

121 FERC ¶ 61,182  
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.

Entergy Gulf States, Inc. and  
Calcasieu Power, LLC

Docket No. EC07-70-000

ORDER AUTHORIZING DISPOSITION AND ACQUISITION OF  
JURISDICTIONAL FACILITIES

(Issued November 19, 2007)

1. On March 15, 2007, as supplemented on April 10, 2007, Entergy Gulf States, Inc. (Entergy Gulf States) and Calcasieu Power, LLC (Calcasieu Power) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA).<sup>1</sup> Applicants request Commission authorization for a disposition and acquisition of jurisdictional facilities associated with the sale of a natural gas-fired combustion turbine generating facility (Facility) by Calcasieu Power to Entergy Gulf States.

2. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. Our 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>2</sup> Section 203 also requires the Commission to find that the

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<sup>1</sup> 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594 (2005) (EPAAct 2005).

<sup>2</sup> *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*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). *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).

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>3</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>4</sup>

## **I. Background**

### **A. Applicants**

3. Entergy Gulf States is a public utility that owns and operates generation, transmission, and distribution facilities, and provides electricity for approximately 720,000 retail customers in Louisiana and Texas. It is a wholly-owned subsidiary operating company of Entergy Corporation (Entergy). Entergy Gulf States thus is affiliated with the other Entergy Operating Companies,<sup>5</sup> as well as Entergy Services, Inc., the service company that performs various administrative, legal, and operational functions for the Energy Operating Companies, including acting as their agent with respect to certain contracts and in proceedings at the Commission.

4. Calcasieu Power is a public utility that has Commission authorization to make wholesale sales of power at market-based rates.<sup>6</sup> It owns certain interconnection facilities but no other transmission assets. Following the sale of the Facility, Calcasieu Power will own no generation assets, transmission interconnection facilities, or jurisdictional assets. Calcasieu Power’s ultimate parent is Dynegy Inc. (Dynegy). Through its affiliates, Dynegy produces and sells electric energy, capacity, and ancillary services in U.S. markets. Dynegy’s power generation portfolio consists of approximately 12,000 megawatts (MWs) of baseload, intermediate, and peaking power plants fueled by a mix

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<sup>3</sup> 16 U.S.C. § 824b(a)(4) (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005).

<sup>4</sup> 18 C.F.R. § 33.2 (2007).

<sup>5</sup> The Entergy Operating Companies are Entergy Gulf States, Entergy Arkansas, Inc., Entergy Louisiana, LLC, Entergy Mississippi, Inc., and Entergy New Orleans, Inc.

<sup>6</sup> *Calcasieu Power, LLC*, 90 FERC ¶ 61,164 (2000).

of coal, fuel oil, and natural gas. Calcasieu Power's affiliate, Dynegy Power Marketing, Inc., markets the output from Dynegy's generation portfolio.

**B. The Proposed Transaction**

5. The Facility is a 310 MW simple-cycle generating facility consisting of two combustion turbine generators. It is located in Calcasieu Parish, Louisiana and is connected to Entergy Gulf States' 230 kV transmission system.<sup>7</sup> As part of the proposed transaction, Entergy Gulf States will assume the existing Interconnection and Operating Agreement (IA). Applicants state that the Facility is needed to improve Entergy system reliability and will provide peaking and reserve capacity that can be scheduled within the current day in the case of generation failures, when there is unexpected demand, or to avoid purchases.<sup>8</sup>

6. Entergy Gulf States, Calcasieu Power, and Dynegy Holdings, Inc. entered into an asset purchase agreement for the sale of the Facility for more than \$10 million (Purchase Agreement). Entergy Gulf States and Calcasieu Power also entered into the Substation and Power Line Transfer Agreement (Transfer Agreement). These two Agreements establish the terms and conditions of the transaction. The Transfer Agreement provides for the transfer of certain interconnection facilities not included under the Purchase Agreement.

7. Entergy Gulf States and certain of the other Entergy Operating Companies currently purchase capacity and energy from the Facility under two call option agreements.<sup>9</sup> As part of the proposed transaction, the parties would modify these two

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<sup>7</sup> The Facility also includes related transmission interconnection facilities owned by Calcasieu Power, pipeline interconnection facilities, and equipment, structures, improvements, and appurtenances.

<sup>8</sup> Applicants state that based on the portfolio of existing long-term resources, the Entergy Operating Companies are more than 3,000 MW short of their projected 2008 reliability requirement. Assuming that no additional resources are added, they will be over 5,000 MW short of their reliability requirement by 2012. Entergy Gulf States' portfolio of long-term resources is nearly 1,200 MW short of its projected 2008 peak demand plus reserve requirement and, assuming no additional resources are added, this deficiency is expected to reach about 1,750 MW by 2012. Application at 7-8.

<sup>9</sup> A call option is a financial contract between two parties, the buyer and the seller of this type of option. The buyer of the option has the right, but not the obligation, to buy an agreed quantity of a particular commodity or financial instrument from the seller at a

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long-term purchase power agreements. The end result would be a tolling arrangement for the full output of the Facility.<sup>10</sup>

## **II. Notices and Responsive Pleadings**

8. Notice of Applicants' original filing was published in the *Federal Register*, 72 Fed. Reg. 15,133 (2007), with protests and interventions due on or before April 30, 2007.

9. On April 6, 2007, Commission staff issued a letter requesting additional data to verify Applicants' "first tier markets" results of their horizontal competition analysis under Appendix A of the *Merger Policy Statement*. On April 10, 2007, Applicants filed the information with the Commission.

10. On April 30, 2007, Occidental Chemical Corporation (Occidental) filed a motion to intervene and protest. The Arkansas Public Service Commission (Arkansas Commission) filed a notice of intervention and protest. The Mississippi Public Service Commission, the Louisiana Public Service Commission (Louisiana Commission), and the City Council of the City of New Orleans filed notices of intervention with no substantive comments. The Louisiana Energy Users Group filed a motion to intervene on April 26, 2007 with no substantive comments.

11. On May 15, 2007, Applicants filed an answer to the protests filed by Occidental and the Arkansas Commission.

12. On June 7, 2007, Commission staff issued a letter (Staff Letter) requesting Applicants to supply an analysis of the effect of the proposed transaction on the West of the Atchafalaya Basin (WOTAB) market for both economic capacity and available economic capacity for the same time periods as those dealt with in the application. Staff also requested that Applicants explain the ratepayer protections they will provide in order to ensure that the transaction will not adversely affect wholesale rates.

13. On June 28, 2007, Applicants filed a response to the Staff Letter. Notice of this filing was published in the *Federal Register*, 72 Fed. Reg. 41,067 (2007), with protests and interventions due on or before July 25, 2007. On July 25, 2007, Occidental filed a

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certain time for a certain price. The seller is obligated to sell the commodity or financial instrument should the buyer so decide. The buyer pays a fee, or premium, for this right.

<sup>10</sup> As discussed below, this outcome was described through subsequent filings made by the Applicants. The original application spoke only of "a tolling arrangement for the full output of the Facility until closing of the acquisition." Application at 9.

supplemental protest to Applicants' response to the Staff Letter. On August 9, 2007, Applicants filed an answer to Occidental's supplemental protest.

### **III. Discussion**

#### **A. Procedural Matters**

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' May 15, 2007 answer to the protests filed by Occidental and the Arkansas Commission and their August 9, 2007 answer to Occidental's supplemental protest because those answers have provided information that assisted us in our decision-making process.

#### **B. Substantive Issues – Section 203 Analysis**

16. Section 203(a) of the FPA requires the Commission to approve a transaction if the Commission makes two determinations.<sup>11</sup> As discussed above, the Commission first must determine whether the transaction will be consistent with the public interest, which it does by considering the effect of the transaction on competition, rates, and regulation. Second, the Commission must determine whether the transaction will result in

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<sup>11</sup> Applicants state that prior Commission approval of the proposed transaction under FPA section 203(a)(1)(D)(i) is required because the Facility is an existing generation facility with a value of over \$10 million that is used to make wholesale sales subject to the Commission's jurisdiction. We note that "value" for these purposes is market value, and market value is rebuttably presumed to be the transaction price. 18 C.F.R. § 33.1(b)(3)(i) (2007). Applicants state that it is not clear whether prior Commission approval under section 203(a)(1)(A) is required for Calcasieu Power's disposition of the transmission interconnection facilities. This is because there is no separately-stated price for these facilities in the Agreements, so the value of the facilities is not known for these purposes. Applicants thus request that the Commission assume jurisdiction over the disposition of such facilities for purposes of the Application. The Commission will not resolve whether it has such jurisdiction for these purposes. In any event, the same statutory standard applies regardless of which subsections apply.

inappropriate cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.

**1. Effect on Competition**

**a. Horizontal Competitive Issues**

**i. Applicants' Analysis**

17. Applicants state that the proposed transaction will not cause any adverse effects on competition. They explain that the Entergy Operating Companies, including Entergy Gulf States and other Entergy affiliates that own generation in the Entergy system control area, are not authorized to make sales at market-based rates in this control area. As a result, Applicants state that these companies would not be able to increase the prices at which they make sales, and wholesale competition would not be affected, even if their market power was enhanced as a result of the proposed transaction. Applicants also state that the Entergy Operating Companies are net purchasers of capacity and energy.

18. Applicants state that because the Entergy Operating Companies are not members of a regional transmission organization (RTO), they analyzed the Entergy system control area as a separate destination market and also analyzed all relevant first-tier control areas, i.e., all control areas that are directly interconnected with the system control area.<sup>12</sup>

19. Applicants further explain that the Facility is a peaking facility that operates primarily in the highest-load hours of the year. They state that the Facility's operating costs are comparable to those of other modern peaking facilities, but that its variable operating costs are high compared to other baseload and mid-merit generation in the region. Consistent with the Competitive Analysis Screen, Applicants considered the effect of the proposed transaction over a range of system conditions and determined that the only relevant system conditions are those in which peaking units such as the Facility are economic. Applicants state that they further concluded that the Facility is economic only in three periods and that these are the only periods when Herfindahl-Hirschman Index (HHI) changes can occur.<sup>13</sup> The periods in question are Summer Super Peak 1, Summer Super Peak 2, and Shoulder Super Peak.

20. Applicants performed both an Economic Capacity (EC) and an Available Economic Capacity (AEC) analysis and found some screen failures for the EC measure in

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<sup>12</sup> Application at 12.

<sup>13</sup> *Id.* at 13 and Exh. J-1 at 20.

the Entergy market following the transaction. However, they note that there are no definite plans for retail competition in Texas, Louisiana, Arkansas, Mississippi, and New Orleans. The Entergy Operating Companies thus have no obligation to serve their native load customers, and this makes the EC measure a poor indication of the competitive significance of the proposed transaction. AEC provides a more relevant measure of the market and therefore should be given more weight, as the Commission found in previous cases.<sup>14</sup> Applicants state that the proposed transaction passes the AEC analysis in all relevant time periods and that the post-transaction market shares range from 7.3 percent to 16.6 percent in markets that are not concentrated (i.e., markets that have an HHI of less than 1,000). Applicants assert that the results in the Summer Super Peak 1 and 2 periods are 16.6 percent and eight percent, which compare favorably to the *Duke* market shares in the Summer Super Peak 1 and 2 periods of 23.6 percent and 27.1 percent respectively.

21. Finally, Applicants' analysis of the first-tier markets for both the EC and AEC measures shows that there are no screen failures. Applicants state that their post-acquisition market share ranges from essentially zero percent to about 10.2 percent in these markets and that the screening analysis is passed in all time periods, because all of the HHI changes are in the single digits, and none exceed 7 points in any market where the post-acquisition HHI is above 1,000.

## ii. Protests

22. Occidental argues that the geographic market used in Applicants' delivered price test (DPT) analysis is unrealistically large because it does not reflect the fact that some customers cannot reach competing supplies due to transmission limitations. It claims that the Entergy transmission system has significant internal transmission constraints that require Entergy to maintain a separate supply portfolio in each of its four sub-regions in order to maintain reliability. Occidental cites documentation by other market participants showing that even small amounts of competing generation cannot participate in wholesale markets. This is because of the prohibitive transmission upgrade costs brought about by Entergy's persistent underinvestment in transmission capacity in its control area.<sup>15</sup> This same study showed 41 instances in which the Webre-Wells 500 kV line was

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<sup>14</sup> *Id.* at 14 (citing *Nevada Power Co.*, 113 FERC ¶ 61,265 (2005) (*Nevada Power*) and *Duke Power Company, LLC*, 117 FERC ¶ 62,094 (2006) (*Duke*)).

<sup>15</sup> Occidental Protest, Attachment 1, Affidavit of David W. DeRamus (DeRamus Affidavit) at 14 (citing Comments of the Louisiana Energy and Power Authority and the Lafayette Utilities System in response to the Department of Energy's Notice of Inquiry, "Consideration for Transmission Congestion Study and Designation of National Interest (continued)

the limiting element in System Impact Studies carried out by Entergy in response to requests by entities attempting to wheel power in and out of the WOTAB region.<sup>16</sup> Occidental further cites the Commission's finding that using the Entergy control area as the relevant geographic market in the DPT for Entergy's market-based rate filing required an evidentiary hearing because it was unclear whether there are binding transmission constraints that make it appropriate to define more than one geographic market within the Entergy control area.<sup>17</sup> Occidental remarks that the evidentiary hearing never occurred because Entergy abandoned its request for market-based rate reauthorization within its control area, so the task of defining the relevant geographic markets remains uncompleted.<sup>18</sup>

23. Occidental argues that defining the relevant geographic market to account for transmission constraints internal to the Entergy control area is important because these constraints are more likely to be binding during peak and super-peak periods, when it is economic to dispatch the Facility. Occidental found in another case that a detailed sub-regional DPT analysis showed a more dominant market position than an analysis that relies on the entire Entergy control area as the relevant market.<sup>19</sup>

24. Occidental claims further that Applicants incorrectly modeled the amount of competing generation available in the Entergy control area. It is unclear from Applicants' testimony how they derived 20,506 MWs of rival capacity in the Entergy control area when Entergy's own transmission study report of February 9, 2004, states that 13,900 MWs of merchant generation was expected to be available within the Entergy control area by the summer of 2004.<sup>20</sup> Further, Applicants assume that there are 4,446

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Electric Transmission Corridors," published in the *Federal Register* on February 2, 2006. 71 Fed. Reg. 5,660 (LEPA Comments), at 212-224).

<sup>16</sup> *Id.* (citing LEPA Comments at 219).

<sup>17</sup> *Id.* at 6. Occidental references the Commission's finding in *Entergy Services, Inc.*, 111 FERC ¶ 61,507 (2005).

<sup>18</sup> *Id.* at 7.

<sup>19</sup> *Id.* See *Entergy Services, Inc.*, 111 FERC ¶ 61,507 at P 25 (establishing a trial-type, evidentiary hearing to examine Entergy's DPT for the purpose of determining whether Entergy should be allowed market-based rate authority for transactions in the Entergy control area).

<sup>20</sup> *Id.* at 8.



MWs of simultaneous import capability in summer periods, but the same transmission study report assumes a simultaneous import capability of 3,000 MWs in the summer period. In addition, Occidental claims that it may not be appropriate to include some merchant generation in the relevant market within a sub-region. Generating facilities, such as its own Taft facility, are often unable to get transmission access to the sub-regional market. Occidental further claims that Applicants incorrectly included planned outages during the extreme summer super-peak period, because generators typically do not plan outages during the top one percent of load hours in summer. Making this correction, Occidental finds that Applicants' analysis understates the potential harm to competition caused by the transaction.<sup>21</sup>

25. Occidental also contends that Applicants' AEC analysis is faulty. Occidental's analysis of wholesale transactions delivered into the Entergy control area as reported in 2005 Electronic Quarterly Report filings indicates that Entergy had a 67 percent share of those transactions, yielding an HHI of over 4,600.<sup>22</sup> Applicants' DPT analysis is not verifiable because Applicants did not provide information such as a list of competing generation in the Entergy control area, historical trade data, historical transmission data, long-term purchase and sales data, native load commitments of competing suppliers, information regarding transmission constraints, and work papers regarding the simultaneous import capability computation.<sup>23</sup>

26. Occidental objects to Applicants' reliance on *Nevada Power Co.*<sup>24</sup> and *Westar Energy Inc.*<sup>25</sup> to support the claim that AEC is the more relevant measure. To the contrary, EC analysis provides a better measure of competitive conditions in the short-term non-firm wholesale market than AEC because native load varies from hour to hour, and generation that serves native load in one hour can serve wholesale load in another hour. Occidental observes that in the cases cited, the Commission did not hold that EC is not a valid measure of competition in markets where there is no retail access and no definitive plan for retail access. The determination of whether EC is relevant turns on the market conditions in the particular case. Based solely on DPT screen failures using the

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<sup>21</sup> *Id.* at 9-10.

<sup>22</sup> *Id.* at 10.

<sup>23</sup> *Id.* at 11-12.

<sup>24</sup> 113 FERC ¶ 61,265 (2005).

<sup>25</sup> 115 FERC ¶ 61,228; *order on reh'g*, 117 FERC ¶ 61,011 (2006); *order on reh'g*, 118 FERC ¶ 61,237 (2007).

EC measure, the Commission found in *Oklahoma Gas & Elec. Co.* that, without mitigation, the proposed transaction would harm competition due to an increase in market power.<sup>26</sup>

27. Occidental performed an Appendix A analysis of the proposed acquisition on horizontal competition using the DPT methodology. It relied on 2002-2003 price and cost data used in Entergy's 2004 market-based rate filing. In order to ensure an "apples to apples" comparison with Applicants' results, Occidental updated some of the price and cost data inputs used in its own prior DPT analysis to reflect 2004-2005 price and cost data. Occidental's computations indicate that the Entergy control area and the transmission-constrained WOTAB load pocket in which the Facility is located are highly concentrated markets. Occidental's 2004-2005 analysis shows five screen failures for EC<sup>27</sup> and one screen failure for AEC.<sup>28</sup>

28. Occidental also claims that Entergy's proposed acquisition of the Facility is just one in a series of three Entergy acquisitions of distressed generation assets in the past two years. Including the Facility's 310 MWs of capacity, Entergy will have removed 1,535 MWs of independently-owned generation from the wholesale market and significantly increased its dominant share of generation in its control area. Occidental's cumulative DPT analysis of 2004-2005 data for the cumulative transactions shows EC screen failures in all ten time periods analyzed<sup>29</sup> and AEC failures in three time periods.<sup>30</sup> Occidental concludes that it is important for the Commission to consider Entergy's overall business strategy in assessing whether the transaction is likely to harm competition and whether it is in the public interest. The antitrust agencies (the Department of Justice and the Federal Trade Commission) have been concerned when parties attempt to harm competition through a series of smaller acquisitions. Occidental states that those agencies may review even a small transaction that would otherwise not be subject to review if it has an incrementally negative effect on competition.<sup>31</sup>

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<sup>26</sup> 105 FERC ¶ 61,297 (2003) (*OG&E*).

<sup>27</sup> DeRamus Affidavit at 27.

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

<sup>29</sup> *Id.* at 32.

<sup>30</sup> *Id.* at 33.

<sup>31</sup> Occidental Protest at 13-15.

29. Occidental argues that Applicants' attempt to draw a parallel between the proposed transaction and other Commission-approved acquisitions of generation to serve native load is misleading. The proposed transaction is unique because it involves an asset in distress as a result of Entergy's exercise of market power. Occidental points to the caution provided by Calcasieu Power, along with other independent power producers (IPPs) and wholesale customers, that deficiencies in Entergy's transmission grid "have the effect of suppressing competition by...preventing IPPs from reaching customers within and outside the Entergy region, causing many of those IPPs to suffer competitive distress to the point at which they have no choice but to sell their assets to Entergy at fire-sale prices."<sup>32</sup>

30. Occidental discounts Applicants' contention that because Entergy does not have market-based rate authority in its home control area, it has no incentive to increase prices there. The Commission's merger review authority — and its obligation to ensure that a merger does not harm competition and is consistent with the public interest — applies to markets in which the merging parties do not have market-based rate authority as well as to markets in which they have such authority.<sup>33</sup> Applicants' conclusion appears to be based on an overly narrow definition of market power. Economists and antitrust courts have long recognized that a market participant is able to exercise market power if it is able either to increase prices above a competitive level or to exclude competition.<sup>34</sup> Occidental maintains that because Entergy's lack of market-based rate authority constrains its ability to raise prices, the primary way in which Entergy can exercise market power with respect to generation is through market foreclosure.<sup>35</sup>

31. Occidental challenges Applicants' contention that the proposed transaction does not create a market power problem because Calcasieu's capacity factor is so minimal. The Facility would account for 17 percent of Entergy's peaking capacity in its home control area and 51 percent of the total peaking capacity in the WOTAB load pocket.<sup>36</sup>

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<sup>32</sup> Occidental Protest at 15-16 (citing the Request for Rehearing of Arkansas Electric Cooperative Corp., *et al.* filed on April 21, 2005 in Docket No. EL05-52 at 31).

<sup>33</sup> DeRamus Affidavit at 40.

<sup>34</sup> *Id.* at 40 (citing *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1965)).

<sup>35</sup> Occidental Protest at 16.

<sup>36</sup> *Id.* at 17-18.

32. Occidental says that the proposed transaction will result in the removal of an active competitor from the wholesale market. This alone means that the transaction raises wholesale market power issues. Any increase in market concentration (and Entergy's generation dominance) caused by the transaction will affect the competitiveness of the wholesale market.

33. Occidental argues that the proposed acquisition is contrary to the public interest because it increases the incentive and ability for Entergy to favor its generation interests over those of its competitors – especially qualifying facility (QF) competitors. Entergy rebuffed Occidental's efforts to obtain a long-term contract to sell power from the Taft QF in accordance with the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>37</sup> Instead, Entergy acquired the distressed Perryville facility. This is an example of Entergy resisting its obligation under the law to transact with a competitor until governmental orders require it to meet that obligation. Occidental cites Entergy's rejection of Occidental's bids for the Multiple-Year Unit Capacity Call Option because Occidental refused to waive its rights under PURPA. This is an example of Entergy circumventing the competitive procurement process to avoid buying power from competing generation.

34. Occidental argues that Applicants have not analyzed whether the purported benefits of increased system reliability and cost savings in peaking capacity resulting from the acquisition can be obtained through other means. The benefits Applicants attribute to the transaction are a consequence of the dispatch of the Facility, not of its acquisition by Entergy. If Entergy's ownership of the Facility is expected to change fundamentally the way in which the Facility is dispatched, that change provides significant evidence of anticompetitive foreclosure. Occidental argues that this indicates that the transaction would harm competition and be inconsistent with the public interest.<sup>38</sup>

35. Occidental requests that the Commission either reject the proposed acquisition or impose conditions on it. The Commission should condition any approval on the completion of additional transmission upgrades in Amite South and WOTAB. Occidental also requests that before approving the acquisition, the Commission hold a trial-type proceeding to determine the mitigation that is necessary to alleviate the anticompetitive effects of Entergy's acquisition of the Facility.

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<sup>37</sup> 16 U.S.C. § 824a-3 (2000).

<sup>38</sup> Occidental Protest at 30-31.

### iii. Applicants' Answer

36. Applicants state that using the WOTAB region as the relevant geographic area is not appropriate, given current market conditions in the Entergy system control area. Citing Order No. 642, Applicants state that where there are no transmission constraints between markets and where there is a demonstrated lack of price discrimination, similar prices across destination markets generally indicate a larger, single geographic market.<sup>39</sup> Applicants claim that the historical publication of a single "Into Entergy" spot price, not differentiated within the Entergy system control area, demonstrates a lack of price discrimination within the control area, and it shows that the control area is thus a single market. The Entergy Operating Companies operate as one control area or balancing authority. Applicants state that the Commission has recognized that analysis of sub-markets makes sense only when transmission congestion is used to set the price for a product, as in the case of locational marginal pricing (LMP) of transmission congestion. Applicants note that LMP is not used in the Entergy system control area.<sup>40</sup> An alternative analysis of the WOTAB region would show results similar to those for the Entergy system control area.<sup>41</sup>

37. Applicants argue that they correctly calculated the amount of rival generation. Expansion of generation capacity from the date of the Phase II Transmission Study Report quoted by Occidental (February 9, 2004) to the present explains the difference between their respective figures. Applicants also claim that Occidental did not include generation from various municipalities and other traditional load-serving entities in their calculations, biasing Occidental's numbers downwards. Further, the difference in rival generating capacity claimed by Occidental is not material in Applicants' DPT analysis.<sup>42</sup> Likewise, Applicants claim that the difference Occidental finds in simultaneous import capability values is based on the outdated historical study Occidental used.<sup>43</sup>

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<sup>39</sup> Applicants' Answer at 5 (citing *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,891 (2000)).

<sup>40</sup> *Id.* at 5-6 (citing *Sithe Energies, Inc.*, 93 FERC ¶ 61,244 (2000)).

<sup>41</sup> *Id.*, Exhibit J-10 (Arenchild Rebuttal) at 5. Applicants did not perform this analysis, however. Arenchild Rebuttal, at 20.

<sup>42</sup> *Id.* at 7.

<sup>43</sup> *Id.* at 8.

38. Applicants contend that the Equivalent Forced Outage Rate incorporated in their analysis is an industry standard commonly used in other DPT computations submitted to the Commission. They argue that if they had used the Forced Outage Rate, as suggested by Occidental, there would be little difference in the results of their DPT computations. As long as outage rates are applied consistently to all units in the analysis, any difference should be largely symmetrical.<sup>44</sup>

39. Applicants challenge Occidental's claim that Entergy has a 67 percent market share. Occidental incorrectly eliminated a significant number of transactions for other entities, but not for the Entergy Operating Companies and their affiliates. Applicants say that Entergy's market share of wholesale sales is less than 4 percent.<sup>45</sup>

40. Applicants argue that they provided adequate workpapers in support of their analysis. The workpapers offer the same kind of support as workpapers provided to the Commission in other section 203 proceedings. They claim that other necessary data is publicly available on their Open Access Same-Time Information System (OASIS).<sup>46</sup>

41. Applicants argue that a cumulative DPT analysis is not necessary. They contend that load growth, combined with the legal obligation to serve the growing energy needs of their native load electricity customers, requires Entergy to acquire capacity. Even with the acquisition of the Facility, the Entergy Operating Companies are still short of capacity to meet their forecasted requirements.<sup>47</sup>

42. Applicants state that the output of the Facility is currently sold to the Entergy Operating Companies under two long-term agreements. Entergy included these agreements in the Notice of Change of Status it submitted in Docket No. ER91-569 on June 20, 2006.<sup>48</sup> Because the Entergy Operating Companies reported control of the Facility through the long-term agreements, the actual purchase of the Facility has no effect on the HHI calculation. Applicants state that their conservative analysis ignored

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<sup>44</sup> *Id.* at 9.

<sup>45</sup> *Id.* at 10.

<sup>46</sup> *Id.* at 10-11.

<sup>47</sup> *Id.* at 11-12.

<sup>48</sup> *Id.* at 13, citing *Entergy Services, Inc., et al.*, 116 FERC ¶ 61,276 (2006).

the existing agreements and assumed that the change due to the transaction is the full amount of the Facility's generating capacity in order to present the worst-case scenario.<sup>49</sup>

43. Applicants argue that the proposed transaction does not eliminate a competitor, as Entergy Gulf States is acquiring neither Calcasieu Power nor Dynegy Power Marketing, Inc., both of which remain free to participate in competitive wholesale power markets in the region.<sup>50</sup>

44. Applicants argue that the market power issues raised by Entergy Gulf States' acquisition of the Facility are quite specific and are not the traditional issues raised in horizontal acquisitions. The Entergy Operating Companies do not have market-based rates for power sales within their home control area and thus cannot exercise market power by raising prices. They argue that Occidental has not explained how the transaction would enable them to exercise market power in light of Entergy Operating Companies' cost-based rates. The Entergy Operating Companies are net buyers of power and thus have no incentive to raise prices in these markets. Applicants characterize the transaction as necessary to serve load, not an attempt to raise prices or foreclose rivals.<sup>51</sup>

45. Applicants claim that the variations in the capacity factor of the Facility between 2005 and 2006 do not indicate anything relevant to the proposed transaction.<sup>52</sup>

46. Applicants argue that the EC measure is not a valid measure of competition in markets, such as the Entergy system control area, where there is no retail access and no definitive plan for retail access in the foreseeable future. Applicants argue that, as in *Nevada Power* and *Westar Energy, Inc.*, AEC is the relevant measure of market power in this case.<sup>53</sup>

47. Applicants argue that the proposed transaction would have no effect on the Entergy Operating Companies' obligations under PURPA. Occidental will continue to receive avoided cost for all PURPA "puts." Applicants argue that the *Mountainview Power Company, LLC* case cited by Occidental indicates that PURPA issues are beyond

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 14.

<sup>51</sup> *Id.* at 16-17.

<sup>52</sup> *Id.* at 17.

<sup>53</sup> *Id.* at 18-19.

the scope of section 203 proceedings.<sup>54</sup> Arguments concerning QF discrimination are also beyond the scope of this proceeding.<sup>55</sup>

48. Applicants argue that an evidentiary hearing is not necessary.<sup>56</sup> In addition, requiring Entergy to complete upgrades in the Amite South region would not remedy any anticompetitive harm from the transaction.<sup>57</sup>

#### iv. Response to Staff Letter

49. The June 7, 2007 Staff Letter requested that Applicants provide an analysis of the effect of the transaction on competition in the WOTAB region. Applicants disagree with Occidental that the WOTAB region is the relevant geographic market but perform the Appendix A analysis requested by staff. They state that their results show that the Commission's safe-harbor thresholds for the AEC measure are easily met even when the relevant geographic market is assumed to be the WOTAB region and conservative assumptions are used. Applicants state that during the three periods relevant to their analysis, the market for AEC is not concentrated (as indicated by a post-transaction HHI below 1,000), so no further analysis is necessary. In addition, even if the market were moderately concentrated (HHI between 1,000 and 1,800), the transaction would still meet the Commission's safe-harbor thresholds.

50. Applicants' analysis for EC found screen failures (HHI changes between 322 and 342) in the highly concentrated (HHI > 1,800) WOTAB market. Applicants argue that these screen violations do not indicate any actual competitive concerns because the screen results are similar to those in the *Nevada Power Co.* case, where the Commission found no competitive concerns.<sup>58</sup>

51. Applicants stress that for the purposes of providing a conservative, worst-case analysis they intentionally ignored the fact that, at the time of their response, the output of the Facility was sold under contract to the Entergy Operating Companies under two long-term agreements, which were to be converted to a tolling agreement, effective on

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<sup>54</sup> 109 FERC ¶ 61,086 (2004).

<sup>55</sup> Applicants' Answer at 22-23.

<sup>56</sup> *Id.* at 24.

<sup>57</sup> *Id.* at 26.

<sup>58</sup> Response to Staff Letter at 6-7.



July 1, 2007. Applicants again point out that the Facility's output was included in the Notice of Change of Status submitted by the Entergy Operating Companies in Docket No. ER91-569 on June 20, 2006. Further, the Commission accepted the Notice of Change in Status by order dated September 22, 2006.<sup>59</sup> Applicants argue that because the Entergy Operating Companies previously reported control of the Facility through the long-term agreements, and will continue to retain control through the tolling agreements, the actual purchase of the Facility has no effect in the HHI calculation in the WOTAB region.<sup>60</sup>

**v. Supplemental Protest**

52. Occidental argues that Applicants' new DPT for the WOTAB region is based on several false assumptions. The most significant flaw is their *pro rata* allocation of the internal import limits into WOTAB among all suppliers with available economic capacity. Occidental argues that it is more appropriate to allocate those limits by assigning to Entergy's AEC outside of WOTAB a priority over other competing sources of generation located in other regions of the Entergy control area. Occidental argues that Commission precedent requires this.<sup>61</sup> In the case they cite, the applicants likewise attempted to use a *pro rata* allocation, assuming that other suppliers would have the same rights to the internal transmission interface capability as the applicants. The Commission, however, found that allocating to competing sellers unreserved transmission capability over interfaces internal to the merged company was not appropriate. The Commission found that transmission capability that is not under contract warrants a more conservative approach because utilities are permitted to reserve internal capability to serve their native load before suppliers have an opportunity to use it.<sup>62</sup>

53. Occidental's own analysis, which it claims properly allocates transmission imports, shows that the transaction causes HHI changes between 145 and 253 points in a moderately concentrated market (pre-transaction HHIs between 1000 and 1800) for the

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<sup>59</sup> *Id.* at 7 (citing *Entergy Services, Inc.*, 116 FERC ¶ 61,276 (2006)).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 4 (citing *Ohio Edison Co.*, 80 FERC ¶ 61,039 at 61,103 (1997)).

<sup>62</sup> *Id.* at 4-5.

Summer Super Peak 1 and 2 load periods. These results are well above the threshold of 100 points used by the Commission in moderately concentrated markets.<sup>63</sup>

54. Occidental argues that the Applicants continue to overestimate outage rates, with the result that their DPT analysis continues to understate the amount of AEC. Correct outage rates result in even more severe DPT failures for the Summer Super Peak 1 and 2 load periods.<sup>64</sup>

55. Occidental argues that Applicants' new DPT analysis fails to account for the native load attributable to utilities other than Entergy. As an example, Applicants treat Central Louisiana Electric Cooperative's 50 percent ownership in Acadia Energy Center as being available for wholesale sales, but this ignores that entity's own native load commitments.<sup>65</sup> Occidental argues that the effect of these additional corrections increases the HHI changes attributable to the transaction.

56. Occidental continues to argue that EC screen failures indicate competitive harm. The market conditions in that case are quite different from those in *Nevada Power*. Occidental concludes that Applicants' reliance on this case as support for their claim that AEC is the more relevant measure is misplaced.<sup>66</sup>

57. Occidental next argues that Applicants' analysis fails to give adequate consideration to historical trade and transmission data. This data contradicts Applicants' assumption that competing sources of generation can participate in the wholesale market on terms similar to Entergy's generation.<sup>67</sup> Occidental argues that this data indicates that Applicants' DPT results underestimate Entergy's actual market share and also the overall level of market concentration for both WOTAB and the Entergy control area.<sup>68</sup>

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<sup>63</sup> *Id.* at 5.

<sup>64</sup> *Id.* at 5-6.

<sup>65</sup> *Id.* at 6.

<sup>66</sup> *Id.* at 8.

<sup>67</sup> *Id.* at 9. Occidental cites differences in capacity factors for various facilities owned and not owned by Entergy to support its point.

<sup>68</sup> *Id.* at 10.

58. Finally, Occidental continues to argue that Applicants' Appendix A analysis is incomplete.<sup>69</sup> Occidental contends that because there are genuine issues of material fact that cannot be resolved on the basis of the written record, the Commission should either reject the application or set for hearing what mitigation is needed to address the competitive harm caused by the transaction.<sup>70</sup> The Commission should institute a paper hearing with a limited period of discovery if it determines that holding a trial-type proceeding is not feasible due to the statutory deadlines applicable to section 203 applications.

**vi. Answer to Supplemental Protest**

59. Applicants argue that *Ohio Edison* is not controlling in this case. *Ohio Edison* dealt with a merger of two vertically-integrated utilities with separate control areas. The applicants in *Ohio Edison* proposed to combine their control areas and operate under a new, single-system open access transmission tariff following the merger and also to conduct joint-dispatch of the combined system. Applicants argue that the concern in *Ohio Edison* was whether the combined entity could reserve the transmission capacity following the merger that previously was an external path between the two control areas, but would become an internal path post-merger. In the present case, the proposed transaction does not involve merging separate control areas and does not result in a change in transmission access. Applicants thus argue that the concern presented in *Ohio Edison* does not exist here. Applicants further argue that while Occidental maintains that the Entergy Operating Companies should have a priority to the transfer capability over other sources of generation located outside of WOTAB, the argument is based on fallacious premises because the Entergy Operating Companies and their affiliates do not have any special or unique claim to use the transfer capability within the Entergy system control area to make sales in WOTAB over and above any native load requirements.<sup>71</sup>

60. Applicants argue that they accounted for the output of the Acadia Plant correctly. They say that Occidental fails to recognize that an unaffiliated third-party, Tenaska Power Services Company, has an energy management services agreement with respect to

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 12.

<sup>71</sup> Answer to Supplemental Protest at 5-6.

the Acadia Plant. Under this agreement, Tenaska Power controls the output of this plant.<sup>72</sup>

### **vii. Commission Determination**

61. We find that the horizontal combination of generation resulting from the transaction will not adversely affect competition. We make this determination despite the discrepancies in the results of the various DPT analyses in this record, which we find are not controlling in this case. Even assuming, *arguendo*, that the analysis of the competitive effects in the WOTAB region does result in failures of the Competitive Analysis Screen, we find that Entergy's purchase of the Facility does not harm competition.

62. Appendix A of the Merger Policy Statement states that even if screen failures are present, the Commission will nevertheless take into account the competitive facts of the case.<sup>73</sup> The relevant competitive facts here are that the Facility is a peaking plant that has historically run for only approximately 50 hours per year. The record indicates that Entergy Gulf States is approximately 1,200 MWs short of its projected 2008 peak demand plus reserve requirement. Because Entergy is short during the periods when the Facility will be operational, and it needs this power supply to help maintain reliability, it will not have an incentive to attempt to exercise horizontal market power during these times by withholding the Facility from the market. Physical withholding of the Facility would require Entergy to purchase even more electric energy from elsewhere at a higher price, making a withholding strategy counterproductive. Thus, we find no adverse effect on competition as a result of this acquisition.

### **b. Vertical Market Power Issues**

#### **i. Applicants' Analysis**

63. Applicants assert that the proposed transaction does not increase any ability they have to abuse their ownership of transmission facilities to give themselves an advantage in energy markets. They explain that the Entergy Operating Companies provide transmission service under an open access transmission tariff (OATT) and that the

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<sup>72</sup> *Id.* at 8.

<sup>73</sup> Merger Policy Statement at 30,135; *Commonwealth Edison Co.*, 91 FERC ¶ 61,036, at 61,133 & n.42 (2000); *Duke Energy Corp. and Cinergy Corp.*, 113 FERC ¶ 61,297, at P 83 (2005); Supplemental Policy Statement at P 60.

Commission recently approved the Entergy Operating Companies' request to contract with an independent entity, the Independent Coordinator of Transmission (ICT), to provide oversight over the operations of the Entergy Operating Companies' transmission system.<sup>74</sup> The Southwest Power Pool, Inc. is the ICT. They assert that with the transfer of Calcasieu Power's limited transmission facilities to Entergy Gulf States, Calcasieu Power will have no transmission facilities that it could use to exercise market power.

64. Applicants further state that section 33.4(a)(1) of the Commission's regulations requires a vertical analysis only if a transaction results in a single entity controlling both generation and inputs to generation. They assert that because no natural gas transportation assets or other inputs to gas-fired generation facilities are being transferred as part of the proposed transaction, no vertical market power issues are raised and no vertical analysis is required.

## ii. Protests

65. Occidental argues that Entergy's acquisition of the Facility provides Entergy with an opportunity to use its control of its transmission network to disadvantage its competitors in the wholesale markets. This, in turn, disadvantages Entergy's retail customers by shielding system costs from the benefits of competition. As the Commission found in *OG&E*, the increase in vertical market power comes from the fact that Entergy, a vertically integrated utility, would be adding 310 MWs of generation capacity to its existing transmission and generation facilities, thus increasing its incentive to use its control of transmission facilities to disadvantage its competitors.<sup>75</sup> Occidental adds that Applicants' reliance on Entergy's OATT and the ICT is misplaced, as the Commission has never used a bright-line approach to vertical market power issues. The Commission has rejected arguments that the OATT mitigates increases in vertical market power because the OATT fails to address the opportunity for undue discrimination and the incentive for vertically integrated utilities to use their transmission facilities to harm competition.<sup>76</sup> Occidental argues that while the Commission recently adopted reforms to address the opportunities for discrimination under the OATT, there is no basis to conclude that these reforms will eliminate the opportunities for Entergy to engage in

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<sup>74</sup> *Entergy Services, Inc.*, 115 FERC ¶ 61,095, *order on reh'g*, 116 FERC ¶ 61,275 (2006).

<sup>75</sup> Occidental Protest at 22.

<sup>76</sup> *Id.* at 26-27, citing *OG&E*.

discrimination.<sup>77</sup> Occidental states that the Commission has found Entergy to be violating its OATT, and Entergy has demonstrated that it does not abide by commitments made to regulators to remedy the Amite South constraint in the Gulf States Utilities Company merger and the Final Phase II Transmission Study Report.<sup>78</sup> Occidental concludes that the reformed OATT will not change Entergy's pattern of non-compliance.<sup>79</sup>

66. Occidental argues that the ICT also does not eliminate vertical market power concerns. The Commission has made clear that the only way the ICT could alleviate such concerns is if Entergy's transmission facilities were under the functional control of the ICT.<sup>80</sup> Occidental argues that the ICT will not be able to address vertical market power issues as long as its authority is limited to implementing criteria, standards, and policies developed by Entergy. The ICT cannot relieve transmission constraints by ordering Entergy to construct new facilities.

67. Occidental recommends that, if the Commission approves the transaction, we impose conditions to address its negative effects. The most immediately feasible mitigation is transmission expansion. The only way to address meaningfully the competitive threat of Entergy's increased generation market power is to require Entergy to remedy its major constrained load pockets (Amite South and WOTAB). Occidental argues that this is appropriate in Amite South, given that area's exceptionally high level of market concentration and large amount of system load, Entergy's continued delays in fulfilling its commitments to relieve transmission constraints and the system-wide benefits that will result from relieving them. In any event, the Commission should establish a trial-type proceeding to identify the mitigation that is necessary to alleviate the anticompetitive effects that will result from Entergy's acquisition of the Facility.<sup>81</sup>

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<sup>77</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007).

<sup>78</sup> *Entergy Services, Inc.*, 65 FERC ¶ 61,332 at 62,480 (1993), *order on reh'g*, 67 FERC ¶ 61,192 at 61,584 (1994). See also Final Phase II Transmission Study Report, available at <http://www.lpsc.org>.

<sup>79</sup> Occidental Protest at 27.

<sup>80</sup> *Id.* at 27-28 (citing *Entergy Services, Inc.*, 115 FERC ¶ 61,095, P 116 (2006)).

<sup>81</sup> *Id.* at 31-32.

**iii. Applicants' Answer**

68. Applicants argue that the proposed transaction does not increase any ability Applicants could have to abuse their ownership of transmission facilities to give themselves an advantage in energy markets. Applicants argue that access to, and service on, Entergy Gulf States' transmission facilities under the Entergy Operating Companies' OATT addresses the vertical market power issue. Applicants state that the Commission has held that a commitment to join an ISO or an RTO mitigates any potential vertical market power.<sup>82</sup>

69. Applicants further argue that the ICT directly addresses many of the issues raised by Occidental in its protest. For example, the Commission has determined that the ICT has sufficient authority to grant or deny transmission service independently and fairly, to perform feasibility and system impact studies, to administer the Entergy Operating Companies' OASIS, and to ensure that the OATT is administered in a non-discriminatory fashion. The Commission has already rejected Occidental's argument that the ICT's authority is limited to implementing criteria, standards, and policies Entergy developed in the Available Flowgate Capacity proceeding.<sup>83</sup> Occidental's assertions thus are a collateral attack on the Commission's orders on the ICT.

70. Applicants further argue that Occidental's transmission concerns are unrelated to the proposed transaction.<sup>84</sup> Applicants point out that neither the Entergy Operating Companies nor their affiliates are acquiring any additional transmission assets, other than Calcasieu's limited interconnection facilities. Having direct ownership of a peaking facility, as opposed to controlling the same facility by contract, does not affect the Entergy Operating Companies' incentives to exercise vertical market power, if that were possible.<sup>85</sup> Applicants maintain that Occidental's assertions regarding market foreclosure, monopsony power and lack of transmission investment as a barrier to entry, as well as Occidental's argument that the benefits of the transaction could be obtained in other ways, also are unrelated to the transaction.<sup>86</sup>

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<sup>82</sup> Applicants' Answer at 20.

<sup>83</sup> *Id.* at 21 (citing *Entergy Services, Inc.*, 119 FERC ¶ 61,018 (2007)).

<sup>84</sup> *Id.* at 20-22.

<sup>85</sup> Arenchild Rebuttal at 9-10.

<sup>86</sup> *Id.* at 10.

#### iv. Commission Determination

71. We find that the proposed transaction does not increase any ability the Applicants have to abuse their ownership of transmission facilities to give themselves an advantage in energy markets because Entergy's transmission system is operated under a Commission-approved OATT, which ensures open access to the transmission system, and its operation is overseen by the ICT. We will not condition section 203 authorization on Entergy completing transmission upgrades in Amite South or WOTAB, as requested by Occidental, because the record does not indicate that the transaction will result in increased congestion in those areas. The Commission conditions section 203 authorizations only when needed to address specific, transaction-related harm.<sup>87</sup>

72. The acquisition of a peaking facility inside a load pocket might increase congestion only if Entergy Gulf States purchases this facility only to withhold it from the market, replacing its output with more costly energy from outside the WOTAB region. However Applicants state that the Facility will provide peaking and reserve capacity that can be scheduled within the current day for generation failures, unexpected demand, or to avoid purchases. In addition, as discussed above, Entergy will not have an economic incentive to withhold the output of the Facility.

### 2. Effect on Rates

#### a. Applicants' Analysis

73. Applicants assert that the proposed transaction will not have an adverse effect on transmission rates because no significant transmission system facilities are being transferred from Calcasieu Power to Entergy Gulf States. They state that the only transmission facilities being transferred are interconnection facilities, so Entergy Gulf States' transmission rates will be unaffected. Moreover, Calcasieu Power does not provide transmission service.

74. With respect to wholesale requirements rates, Applicants state that Entergy Gulf States is obligated to serve its wholesale requirements customers. They state that any future long-term wholesale requirements contracts in the Entergy system control area will be filed under section 205 of the FPA<sup>88</sup> as cost-based rates. Moreover, the rates in Entergy Gulf States' existing wholesale power supply contracts will not be modified as a

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<sup>87</sup> See, e.g., *Duke Energy Corporation*, 113 FERC ¶ 61,297 at P 82 (2005).

<sup>88</sup> 16 U.S.C. § 824d (2000).



result of the proposed transaction. The transaction would not have any effect on Calcasieu Power's or Dynegy Power Marketing, Inc.'s wholesale rates, and neither Calcasieu Power nor its affiliate Dynegy Power Marketing, Inc. have any long-term commitments to sell power from the Facility that could be affected by the transaction, other than the two agreements discussed above. Finally, Applicants state that the Facility will be reflected in Entergy Gulf States' capability under the Entergy System Agreement, and accordingly, the costs of the Facility will flow through the various System Agreement service schedules.

**b. Protests**

75. The Arkansas Commission argues that Applicants have not shown that the transaction will not adversely affect rates. The Arkansas Commission argues that Applicants have provided no analysis of the relative effects of the proposed transaction on the different Entergy Operating Companies under their System Agreement, including "bandwidth" payments under the System Agreement.<sup>89</sup> In Opinion Nos. 480 and 480-A,<sup>90</sup> the Commission adopted a bandwidth remedy to implement rough production cost equalization among the Entergy Operating Companies. The Arkansas Commission says that with the bandwidth remedy and the current production cost levels among the Entergy Operating Companies, any increase in production costs of Entergy Operating Companies other than Entergy Arkansas, Inc. (EAI) will automatically result in an increase in EAI's bandwidth payments.<sup>91</sup> The Arkansas Commission argues that Entergy's testimony before the Louisiana Commission indicates that the EAI may be harmed by the proposed transaction. Entergy estimates in that proceeding that the first year's cost of the plant will be approximately \$16 million. The Arkansas Commission concludes that since EAI's load ratio is approximately 20 percent, the bandwidth remedy requires that EAI's bandwidth payments increase by approximately \$3.2 million due to the transaction.<sup>92</sup>

76. The Arkansas Commission also questions whether the Facility should be considered a system generating resource. It argues that Entergy Operating Companies

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<sup>89</sup> Arkansas Commission Protest at 3.

<sup>90</sup> Opinion No. 480, 111 FERC ¶ 61,311 (2005); Opinion No. 480-A, 113 FERC ¶ 61,282 (2005).

<sup>91</sup> Arkansas Commission Protest at 4.

<sup>92</sup> *Id.* at 5-6.

other than Entergy Gulf States, Inc. will not benefit from the transaction because the Facility will rarely enter the Entergy energy exchange.<sup>93</sup> There thus is a material issue of fact as to the effect of the proposed acquisition on the Entergy Operating Companies' wholesale rates, and an evidentiary hearing into the matter is necessary.<sup>94</sup>

**c. Applicants' Answer**

77. Applicants argue that the transaction will not have any adverse effect on the rates paid by Entergy Gulf States' wholesale power customers or the Entergy Operating Companies' transmission customers. Applicants assert that the Calcasieu transaction is the least costly option of the viable alternatives available to get the power they need. Furthermore, the transaction will have a minimal effect on the relative rates of the Entergy Operating Companies.<sup>95</sup> The Facility will be an Entergy system resource and will provide benefits to all of the Entergy System Agreement participants. The acquisition will not adversely affect rates compared to other options.<sup>96</sup>

78. Applicants criticize the Arkansas Commission's argument that the Facility should not be considered as an Entergy system resource. They point to other generation facilities that are considered to be Entergy system resources but whose output rarely passes through the Entergy energy exchange.<sup>97</sup>

79. Applicants state that the transaction will increase the total Entergy system capacity by approximately 1.5 percent and increase the total annual Entergy system revenue requirement by a smaller amount. Applicants contend that the transaction will have a minimal effect on the relative rates of the Entergy Operating Companies.<sup>98</sup>

80. Applicants recognize that Opinion Nos. 480 and 480-A can result in one Entergy Operating Company's resource planning decisions affecting other Entergy Operating

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<sup>93</sup> *Id.* at 5.

<sup>94</sup> *Id.*

<sup>95</sup> Applicants' Answer at 3.

<sup>96</sup> *Id.* at 27.

<sup>97</sup> *Id.* at 29-30.

<sup>98</sup> *Id.* at 31.

Companies. However this cannot prevent an Entergy Operating Company from acquiring resources. Applicants argue that whether an acquisition increases or decreases an individual Entergy Operating Company's costs should not be a condition for qualifying a unit as an Entergy system resource, given the need for additional capacity. The showing that the Entergy system needs the capacity that the Facility will provide, combined with the fact that the acquisition is less costly than other alternatives, overcomes the Arkansas Commission's objections.

**d. Response to Staff Letter**

81. Applicants state that Entergy Gulf States serves four wholesale requirements customers, who all have fixed, cost-based rate agreements and who do not oppose the transaction. Applicants submit that the Arkansas Commission has not shown that any wholesale requirements customers or transmission customers are likely to be harmed as a result of the transaction. Thus no additional ratepayer protection is necessary.<sup>99</sup>

82. Applicants note that the Arkansas Commission appears to be concerned about the effect of the transaction on the Entergy System Agreement. The Arkansas Commission's protest mainly relates to the costs of the Facility in the calculation of production costs under Opinion Nos. 480 and 480-A. Applicants argue that this issue is outside the scope of this proceeding and is already before the Commission in another docket.<sup>100</sup>

**e. Commission Determination**

83. Applicants have shown that the proposed transaction is unlikely to affect wholesale rates. We note that that Entergy Gulf States' wholesale requirements customers all have fixed, cost-based rate agreements and have not argued that the transaction will not adversely affect their rates. Further, the transaction will have no effect on transmission rates because Calcasieu Power does not provide transmission service and no significant transmission system facilities are being transferred from Calcasieu Power to Entergy Gulf States as a result of the transaction. The issues raised

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<sup>99</sup> Response to Staff Letter at 9-10.

<sup>100</sup> See *Entergy Services, Inc.*, 120 FERC ¶ 61,020 (2007). In that order, the Commission refused to find that, where a resource to be acquired or constructed by one or more of the Entergy Operating Companies has met certain approval requirements, including a public interest finding by retail regulators that have jurisdiction, that resource will be a system resource, and all its costs may be reflected in the formula rates in the Entergy System Agreement.

by the Arkansas Commission are not properly a part of this proceeding. Opinion Nos. 480 and 480-A require Entergy to make annual filings that will be examined to ensure appropriate production cost equalization for the Entergy system. Concerns of the type expressed by the Arkansas Commission can be raised in connection with those filings.

### 3. Effect on Regulation

#### a. Applicants' Analysis

84. Applicants state that Entergy Gulf States' status as a FPA jurisdictional utility will not change as a result of the proposed transaction. State regulation will not be affected as a result of the proposed transaction, the Purchase Agreement requires that Entergy Gulf States obtain the approval of the Louisiana Commission, and Entergy Gulf States submitted its application for such approval on March 15, 2007.

#### b. Commission Determination

85. Applicants have shown that the proposed transaction will have no adverse effect on federal or state regulation. The Commission's review of a merger's effect on regulation is focused on ensuring that a merger does not result in a regulatory gap at the federal or state level.<sup>101</sup> The transaction will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over the merged companies. The Commission stated in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a merger on state regulatory authority for a trial-type hearing where a state has authority to act on a merger. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing and that it will address such circumstances on a case-by-case basis.<sup>102</sup> In this case, state regulation will not decrease as a result of the proposed transaction, and hence the effectiveness of state regulation will not be impaired. Entergy Gulf States submitted the Purchase Agreement to the Louisiana Commission for approval, as required. We note that no party alleges that regulation would be impaired by the proposed transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

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<sup>101</sup> *Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,124.

<sup>102</sup> *Id.* at 30,125.

#### **4. Cross-Subsidization**

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

86. Applicants argue that the transaction does not raise any concerns regarding cross-subsidization. Applicants attest that other than the transfer of the Facility to Entergy Gulf States from Calcasieu Power, which is not an associate company of Entergy Gulf States, the transaction does not call for any transfers of any facilities, much less any transfers between a traditional utility company and an associate company, either at the time of the transaction or the future. Applicants state that no new securities will be issued by Entergy Gulf States for the benefit of an associated company, either at the time of the transaction or in the future. Applicants state that Entergy Gulf States will not enter into any new pledges or encumbrances for the benefit of an associate company in connection with the transaction, either at the time of the transaction or in the future. Applicants submit that Entergy Gulf States intends to sell a portion of the output of the Facility to one of the Entergy Operating Companies under Service Schedule MSS-4 of the System Agreement. Service Schedule MSS-4 contains a formula rate for a unit power sale or purchased power sale among the Entergy Operating Companies. Applicants state that no other contracts between Entergy Gulf States and its affiliates are contemplated in connection with the transaction either at the time of the transaction or in the future.

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

87. Applicants have demonstrated that the proposed transaction does not raise any concerns with respect to cross-subsidization. Consistent with Order No. 669,<sup>103</sup> Applicants have verified that the proposed transactions do not result in, at the time of this transaction or in the future: (1) transfers of facilities between a traditional utility associate company with wholesale or retail customers served under cost-based regulation and an associate company; (2) new issuances of securities by a traditional utility associate companies with wholesale or retail customers served under cost-based regulation for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional utility associate company with wholesale or retail customers served under cost-based regulation for the benefit of an associate company; or (4) new affiliate contracts between non-utility associate companies and traditional utility associate companies with wholesale or retail customers served under cost-based regulation, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

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<sup>103</sup> Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 169.

## 5. Analysis of Proposed Accounting

88. The application includes a proposed accounting entry recording Entergy Gulf State's acquisition of the Facility.<sup>104</sup> Entergy Gulf States proposes to debit Account 102, Electric Plant Purchased or Sold, and credit Account 232, Accounts Payable, in the amount of \$56,500,000, the estimated purchase price of the Facility. However, Entergy Gulf States does not provide a journal entry clearing the original cost, related accumulated depreciation, and any acquisition adjustments from Account 102.

89. Electric Plant Instruction No. 5 of the Commission's Uniform System of Accounts requires that the purchase of electric plant that is an operating unit or system must be cleared through Account 102. Accordingly, Entergy Gulf States must debit the original cost, estimated if not known, to Account 101, Electric Plant in Service, with a concurrent credit to Account 102 and credit accumulated depreciation and amortization applicable to the original cost of the Facility to Accounts 108, Accumulated Provision for Depreciation of Electric Utility Plant, and 111, Accumulated Provision for Amortization of Electric Utility Plant, with a concurrent debit to Account 102. Any amounts remaining in Account 102 must be closed to Account 114, Electric Plant Acquisition Adjustments.

### The Commission orders:

(A) The proposed disposition of jurisdictional facilities is hereby authorized as discussed in the body of 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 costs, or any other matter whatsoever now pending or which may come before this Commission.

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

(D) 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.

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<sup>104</sup> On February 23, 2000, in Docket No. ER00-1049-000, the Commission waived its accounting and reporting requirements at 18 C.F.R. Parts 41, 101, and 141 for Calcasieu Power. *Lake Wentworth Generation, LLC, et al.*, 90 FERC ¶ 61,164 (2000). Therefore, Calcasieu Power did not provide accounting entries for the sale of the Calcasieu Facility to Entergy Gulf States.

(E) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the acquisition and disposition.

(F) Applicants shall notify the Commission within 10 days of the date that the acquisition and disposition of jurisdictional facilities have been consummated.

(G) 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.

(H) Entergy Gulf States shall account for the transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. Entergy Gulf States shall submit its final accounting entries within six months of the date that the transfer is consummated, and the accounting submissions shall provide all the accounting entries and amounts related to the transfer along with narrative explanations describing the basis for the entries.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.