>32</sup> *Id.* at 5 (citing *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 53).

<sup>33</sup> 16 U.S.C. § 824b (2006).

<sup>34</sup> *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

<sup>35</sup> 16 U.S.C. § 824b(a)(4) (2006).

<sup>36</sup> 18 C.F.R. § 33.2(j) (2008).

**C. Analysis Under Section 203**

**1. Effect on Competition – Horizontal Market Power**

**a. Applicants’ Analysis**

24. Applicants state that the Proposed Transaction will have no adverse effect on competition in any relevant market. They include an affidavit (Affidavit) in support of the Application that provides an analysis conducted in accordance with Appendix A of the Merger Policy Statement (Appendix A Analysis). Applicants identify the relevant geographic market related to the Proposed Transaction as that where they have significant overlapping sales, which is the Entergy balancing authority area. Applicants each have ownership interests in power plants there. Applicants state that a delivered price test (DPT) was conducted for this geographic market by analyzing the potential competitive impact of the Proposed Transaction on Economic Capacity (EC) and Available Economic Capacity (AEC) energy products.<sup>37</sup>

25. Applicants state that they do not have overlapping ownership interests in power plants in any other balancing authority area. Nonetheless, the Applicants’ analysis also examines the APS balancing authority area, where Gila River is located, and evaluates other balancing authority areas interconnected to Entergy to determine if there were significant overlapping sales. Applicants state that the results of the analysis determined that overlapping sales were *de minimis* in those balancing authority areas where Applicants do not each own assets, and that an Appendix A analysis was therefore necessary only for the Entergy balancing authority area.<sup>38</sup>

26. Applicants state that Harbinger does not have ownership interests in any generating facilities in the APS balancing authority area where Entegra’s Gila River Facility is located. Harbinger has an investment in Calpine, which owns Southpoint Energy LLC, whose generation facility is interconnected with the Western Area Lower Colorado balancing authority area. Applicants state that their analysis confirmed that any geographic market overlap is *de minimis*, and they also state that review of the Electric Quarterly Report data revealed that Calpine does not make significant sales in the APS balancing authority area. Applicants state that a horizontal competitive analysis screen was not needed in the APS balancing authority area because section 33.3(a)(2)(i) of the Commission’s regulations states that this analysis is not necessary if the applicant “demonstrates that the merging entities do not currently conduct business in the same

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<sup>37</sup> Application at 14.

<sup>38</sup> *Id.* at 15.

geographic markets or that the extent of the business in the same geographic markets is de minimis.”<sup>39</sup>

27. Harbinger currently owns 1,233 MW of generating capacity in the Entergy balancing authority area through its ownership of Kelson. Harbinger also owns through Kelson 2,000 MW located in regions directly interconnected to the Entergy region.<sup>40</sup> Calpine, in which Harbinger has an ownership interest, owns a total of approximately 700 MW of capacity in the Entergy balancing authority area, and it owns 2,300 MW in first-tier markets to the Entergy balancing authority area. Entegra’s Union Power plant in the Entergy balancing authority area produces approximately 2,020 MW.<sup>41</sup>

28. Applicants state that because of uncertainty regarding whether the generating capacity of Calpine plants should be attributed to Harbinger under the Commission’s control analysis, they conducted two sets of DPT analyses, one that assumes that the Calpine plants are under Harbinger’s control, and one that assumes they are not. Applicants also state that Harbinger and Calpine have represented to the Commission that Harbinger cannot control Calpine.<sup>42</sup>

29. Applicants state that “Harbinger has indicated that it will not have the ability to manage, direct or control the day-to-day wholesale power sales activities conducted by Calpine relating to Calpine’s public utility subsidiaries, or have other rights that would constitute control over Calpine’s subsidiaries’ power sales activities.”<sup>43</sup> They state that Harbinger’s business is managing investments, rather than producing, selling or

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<sup>39</sup> *Id.* at 15-16 (quoting 18 C.F.R. § 33.3(a)(2)(i) (2008)).

<sup>40</sup> Harbinger’s utility assets located in regions directly interconnected to the Entergy region are Redbud Energy LP, a subsidiary of Kelson that owns a 1,194 MW natural gas-fired generation facility in the Oklahoma Gas & Electric Company balancing authority area and Magnolia Energy LP, a subsidiary of Kelson that owns a 807 MW natural gas-fired generation facility in the Tennessee Valley Authority balancing authority area. *Id.* at 7.

<sup>41</sup> *Id.* at 16 Exhibit AJC-1 to the Application tabulates reported plant summer and winter ratings. Applicants state that summer ratings are used in the Application. *Id.* n.39.

<sup>42</sup> *Id.* at 17 (citing Harbinger March 21, 2008 Application for Approval Under Section 203 of the Federal Power Act, Docket No. EC08-59-000, at 11-12; Calpine Corp. April 29, 2008 Motion to Intervene and Conditional Protest, Docket No. EC08-67-000, at 6).

<sup>43</sup> *Id.* at 17-18.

transmitting electric power, and that Calpine's business is managed by its board of directors, not its minority stockholders.<sup>44</sup> Applicants therefore conclude that Harbinger cannot control the Calpine generators or exercise market power as to the capacity of such generators.<sup>45</sup>

30. Under Applicants' Appendix A analysis for the Entergy balancing authority area that does not attribute control of Calpine to Harbinger, the Proposed Transaction passes the Commission's market power screens in all seven of the time periods when the EC analysis is applied, and it fails the screens only during the summer on-peak time period when the AEC analysis is applied.<sup>46</sup> Applicants assert that this screen failure is minimal and is not indicative of Applicants' ability to exercise market power. Specifically, they state that the geographic region is characterized by large amounts of competing uncommitted capacity, Applicants are not pivotal, Applicants lack the incentive to withhold capacity in order to raise price, and incremental cost price caps are imposed on Entergy's wholesale sales in its balancing authority area.<sup>47</sup>

31. Applicants state that if one assumes that Harbinger controls Calpine and thus attributes Calpine's generating capacity to Harbinger, the Appendix A analysis reveals a number of screen failures in the Entergy balancing authority area when the AEC analysis is applied. Screen failures occur during on-peak periods, where Herfindahl-Hirschman Index (HHI)<sup>48</sup> increases change the market from unconcentrated to moderately

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<sup>44</sup> *Id.* at 19 (citing section 3.1 of the Amended and Restated Bylaws of Calpine Corporation, <http://www.sec.gov/Archives/edgar/data/916457/000119312508017427/dex32.htm>).

<sup>45</sup> Applicants note that "[b]ecause Harbinger cannot direct the operation of Calpine's power plants, it cannot exercise market power as to those plants. Harbinger may take actions directed at protecting the value of its investment in Calpine, but these actions do not extend to operational issues with respect to Calpine's generating facilities that would permit the exercise of market power." *Id.* n.49.

<sup>46</sup> Cavicchi Aff. at Exhibits AJC-5 and AJC-6.

<sup>47</sup> Application at 18-19; Cavicchi Aff. ¶¶ 63-65.

<sup>48</sup> The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered moderately concentrated; and markets where the HHI is greater than or equal to 1,800 points are considered highly

(continued...)

concentrated, with a post-transaction on peak HHI of between 1,232 and 1,433 and a transaction-related increase of between 394 and 493 HHI.<sup>49</sup> Applicants maintain that these screen failures are not indicative of market power when viewed in conjunction with the following factors: (i) 20,000 MW of new combined cycle capacity which is largely uncommitted has been installed in the Entergy balancing authority area and surrounding balancing authority areas;<sup>50</sup> (ii) Applicants are not pivotal suppliers; the Entergy balancing authority area operates at low capacity factors allowing substantial competition for sales opportunities; and (iii) the supply in the region consists of gas-fired combined-cycle technology with similar marginal costs. According to the Applicants, these facts indicate that despite the increase in market concentration, there will not be an economic incentive to withhold capacity to raise prices.<sup>51</sup> Applicants also state that the Commission has found that despite screen failures, certain transactions would not harm competition in the relevant wholesale markets, and therefore did not require any mitigation.<sup>52</sup>

### **b. Commission Determination**

32. We agree with Applicants that the blanket authorization set forth in 18 C.F.R. § 33.1(c)(8) grants authorization under section 203(a)(2) applies to the Proposed Transaction. As the Applicants note, the Commission clarified this point in Order No. 669-B.<sup>53</sup> The Commission stated at the same time, however, that even when this blanket authorization applies, section 203(a)(1) will still apply if the transaction results in a

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concentrated. The Commission has adopted the Federal Trade Commission/Department of Justice Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of less than 50 points, even in a highly concentrated markets post merger are unlikely to have adverse competitive consequences and ordinarily require no further analysis. U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552 (1992), *revised*, 4 Trade Reg. Rep (CCH) ¶ 13,104 (April 8, 1997).

<sup>49</sup> *Id.* at 19-21; Cavicchi Affidavit ¶ 61; Exhibit AJC-8.

<sup>50</sup> Cavicchi Aff. ¶¶ 12, 72.

<sup>51</sup> Cavicchi Aff. ¶¶ 73, 75, 77.

<sup>52</sup> Application at 19-20 (citing *FPA section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 65, n.55).

<sup>53</sup> *Transactions Subject to FPA Section 203*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225, at P 44 (2006).

change of control over a public utility.<sup>54</sup> In this case, because the transfers of equity interests in Entegra do not qualify as secondary market transactions that do not require prior authorization under section 203(a)(1), Harbinger's proposal to acquire between ten and twenty percent of Entegra's outstanding voting securities requires our review under section 203(a)(1).

33. We disagree with Applicants' contention that despite a twenty-one percent ownership stake in Calpine and approval to acquire up to forty percent of Calpine, Harbinger does not have the ability to control Calpine. Consequently, Calpine's generating assets will be attributed to Harbinger in analyzing the Proposed Transaction. Despite Harbinger's claims that (i) it is an investment manager that is not primarily in the business of supplying power to wholesale markets; (ii) its influence over Calpine's management serves to protect financial interest; and (iii) it is unable to withhold power from the market, Harbinger's Schedule 13D filings submitted at the SEC<sup>55</sup> make clear that Harbinger will take a non-passive role with regard to its investment in Calpine.<sup>56</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> Under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (2000 & Supp V 2005), and the SEC's regulations under that statute, 17 C.F.R. § 240.13d-1 *et seq.*, when any person acquires, directly or indirectly, beneficial ownership of five percent or more of any class of securities of a publicly-traded company, that person must file a disclosure report with the SEC on either a Schedule 13D or 13G. While there are other distinguishing characteristics, the fundamental difference is usually the "investment intent" of the investor, which can change at any time and then be acted upon after 10 days. A Schedule 13D must be filed when the owner of the securities holds the securities "with the purpose or effect of changing or influencing the control of the issuer" or if ownership "equals or exceeds 20 percent of the class of equity securities." 17 C.F.R. § 240.13d-1(c). In order to qualify to file a Schedule 13G, the filer must be able to certify that it "has acquired such securities in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect." 17 C.F.R. § 240.13d-1(b)(1)(i). The commitment not to influence control is not permanent. Under SEC rules, once a Schedule 13G has been filed, a person can change its intent and begin to exert control or commence acquiring additional securities with the intention of exerting control 10 days after filing Schedule 13D. 17 C.F.R. 240.13d-1(c).

<sup>56</sup> Harbinger's Schedule 13D filing states that "[Harbinger] reserve[s] the right to be in contact with members of the Issuer's management, the members of the Issuer's Board of Directors, other significant shareholders and others regarding alternatives that the Issuer could employ to increase shareholder value." *Harbinger Capital Partners Master Fund I, Ltd.*, Form Schedule 13D, General Statement of Acquisition of Beneficial (continued...)

Although Harbinger's 21 percent stake in Calpine requires that it file a Schedule 13D at the SEC regardless of whether it has any intent to control Calpine,<sup>57</sup> Harbinger's ownership of approximately 21 percent of Calpine's outstanding voting securities and authorization to hold up to 40 percent of those securities allows Harbinger to exert control over Calpine. Investments for which Harbinger has filed a Schedule 13D and has taken an active role in operational strategy or contact with the company board of directors include: Cablevision Systems Corporation,<sup>58</sup> Cleveland Cliffs,<sup>59</sup> and the New York

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Ownership, (filed Feb. 11, 2008)

<http://www.sec.gov/Archives/edgar/data/916457/000091957408000713/0000919574-08-000713.txt> ; *Harbinger Capital Partners Master Fund I, Ltd.*, Form Schedule 13D, General Statement of Acquisition of Beneficial Ownership, (filed Feb. 15, 2008) [http://www.sec.gov/Archives/edgar/data/916457/0000919574080001884/d856484\\_13d-a.txt](http://www.sec.gov/Archives/edgar/data/916457/0000919574080001884/d856484_13d-a.txt) ; *Harbinger Capital Partners Master Fund I, Ltd.*, Form Schedule 13D, General Statement of Acquisition of Beneficial Ownership, (filed May 21, 2008) [http://www.sec.gov/Archives/edgar/data/916457/000091957408003441/d885189\\_13d-a.txt](http://www.sec.gov/Archives/edgar/data/916457/000091957408003441/d885189_13d-a.txt).

<sup>57</sup> 17 C.F.R. 240.13d-1(c) (2008).

<sup>58</sup> *Cablevision Systems Corporation, Schedule 13D* at Item 4, [http://www.sec.gov/Archives/edgar/data/1053112/000091957408004840/d910105\\_13d.txt](http://www.sec.gov/Archives/edgar/data/1053112/000091957408004840/d910105_13d.txt) (filed August 11, 2008) (“The Reporting Persons may have discussions with the Issuer’s management, members of the Issuer’s Board of Directors, other significant shareholders and others regarding the Issuer’s business, strategy and future plans and alternatives that the Issuer could employ to increase shareholder value. In addition, the Reporting Persons may have discussions with other parties, including significant shareholders of the Issuer, regarding the Issuer and future plans of proposals with respect to the Issuer and its securities.”).

<sup>59</sup> *Cleveland-Cliffs Inc., Schedule 13D* at Item 4, [http://www.sec.gov/Archives/edgar/data/764065/000095014208001325/sc13d\\_cci.txt](http://www.sec.gov/Archives/edgar/data/764065/000095014208001325/sc13d_cci.txt) (filed July 16, 2008) (stating that “the Reporting Persons may engage in discussions with management, members of the Board, shareholders and other relevant parties concerning the operations, management, Board composition, ownership, capital structure, strategy and future plans of the Issuer, including the Proposed Transaction” and that

The Reporting Persons initially acquired their Shares because they believed that the Shares represent an attractive investment. The Reporting Persons initially reported their investment on a Schedule 13G filed on December 21, 2007 as amended by Amendment No. 1 filed on January 24, 2008 and

(continued...)



Times Company.<sup>60</sup> Applicants' statement that Calpine is managed by its board of directors, not its minority stockholders,<sup>61</sup> does not demonstrate that Harbinger is not able to control Calpine. The Commission has rejected the notion that mere minority ownership is insufficient to exert a degree of control sufficient to require authorization

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by Amendment No. 2 filed on May 27, 2008. Following the announcement on July 16, 2008 that the Issuer's board of directors (the "Board") approved a definitive merger agreement whereby the Issuer is to acquire all of the outstanding shares of Alpha Natural Resources, Inc. (the "Proposed Transaction"), the Reporting Persons determined to file this Schedule 13D to reserve the right to be in contact with members of the Issuer's management, members of the Board, shareholders and other relevant parties regarding the Proposed Transaction and alternatives that the Issuer could employ to maximize shareholder value. Based on their evaluation of the Proposed Transaction to date, the Reporting Persons believe that the Proposed Transaction is not in the best interest of shareholders. As a result, the Reporting Persons may take positions with respect to potential changes in the operations, management, Board composition, ownership, capital structure, strategy and future plans of the Issuer as a means of enhancing shareholder value. Such suggestions or positions may include one or more plans or proposals that relate to or would result in any of the actions required to be reported herein.)

<sup>60</sup> *New York Times and Company, Schedule 13D* at Item 4, [http://www.sec.gov/Archives/edgar/data/71691/000095014208000310/sc13d\\_nytimes.htm](http://www.sec.gov/Archives/edgar/data/71691/000095014208000310/sc13d_nytimes.htm) (filed January 30, 2008) (stating that "the Reporting Persons may engage in discussions with management, the Board, other stockholders of the Issuer and other relevant parties concerning the business, operations, board composition, management, strategy and future plans of the Issuer" and that "Master Fund and the Special Fund (collectively, the 'HCP Funds') delivered a notice (the 'Notice') to the Corporate Secretary of the Issuer to propose the nomination of and nominate for election to the board of directors of the Issuer at the 2008 annual meeting of stockholders of the Issuer (the '2008 Annual Meeting') the following four individuals: Scott Galloway, James A. Kohlberg, Allen L. Morgan and Gregory Shove (each, a 'Nominee')").

<sup>61</sup> Application at 18.

under section 203.<sup>62</sup> Finally, Calpine's Form 10-K filing submitted at the SEC for the fiscal year ending December 31, 2007 states that ownership interests in Calpine are highly concentrated, and identifies this as a risk factor related to Calpine's emergence from Chapter 11 bankruptcy.<sup>63</sup> The fact that the investment firm SPO Advisory Corp., a minority shareholder, holds two seats on the board of directors, including the Chairman of the Board,<sup>64</sup> suggests that minority shareholders SPO Advisory Corp. and Harbinger acting together, or Harbinger acting together with other minority shareholders, are able to exercise control over Calpine. We also find Calpine's claim that its protest of the Application provides evidence that Harbinger does not control it to be unconvincing because Calpine makes no fundamental objections to the Proposed Transaction and instead seeks findings that are consistent with Harbinger's assertions. For these reasons,

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<sup>62</sup> *PDI Stoneman, Inc.* 104 FERC ¶ 61,270 (2003).

<sup>63</sup> Calpine's 2007 Form 10-k filing submitted at the SEC states:

*Our principal shareholders own a significant amount of our common stock, giving them influence over corporate transactions and other matters.*

Three holders [Harbinger, Luminus Management LLC, and SPO Advisory Corp.] (or related groups of holders) of reorganized Calpine Corporation common stock have made filings with the SEC reporting beneficial ownership, directly or indirectly, individually or as members of a group, of 10% or more of the shares of our common stock. These shareholders, who together beneficially own more than 45% of our common stock, may be able to exercise substantial influence over all matters requiring shareholder approval, including the election of directors and approval of significant corporate action, such as mergers and other business combination transactions. If two or more of these shareholders (or groups of shareholders) vote their shares in the same manner, their combined stock ownership may effectively give them the power to elect our entire Board of Directors and control our management, operations and affairs. Currently, two members of our Board of Directors, including the Chairman of our Board, are affiliated, directly or indirectly, with SPO Advisory Corp., one of these shareholders.

*Calpine Corporation*, Form 10-k Annual Report, at 27, Risk Factors: Risks Relating to Emergence from Chapter 11, Item 1A (filed Feb. 29, 2008)  
[http://sec.gov/Archives/edgar/data/916457/000119312508042308/d10k.htm#toc19164\\_3](http://sec.gov/Archives/edgar/data/916457/000119312508042308/d10k.htm#toc19164_3).

<sup>64</sup> *Id.*

Calpine's generating assets will be attributed to Harbinger in analyzing the Proposed Transaction.

34. With regard to the APS balancing authority area, while all sales from the Gila River facility are made in the APS area, no sales from the Southpoint facility are made into that area. Because there is no generation overlap in this market, the Proposed Transaction does not raise horizontal market power concerns.

35. The Applicants' analysis indicates that the geographic region where overlapping sales are significant is the Entergy balancing authority area.

36. Under the Applicants' analysis that attributes Calpine's generating assets to Harbinger, the Proposed Transaction would result in increased market concentration in the Entergy balancing authority area. Consummation of the Proposed Transaction would result in screen failures under the DPT analysis in five of the seven time periods evaluated under the AEC scenario. These screen failures raise concerns about Harbinger's ability to exercise market power. We thus find that the Proposed Transaction raises horizontal market power concerns in the Entergy balancing authority area.

37. We disagree with Applicants' contention that despite the screen failures, other factors indicate that the Entergy balancing authority area is not supply constrained and that consummation of the Proposed Transaction would therefore not raise horizontal market power concerns. Following consummation of the Proposed Transaction, Harbinger's market share under the AEC measure rises across the various time periods from between 7 and 17 percent to between 16 and 31 percent, and results in increases in market concentration from between 678 and 940 to between 956 and 1433. This rise in market concentration could lead to the reduction in competition for supply contracts, and may lead to increased wholesale power prices. Further, while Applicants argue that new uncommitted capacity in the Entergy balancing authority area and surrounding balancing authority areas indicates that the Entergy balancing authority area is not supply constrained,<sup>65</sup> the Applicants have not demonstrated that there is sufficient transmission capacity available to prevent the exercise of market power even if there is excess generation capacity. Nor have Applicants explained why load serving entities have found it necessary to have new power production capacity built in a market where generators are operating at "very low capacity factors."<sup>66</sup>

38. Although the Proposed Transaction raises horizontal market power concerns in the Entergy balancing authority area, we will authorize the Proposed Transaction subject to

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<sup>65</sup> See, e.g., Cavicchi Aff. ¶ 75; Exhibit AJC-11.

<sup>66</sup> See, e.g., Cavicchi Aff. ¶¶ 73 and 75.

certain restrictions, which are designed to guard against the harm to competition that would otherwise result from Harbinger's proposed acquisition of Entegra voting securities. As discussed further below, the Commission's authorization of the Proposed Transaction is conditioned on the requirements that are intended to ensure that Harbinger will not be able to exercise control over Entegra.

39. In granting certain investment firms section 203 authorization to acquire securities beyond the limits set in the Commission's generic blanket authorizations found in its regulations, the Commission has relied on, among other things, commitments that the acquirer would file with the Commission Schedules 13D, 13G, and Form 13F related to acquisitions of utility or holding company securities at the same time and on the same basis, as they are filed with the SEC.<sup>67</sup> In particular, the Commission has relied on assurances from applicants that they intend to remain qualified to file beneficial ownership reports with the SEC on Schedule 13G, and the applicants' acknowledgment that if they attempt to exercise control over a public utility whose securities they acquired, and if they improperly submitted a Schedule 13G filing, they could be subject to civil, and potentially criminal, liability.<sup>68</sup> But in this case, the Commission will not be able to rely on SEC Schedule 13 filing requirements and enforcement oversight because Entegra's securities are not traded on a public exchange.<sup>69</sup>

40. Therefore, in order to ensure that Harbinger's acquisition of voting securities of Entegra does not give Harbinger the ability to control Entegra, the Commission's authorization of the Proposed Transaction is subject to the following conditions: (i) Harbinger will not seek to exercise control over Entegra; (ii) Harbinger will not seek representation on Entegra's board of directors and will not hold any seat on Entegra's

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<sup>67</sup> See *Goldman Sachs Group, Inc.*, 121 FERC ¶ 61,059, at P 37 (2007), *order on clarification*, 122 FERC ¶ 61,005 (2008); *Legg Mason, Inc.*, 121 FERC ¶ 61,061 (2007); *Morgan Stanley*, 121 FERC ¶ 61,060 (2007), *order on clarification*, 122 FERC ¶ 61,094 (2008); *Capital Research and Management Co.*, 116 FERC ¶ 61,267 (2006).

<sup>68</sup> See *Goldman Sachs*, 121 FERC ¶ 61,059. See also 15 U.S.C. § 78r (2000 & Supp V 2005) (civil penalties); 15 U.S.C. § 78ff (2000 & Supp V 2005) (criminal penalties).

<sup>69</sup> Entegra is required to report to the Commission transfers of or acquisitions that occur pursuant to its existing blanket authorizations for future transfers and acquisitions of voting equity interests. *Entegra Power Group LLC*, 115 FERC ¶ 62,038 (2006), as amended by *Entegra Power Group LLC*, 118 FERC ¶ 61,181 (2007) and *Entegra Power Group LLC*, 119 FERC ¶ 62,218 (2007); *Entegra Power Group LLC*, 123 FERC ¶ 61,006 (2008).

board of directors; (iii) Harbinger will not become Entegra's largest shareholder;<sup>70</sup> (iv) Harbinger will not act in concert with one or more minority shareholders to achieve the ends described in (i) or (ii); (v) Harbinger will continue to be able to represent that, notwithstanding its beneficial ownership of twenty percent of the shares of Entegra, it has not acquired the securities of Entegra with any purpose, or with the effect of, changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect;<sup>71</sup> and (vi) Harbinger will not cast any votes or take any action that directly or indirectly dictates the price at which power is sold from Entegra's generating facilities, or directly or indirectly specifies how and when power generated by the facilities will be sold.<sup>72</sup>

41. We will require Applicants to file with the Commission, no later than 45 days after the end of each calendar quarter, a report certifying that Harbinger is complying with each of the conditions stated above. The report must be verified by a duly authorized corporate official in accordance with the provisions on subscription and verification found in 18 C.F.R. § 385.2005 (2008).

42. In addition, we will require Applicants to file with the Commission, no later than 45 days after the end of each quarter, a report listing their holdings of the outstanding shares of Entegra, stated in terms of the number of shares held as a percentage of the outstanding shares.

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<sup>70</sup> Under the Commission's prior orders, future transfers of equity interests in Entegra referred to as Class A Units in the secondary market cannot hold more than twenty percent of the Entegra Class A Units. *Entegra Power Group LLC*, 123 FERC ¶ 61,006, at P 5 (2008). Class A Unit holders are active investors with full voting rights.

<sup>71</sup> We note that this condition is analogous to the certification required by the SEC to qualify to file a Schedule 13G. In order to qualify to file a Schedule 13G, the filer must be able to certify that it "has acquired such securities in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect." 17 C.F.R. § 240.13d-1(b)(1)(i).

<sup>72</sup> We note that the issue concerning what constitutes control for FPA section 203 and market-based rate purposes is the subject of a Petition for Guidance filed by the Electric Power Supply Association on September 2, 2008 in Docket No. PL09-3-000 (originally docketed as Docket No. EL08-87-000). In light of the fact that this is an issue of significance to the industry that the Commission intends to address in Docket No. PL09-3-000, the Commission's actions taken in the instant order are subject to the outcome of the Commission's determinations in that proceeding or any other proceeding the Commission may initiate to address the issues raised in Docket No. PL09-3-000.

43. Based on the conditions restricting Harbinger's ability to control Entegra, we find that the Proposed Transaction will have no adverse effect on competition in terms of horizontal market power because it will not result in Harbinger controlling Entegra's generating assets, and therefore will not result in the consolidation of generation assets that would increase concentration in any relevant geographic market.

44. With regard to Calpine's argument that consummation of the Proposed Transaction will jeopardize the ability of the Calpine market-based rate sellers to retain their market-based rate authority in the Entergy balancing authority area, we find that because the Proposed Transaction will not give Harbinger the ability to control Entegra's generating assets under the conditions we have stipulated, the Proposed Transaction will not result in a consolidation of generation assets that would increase concentration in any relevant market. Further, because of the conditions we impose on Harbinger with regard to its acquisition of Entegra, the Proposed Transaction does not affect the circumstances the Commission relied upon when granting the Calpine market-based rate sellers market-based rate authority.

## **2. Effect on Competition – Vertical Market Power**

### **a. Applicants' Analysis**

45. Applicants assert that the Proposed Transaction does not result in adverse effects on vertical competition. Applicants state that no transmission facilities are involved other than those associated with electric generating facilities. They also state that they do not have control of generation sites or fuel supplies that could be used to prevent entry by new suppliers. Applicants argue that while Entegra does own the Trans-Union pipeline, it is an interstate pipeline that the Commission regulates. They also explain that Harbinger owns no pipeline facilities, and the transfer of part of the upstream ownership interest in the Trans-Union pipeline does not change the competitive landscape. Applicants also state that the Trans-Union pipeline is primarily used to supply natural gas to the Union generating facility, and that some incremental transportation capacity is made available to third parties subject to open access requirements. Applicants state that there are no concerns about dominant control over power plant sites for the development of new capacity, as is demonstrated by the fact that over 20,000 MW of new combined-cycle capacity recently entered the market.<sup>73</sup>

### **b. Commission Determination**

46. Based on the facts presented, we agree that the Proposed Transaction does not raise any vertical market power concerns. The limited transmission facilities involved in

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<sup>73</sup> Application at 22-23.

the Proposed Transaction, Applicants' lack of control of power plant sites, and the open access requirements under which the Trans-Union pipeline is operated, demonstrate that the Proposed Transaction will not result in the Applicants' ability to exert vertical market power in wholesale power markets.

### **3. Effect on Rates**

#### **a. Applicants' Analysis**

47. Applicants contend that the Proposed Transaction will have no adverse effect on rates charged by Applicants' utility affiliates, each of which will continue to sell power at market prices pursuant to its market-based rate authority. In addition, Applicants state that neither they nor their affiliates have captive customers that could be impacted by the Proposed Transaction. Applicants also note that because neither Applicants nor their affiliates provide electric transmission service or own a transmission system, the Proposed Transaction raises no concerns regarding rates for transmission service.<sup>74</sup>

#### **b. Commission Determination**

48. We find that, based on the conditions restricting Harbinger's ability to control Entegra, the Proposed Transaction will have no adverse effect on rates because it will not result in Harbinger controlling Entegra's generating assets, and it therefore will not result in the consolidation of generation assets that would increase concentration in any relevant market such that rates would be adversely impacted. We also note that no customer has argued that consummation of the Proposed Transaction would have an adverse effect on rates.

### **4. Effect on Regulation**

#### **a. Applicants' Analysis**

49. Applicants state that the Proposed Transaction will have no adverse effect on regulation at either level. They state that the Commission will continue to exercise the same jurisdiction over sales of electricity generated by the Applicants' facilities and those of their affiliates following the Proposed Transaction. No facilities will be removed from the Commission's jurisdiction. Applicants also state that no state regulatory commission has any jurisdiction over the Proposed Transaction, and Applicants are unaware of any

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<sup>74</sup> *Id.* at 23-24.

reason for any state commission to raise a concern with regard to the Proposed Transaction.<sup>75</sup>

**b. Commission Determination**

50. Based on the facts presented, we find that the Proposed Transaction will not adversely effect regulation. We note that no state commission has intervened in this proceeding.

**5. Cross-subsidization**

**a. Applicants' Analysis**

51. Applicants state that because the wholesale electric transactions of the Applicants and their affiliates are at market-based rates, the Proposed Transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. In addition, Applicants state that they are not traditional public utilities with captive customers and do not own or provide transmission services over jurisdictional transmission facilities.<sup>76</sup> Accordingly, Applicants verify with respect to themselves and their affiliates, based on the facts and circumstances known to them or that are reasonably foreseeable, that the Proposed Transaction does not now result, and is not in the future expected to result in: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuances of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.<sup>77</sup>

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<sup>75</sup> *Id.* at 24.

<sup>76</sup> *Id.* at 26-27.

<sup>77</sup> 16 U.S.C. §§ 824b, 824c (2006).



52. In addition to providing the four specific showings described in Order No. 669,<sup>78</sup> Applicants verify that, based on the facts and circumstances known to them that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future, any form of cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.<sup>79</sup>

**b. Commission Determination**

53. Based on the facts presented, we find that the Proposed Transaction will not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

The Commission orders:

(A) Applicants' request for section 203(a)(1) authority to dispose of up to 20 percent of the outstanding voting securities of Entegra is hereby granted, subject to the conditions discussed in this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates, or determinations of cost, or any other matter whatsoever now pending or which may come before the Commission.

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) If the Proposed Transaction results in changes in the status or the upstream ownership of Applicants' affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2008) shall be made.

(F) Harbinger (i) will not to seek to exercise control over Entegra; (ii) will not seek representation on Entegra's board of directors or hold any seat on Entegra's board of directors; (iii) will not become Entegra's largest shareholder; (iv) act in concert with one

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<sup>78</sup> *Transactions Subject to FPA section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2006); *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

<sup>79</sup> Application at 26-27.

or more minority shareholders to achieve the ends described in (i) or (ii); (v) will continue to be able to represent that, notwithstanding its beneficial ownership of twenty percent of the shares of Entegra, it has not acquired the securities of Entegra with any purpose, or with the effect of, changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect; and (vi) Harbinger will not cast any votes or take any action that directly or indirectly dictates the price at which power is sold from Entegra's generating facilities, or directly or indirectly specifies how and when power generated by the facilities will be sold.

(G) Applicants must notify the Commission, within 15 days of the issuance of this order, whether they accept each of the conditions stated in Ordering Paragraph (F).

(H) Applicants must file with the Commission, no later than 45 days after the end of each calendar quarter, a report certifying that Harbinger is in compliance with each of the conditions stated in Ordering Paragraph (F), and such report must be verified by a duly authorized corporate official under 18 C.F.R. § 385.2005 (2008).

(I) Applicants shall make the appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(J) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the transaction.

(K) Applicants shall file with the Commission, on a quarterly basis, within 45 days of the end of the quarter, a report listing their holdings of the outstanding shares of Entegra, stated in terms of the number of shares held as a percentage of the outstanding shares.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.