

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Entergy Services, Inc.

Docket Nos. ER91-569-025
EL04-123-001
EL05-105-000

ORDER ON REHEARING AND CLARIFICATION, INSTITUTING SECTION 206
PROCEEDING AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued May 5, 2005)

1. On December 17, 2004, the Commission issued an order¹ on Entergy Services, Inc.'s (Entergy) updated market power analysis, which instituted a proceeding pursuant to section 206 of the Federal Power Act (FPA)² to investigate generation market power issues. In this order, the Commission grants in part, and denies in part, rehearing of the December Order. In granting rehearing in part, we will institute a proceeding under section 206 of the FPA in Docket No. EL05-105-000 to investigate whether Entergy satisfies the Commission's transmission market power and affiliate abuse or reciprocal dealing standards for the grant of market-based rate authority and establish a refund effective date pursuant to the provisions of section 206, for purposes of the additional issues set for hearing today, including sales to customers located outside of the Entergy control area. However, as discussed more fully below, the Commission will hold the investigation in Docket No. EL05-105-000 in abeyance pending the outcome of related proceedings. We will deny rehearing of all other issues. Further, we also grant in part and dismiss in part the request for clarification filed by Occidental. This order will protect customers from excessive rates and charges that may result from the exercise of market power.

¹ *Entergy Services, Inc.*, 109 FERC ¶ 61,282 (2004) (December Order).

² 16 U.S.C. § 824e (2000).

Background

2. On August 9, 2004, as amended, Entergy, on behalf of the Entergy Operating Companies,³ submitted for filing the generation market power screens, as well as the results of a Delivered Price Test, in compliance with the Commission's orders issued on April 14, 2004 and July 8, 2004⁴ and the Commission's data request issued on October 29, 2004.⁵ Entergy's filing indicated that Entergy passed the pivotal supplier screen but failed the wholesale market share screen in each of the four seasons considered in Entergy's control area. As we stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding under section 206 and establishes a rebuttable presumption of market power in the section 206 proceeding. Accordingly, because of Entergy's failure of the wholesale market share screen, in the December Order, the Commission instituted a section 206 proceeding to investigate generation market power issues in the Entergy control area.

3. In addition, in the December Order, the Commission found that Entergy satisfied the Commission's concerns regarding the other three parts of the Commission's analysis for market power- *i.e.*, transmission market power, barriers to entry and affiliate abuse or reciprocal dealing and, therefore, did not include those issues in the section 206 proceeding instituted therein. The Commission noted that several parties had expressed concerns that Entergy's filing failed to satisfy the standards for these three parts but concluded that such arguments would be more appropriately raised in a separate complaint proceeding. With

³ The Entergy Operating Companies are Entergy Arkansas, Inc.; Entergy Gulf States, Inc.; Entergy Louisiana, Inc.; Entergy Mississippi, Inc.; and Entergy New Orleans, Inc.

⁴ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

⁵ On October 29, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to Entergy's submittal.

respect to the protesters' concerns regarding Entergy's transmission market power, the Commission further noted that many of the arguments raised by protesters were being addressed in a contemporaneous proceeding.⁶

Requests for Rehearing

4. Timely requests for rehearing of the December Order were filed by Calpine Corporation (Calpine); Occidental Chemical Corporation (Occidental); and the Joint Parties⁷ (collectively, petitioners).
5. The petitioners generally argue that the Commission erred in the December Order by limiting the scope of the section 206 proceeding to an investigation of Entergy's generation market power without any inquiry into whether Entergy satisfies the other three parts of the Commission's market-based rate analysis, solely on the basis of Entergy's representations that it satisfies the Commission's standards for those parts. The petitioners contend that the Commission wrongly refused to consider relevant and persuasive evidence and actual experiences of market participants that point to Entergy's failure to satisfy the remaining three parts.
6. On January 11, 2005, the Louisiana Public Service Commission filed a notice of intervention.
7. On January 12, 2005, Occidental filed a request for clarification of the December Order.

⁶ *Citing Entergy Services, Inc.*, 109 FERC ¶ 61,281 (2004), *reh'g pending* (AFC proceeding). In that order, the Commission instituted a section 206 proceeding in Docket No. EL05-22-000 to determine whether Entergy has violated its OATT or Commission orders and whether Entergy's provision of access to its transmission system has been unduly discriminatory or preferential.

⁷ American Public Power Association, Calpine Corporation, Electricity Consumers Resource Council, National Rural Electric Cooperative Association, Shell Trading Gas & Power Company and Tractebel Energy Marketing, Inc. (collectively, Joint Parties).

Discussion

8. As noted above, petitioners seek rehearing of the Commission's determinations in the December Order regarding transmission market power, barriers to entry and affiliate abuse. After careful consideration of the arguments raised on rehearing as to why the Commission should have addressed all four parts of the market-based rate analysis in the section 206 proceeding instituted in the December Order, the Commission will grant rehearing in part.

A. Transmission Market Power

9. The petitioners contend that the Commission erred in finding that Entergy satisfies the transmission market power analysis simply because Entergy has a Commission-approved open access transmission tariff (OATT). They argue that the evidence indicates that merely having an OATT has clearly not been sufficient to curb Entergy's transmission market power. Occidental asserts that prior to the December Order, the Commission has never used a bright-line approach to the transmission market power standard. Rather, Occidental asserts, prior to the December Order, the Commission's policy was that "[t]he typical test for demonstrating the requisite absence or mitigation of transmission market power is whether the applicant and its affiliates have an approved [OATT]."⁸

10. The Joint Parties state that before finding that Entergy satisfies the transmission market power standard, the Commission should have examined the specific transmission-related allegations made by the parties, as well as statements submitted directly to the Commission in the Docket No. RM04-7-000 rulemaking proceeding and contrary statements made by the Commission in other proceedings.⁹ Occidental asserts that the evidence indicates that Entergy has the ability to exercise control of its transmission facilities to block alternative generation sources. In addition, Calpine asserts that Entergy has exercised transmission market power, despite having an OATT, by, among other

⁸ *Citing AEP Power Marketing, Inc.*, 97 FERC ¶ 61,219 at 61,969 (2001) (*AEP*), *order on reh'g*, *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

⁹ *Citing Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 810, 823-825 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 at 31,015 (2000), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), 90 FERC ¶ 61,201 (2000); *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking*, 67 Fed. Reg. 55,452 at P 5-6, 38-39, 68-69 and Appendix C (August 29, 2002).

things, periodically failing to provide interconnections or foreclosing competitors' access to transmission service; raising its competitors' costs by increasing its interconnection or transmission upgrade costs; causing undue delays in system impact studies, facilities studies or transmission upgrades; preferentially allowing the delisting or redispatch of network resources to ensure market access for Entergy-owned and affiliated generating units, while failing to provide such delisting or redispatch options for competing generators; and/or dispatching or failing to dispatch Entergy-controlled generation in order to foreclose competing generators from gaining access to adequate transmission service.

11. Moreover, Occidental argues, the December Order also contradicts a prior Commission order, which stated that the triennial market power update proceeding was the appropriate forum for addressing concerns regarding Entergy's transmission market power. Occidental states that five years ago, in a complaint proceeding initiated by Aquila Power Corporation, the Commission found Entergy in violation of its OATT and Order No. 888, but directed parties to Entergy's triennial market power update proceeding (the instant proceeding) as the appropriate forum for addressing the issue of whether Entergy's market-based rate authority should be revoked.¹⁰ Now, Occidental argues, rather than address the concerns about Entergy's transmission market power expressed by parties in this forum, the Commission has directed them to another proceeding (the Available Flowgate Capability (AFC) proceeding) in which the Commission has already stated that revocation of Entergy's market-based rate authority is not a cognizable remedy for any breaches of the FPA that are found in that investigation or to file yet another complaint. Occidental argues that the Commission has violated the due process rights of the parties by denying them the opportunity to be heard at a meaningful time and in a meaningful manner by consistently directing parties to separate proceedings.

12. Petitioners have raised credible concerns regarding the issue of transmission market power. The concerns are raised by several market participants and similar issues have been raised in other proceedings, including a prior Entergy proceeding where we instructed intervenors to redirect their allegations to the instant proceeding. The Commission will grant rehearing and address the petitioners' transmission market power concerns in a section 206 proceeding in Docket No. EL05-105-000, which we institute herein. However,

¹⁰ *Citing Aquila Power Corp. v. Entergy Services, Inc.*, 90 FERC ¶ 61,260 (2000), *aff'd*, *Entergy Services, Inc. v. FERC*, 375 F.3d 1204 (D.C. Cir. 2004). The Commission found that Entergy violated the requirements of section 28.2 of the OATT "by failing to designate the resources associated with Entergy's reservations of firm import capacity on behalf of its native load customers in the same manner as do network customers reserving firm capacity."

in light of the recently-issued Commission order¹¹ involving Entergy's Independent Coordinator of Transmission (ICT) proposal in Docket No. EL05-52-000, which may resolve most of the petitioners' concerns, the Commission will hold the investigation of Entergy's transmission market power in abeyance in this proceeding until 60 days after the issuance of a Commission order approving Entergy's section 205 filing to implement the ICT proposal,¹² unless superceded by a future order in Docket No. EL05-105-000. We note, however, that many of the concerns raised relate to lack of transmission capacity and impediments to independent competitors obtaining access to transmission to bring their supplies to market. This is the type of evidence that the April 14 and July 8 Orders anticipated could be considered as part of the Commission's examination of generation market power.¹³ Therefore, in addition to the ICT proceeding, the Commission may consider these issues in the context of the generation market power section 206 investigation in Docket No. EL04-123 that was instituted in the December Order.

B. Other Barriers to Entry

13. The petitioners further state that the Commission erred in accepting Entergy's representations that neither Entergy nor its affiliates can erect barriers to entry without giving full consideration to the countervailing allegations of and the evidence submitted by other parties. Occidental states that the Commission's decision in the December Order was contrary to Commission precedent; rather, Occidental argues, prior to the December Order, the Commission's approach to evaluating the barriers to entry part of the market

¹¹ *Entergy Services, Inc.*, 110 FERC ¶ 61,295 (2005), *reh'g pending* (ICT Order). In Docket No. ER04-699-000 as enhanced by its filing in Docket No. EL05-52-000, Entergy has proposed to revise its OATT to contract with an independent entity, the ICT, which would, among other things, oversee certain operations on the Entergy transmission system such as granting or denying requests for transmission service, calculating AFC, administering Entergy's Open-Access Same Time Information Systems, and performing certain planning functions. Entergy has also proposed a new process for assigning cost responsibility for transmission upgrades, as well as a new Weekly Procurement Process.

¹² On April 21, 2005, Entergy submitted a letter in Docket Nos. EL05-22-000 and EL05-52-000 informing the Commission that it will make a section 205 filing on or about May 27, 2005 to implement its ICT proposal consistent with the Commission's guidance in the ICT Order.

¹³ April 14 Order, 107 FERC ¶ 61,108 at P 102, 119 and July 8 Order, 108 FERC ¶ 61,026 at n.84 (Explaining that the type of evidence to be considered is historical sales and/or access to transmission to move supplies within, out of, and into a control area.)

power analysis was to rely on the applicant's representation as well as "public policing."¹⁴ Calpine asserts that the Commission should take a broader approach in assessing barriers to entry and should take into account other factors such as whether competing suppliers can economically gain access to the transmission network. Calpine argues that the inability of competing generators to economically gain access to the transmission network results in increased wholesale prices by discriminating against lower cost generation offered by competing suppliers. Similarly, Calpine argues, if a utility that is the dominant purchaser of wholesale power (actual or potential) refuses to purchase power from lower cost competing generators, the utility's buyer market power is a barrier to entry that ensures the inclusion of the utility's high-cost capacity in the rate base and thereby increases costs to customers. Calpine contends that this also increases wholesale prices since the utility's refusal to purchase may prevent competitors from effectively disciplining the utility's pricing behavior with respect to smaller wholesale customers, due to ramping constraints and minimum run-times.

14. Although petitioners have raised concerns regarding Entergy's ability to erect barriers to entry, the Commission finds that the allegations made are not, in fact, "other" barriers to entry.¹⁵ Accordingly, we will deny the petitioners' request for rehearing of this issue.

C. Affiliate Abuse and Reciprocal Dealing

15. The petitioners also allege that the Commission erred in accepting Entergy's representations that it satisfies the Commission's affiliate abuse concerns without giving full consideration to the evidence submitted by other parties. Calpine states that it has submitted specific evidence that affiliate abuse has occurred in the Entergy control area in the recent past. For example, Calpine states, protesters in the Request For Proposal (RFP) proceeding in Docket No. ER03-583 have alleged that Entergy engaged in affiliate abuse by acting as both evaluator and competitor in the RFP process; refusing to consider certain contract proposals; exempting its affiliated operating company wholesale suppliers from having to bid into the RFP process, and subsequently entering into agreements with such affiliated sellers; allowing employees representing Entergy's generation interests to assess

¹⁴ *Citing AEP*, 97 FERC at 61,969.

¹⁵ As the Commission has previously stated, when evaluating other barriers to entry, the Commission considers, *e.g.*, a power producer's ownership of building sites, and affiliation with or ownership of interstate natural gas pipelines, engineering and construction firms, and local natural gas distribution systems. *See, e.g., Heartland Energy Svcs., Inc.*, 68 FERC ¶ 61,223 at 62,062 (1994).

whether non-affiliated resources were likely to encounter transmission problems; restricting the length of the term of its requests for proposal; and refusing to consider generation sources other than solid fuel resources for some transactions, effectively excluding 14,000 MW of merchant generators' gas-fired units. Calpine further notes that similar affiliate abuse concerns have also been raised in proceedings involving Entergy's Weekly Procurement Process (WPP) in Docket No. EL03-132. Furthermore, Calpine alleges that Entergy may also be exercising market power by foreclosing competing generators from the majority of the wholesale market in the Entergy control area by preferentially dispatching Entergy's own higher-cost generating units despite the availability of lower-cost competing generation.

16. Petitioners have made credible allegations and related instances of actual experience that give rise to serious concerns regarding whether Entergy satisfies the Commission's concerns regarding affiliate abuse or reciprocal dealing. However, in light of the ongoing RFP proceeding in Docket No. ER03-583 and the ICT proceeding in Docket No. EL05-52 (which will involve Entergy's WPP), which may resolve many of the issues raised by petitioners, the Commission will grant rehearing in part and consider these allegations in the 206 proceeding that we institute herein but hold the investigation in abeyance pending the outcome of those proceedings.

D. Administrative Process Issues

17. The Joint Parties argue that the four parts of the Commission's market-power analysis are interrelated and cannot be treated as separate and distinct categories. In addition, the Joint Parties assert that this truncated market power review creates the real possibility that Entergy will retain authority to charge market-based rates while still possessing transmission market power, the ability to erect barriers to entry in the Entergy control area, and the ability to engage in affiliate abuse – all of which ultimately permit Entergy to exercise generation market power as well.

18. The petitioners assert that the December Order creates difficulties for those market participants that wish to challenge, in one comprehensive docket, all issues relating to Entergy's fitness to hold market-based rate authority, requiring market participants to use their scarce litigation resources in multiple section 206 proceedings and to bear the burdens of proof and of going forward with evidence on the other three parts of the market power analysis, when they should not be required to do so. Calpine acknowledges that there are other proceedings that address many of the issues dealing with the other parts (*e.g.*, the investigation established in the AFC proceeding that addresses transmission-related issues and the ongoing hearing concerning Entergy's RFP process in Docket No. ER03-583 that addresses affiliate abuse concerns). However, Calpine argues, neither those proceedings nor a separate complaint proceeding is an effective substitute for examining the other parts of the market power analysis in this proceeding. In addition, the Joint

Parties note that if the outcome of a separate complaint proceeding dealing with only one of the four relevant parts of the market power analysis is that an applicant's market-based rate authority could be revoked or conditioned, that decision would effectively moot any other pending proceedings. Therefore, the Joint Parties conclude, all issues relating to the possible revocation or conditioning of an applicant's market-based rate authority should be heard by a single decision-maker in a single proceeding.

19. The Commission recognizes that the petitioners have expressed concerns regarding the administrative difficulties presented by the December Order. As discussed above, the Commission has granted rehearing and will now consider issues concerning the transmission market power and affiliate abuse/reciprocal dealing standards in the section 206 proceeding instituted herein in Docket No. EL05-105-000. However, as also noted above and as acknowledged by the petitioners, many of the petitioners' concerns regarding the transmission market power and affiliate abuse or reciprocal dealing standards overlap with issues raised in various proceedings that are already before the Commission. Accordingly, we will hold our investigation of these issues in abeyance pending the outcome of the RFP proceeding in Docket No. ER03-583 and the ICT proceeding in Docket No. EL05-52. We find that this approach is reasonable and will not result in a piecemeal review of the Entergy's market-based rate application. To the extent that the other proceedings fail to address the issues raised by the petitioners, the Commission will address those issues in this proceeding.

20. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with our precedent,¹⁶ we will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceeding in Docket No. EL05-105-000 is published in the *Federal Register*. The refund effective date established herein in Docket No. EL05-105-000 applies to the additional issues set for hearing today, including sales to customers located outside of Entergy's home control area. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by September 30, 2005.

¹⁶ See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

Additional Issues

21. Occidental alleges that the Commission's December Order violates due process because it fails to give parties a meaningful opportunity to comment on Entergy's filings. Occidental contends that the Commission erred in the December Order by dismissing its motion for an extension of time to file comments and protests without requiring Entergy to produce all of the information required by the Commission's April 14 and July 8 Orders. Occidental states that Entergy has failed to respond to Occidental's request for certain information necessary to review Entergy's updated market power analysis and, consequently, parties have not been given the opportunity to review and comment on Entergy's complete updated market power analysis.

22. As noted above, Occidental seeks rehearing of the Commission's decision in the December Order to dismiss as moot Occidental's motion for extension of time to file comments and protests. However, the Commission believes that parties have had ample notice and opportunity to respond to evidence in this proceeding. Subsequent to Entergy's August 9, 2004 filing of its revised generation market power screen, the Commission provided an opportunity for parties to file comments. In addition, the Commission provided a further opportunity to file comments after Entergy submitted an amended filing on November 19, 2004 in response to a October 29, 2004 data request issued pursuant to delegated authority. Occidental submitted timely protests in response to both the August 9, 2004 and the November 19, 2004 filings. Further, as noted below, Entergy states that it has already provided Occidental with the information necessary to review Entergy's updated market power analysis. As a result, the Commission will deny Occidental's request for rehearing on this issue.

Request for Clarification

23. On January 12, 2005, Occidental filed a request for clarification of the type of "additional information" that Entergy is required to file in the section 206 proceeding. It states that the December Order failed to specify what type of additional information the Commission is directing Entergy to provide. Occidental maintains that, at a minimum, Entergy must provide all of the information required by the Commission in the April 14 and July 8 Orders, which, Occidental asserts, Entergy still has not done. Specifically, Occidental states, Entergy should be required to provide the Charles Rivers Associates' Competitive Analysis Screen Model (CASm Model) used by Entergy's consultant to perform the Delivered Price Test submitted by Entergy in its filings. Occidental states that the CASm Model is required to review Entergy's Delivered Price Test analysis and also contains information that Entergy was required to produce by the April 14 and July 8 Orders, which Entergy still has not produced. In addition, Occidental asserts, Entergy has not provided the market price assumed in its Delivered Price Test, as well as information concerning statutory restrictions that may apply to generation suppliers.

Occidental further asks the Commission to clarify that Entergy's response will be noticed with an opportunity for intervenors to file comments or protests.

24. On January 27, 2005, Entergy filed an answer to Occidental's motion for clarification. Entergy responds that Occidental's requests have already been addressed in the December Order and should, therefore, be dismissed as moot. Entergy states that the market prices for the relevant markets and time intervals assumed in the Delivered Price Test are provided in an exhibit in its August 9 filing. Entergy further states that it has already provided all of the data used by the CASm Model to both the Commission and to Occidental. Entergy states that the only data not provided to Occidental is a proprietary CASm computer code. Entergy argues that the April 14 and July 8 orders only required an applicant to make data workpapers available to the intervenors, not copies of computer software and therefore, Occidental's request should be dismissed. In addition, Entergy states that Occidental's request for "information concerning statutory restrictions that may apply to generation suppliers" fails to specify what types of restrictions Occidental is referring to. Furthermore, Entergy states that it is unaware of any such information and that if such information does exist, it would be in the hands of independent generation suppliers, such as Occidental.

25. The second sentence of paragraph 47 in the December Order states "[i]n this order, the Commission has instituted a section 206 proceeding and requested additional information to supplement the record." The Commission clarifies that the phrase "and requested additional information to supplement the record," was inadvertently included in P 47 of the December Order. Regarding the additional information that Occidental states that Entergy should provide, as noted above, Entergy states that it has already provided the requested information directly to Occidental as well as to the Commission. Accordingly, the Commission will dismiss as moot Occidental's request to direct Entergy to provide this additional information. We also dismiss Occidental's request to direct Entergy to provide "information concerning statutory restrictions that may apply to generation suppliers" because this request is not sufficiently specific and it is unclear what Occidental is referring to.

26. Finally, Occidental asks the Commission to clarify that the section 206 proceeding in Docket No. EL04-123 will include the complete record in Docket Nos. ER91-569-023 and ER91-569-024, including the Delivered Price Test analyses submitted by Dr. David DeRamus on behalf of Occidental and Calpine, as well as any additional or supplemental intervenor submittals as the Commission may direct or permit in further orders in that section 206 proceeding. Occidental further requests leave to include in the record the workpapers for Dr. DeRamus' Delivered Price Test analysis.

27. The Commission further clarifies that the section 206 proceeding in Docket No. EL04-123 will examine the entire record in Docket Nos. ER91-569-023 and ER91-569-024, including all of the intervenors' submittals. To that end, we further grant Occidental's request for leave to include Dr. DeRamus' workpapers in the record.

The Commission orders:

(A) The requests for rehearing are hereby granted in part and denied in part, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL05-105-000 concerning the justness and reasonableness of Entergy's continuing to charge market-based rates, as discussed in the body of this order.

(C) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the Federal Power Act in Docket No. EL05-105-000.

(D) The refund effective date in Docket No. EL05-105-000 will be 60 days following publication in the *Federal Register* of the notice discussed in Ordering Paragraph (C) above.

(E) The investigation of whether Entergy satisfies the transmission market power and affiliate abuse or reciprocal dealing parts of the Commission's analysis for market-based rates is held in abeyance, as discussed in the body of this order.

(F) Occidental's request for clarification is granted in part and dismissed in part, as discussed in the body of this order.

(G) Occidental's motion for leave to include Dr. DeRamus's workpapers in the record is granted.

By the Commission. Commissioner Kelly not participating. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services, Inc.

Docket Nos. ER91-569-025
EL04-123-001
EL05-105-000

(Issued May 5, 2005)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

This order grants rehearing to expand the section 206 investigation initiated in the December Order, and reverses the Commission's determination that Entergy satisfied the Commission's market power test with respect to transmission market power and affiliate abuse. I support reversing the Commission's determination with respect to transmission market power, but not with respect to affiliate abuse, and therefore dissent in part on this order.

To date, the transmission market power prong of the Commission's market power test has largely involved whether or not a public utility seeking market-based rate authorization that owns transmission has an OATT on file.¹ Generally, the inquiry ends there. However, the Commission has investigated transmission market power issues when there is a *prima facie* showing that a public utility with an OATT on file has violated its OATT, rather than generalized allegations of transmission market power.² That is exactly what we have here.³

With respect to the affiliate abuse prong, the Commission has set the affiliate abuse

¹ *Consumers Energy Co. v. FERC*, 367 F.3d 915, 917 (D.C. Cir. 2004) citing *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); and December Order at P 39.

² *WPS Resources Corp.*, 83 FERC ¶ 61,196 at 61,837-38 (1998).

³ *See supra* P 11 and note 11.

issue for hearing when intervenors have made a prima facie case of possible affiliate abuse in a proposed wholesale power sale between affiliates.⁴ In this instance, I simply do not believe the petitioners have met the burden necessary to justify further investigation. The order's analysis of the allegations on how Entergy fails the affiliate abuse prong is terse, nothing more than a summary conclusion.⁵ For that reason, I dissent in part.

Joseph T. Kelliher

⁴ *Wisconsin Public Service Corp.*, 109 FERC ¶ 61,319 (2004).

⁵ Order at P 16.