125 FERC ¶ 61,145
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Harbinger Capital Partners Master Fund I, Ltd.	Docket Nos. EC08-59-000
Harbinger Capital Partners Special Situations Fund, L.P.	EC08-59-001

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

(Issued November 5, 2008)

1. Harbinger Capital Partners Master Fund I, Ltd. (Harbinger Master Fund) and Harbinger Capital Partners Special Situations Fund, L.P. (Harbinger Special Situations Fund) (collectively, Harbinger) filed an application (Application) requesting authorization under section 203 of the Federal Power Act (FPA)[1] for Harbinger to own up to 25 percent of the outstanding voting securities of Mirant Corporation (Mirant) (Proposed Transaction).

2. The Commission has reviewed the Application under the Merger Policy Statement.[2] As discussed below, we will authorize the Proposed Transaction under

[1] 16 U.S.C. § 824b (2006).

[2] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order

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section 203(a)(1), as we find that it is consistent with the public interest. Although Harbinger does not specifically state whether it seeks authorization under section 203(a)(1)[3] or 203(a)(2),[4] in the instant order the Commission is asserting jurisdiction under section 203(a)(1). We note that authorization under section 203(a)(2) is granted pursuant to the blanket authorization granted in section 33.1(c)(8) of the Commission's regulations. We remind applicants that when they submit an application seeking authorization under section 203 of the FPA, they must specify the subsection(s) of section 203 under which they are seeking authorization. Moreover, if an entity is uncertain whether a particular disposition or acquisition is a transfer of control that requires a section 203 authorization, it should seek a declaratory order or file the appropriate section 203 application.[5]

I. Background

A. Description of the Parties

Harbinger and Related Entities

3. Harbinger Master Fund and Harbinger Special Situations Fund are hedge funds. They are separate investment funds, but they are under common control. According to Harbinger, each invests primarily in distressed/high yield debt securities, special situation equities, and private loans and notes, including the securities of financially-distressed

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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).

[3] Section 203(a)(1) applies to dispositions of jurisdictional facilities by public utilities. Harbinger never directly references this section, but states that "separate prior Commission approval should not be required under section 203 because [it is] not proposing to acquire control of Mirant." Application at 11.

[4] Section 203(a)(2) requires prior Commission authorization for holding companies to acquire certain securities with values in excess of $10 million of transmitting utilities, electric utility companies or holding companies containing such entities. Harbinger states that section 203(a)(2) is "relevant" to the Proposed Transaction. Application at 8.

[5] *See* Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 at P 96.

generation companies.[6] Applicants state that they are holding companies solely with respect to one or more exempt wholesale generators (EWGs), qualifying facilities (QFs) and foreign utility companies (FUCOs).[7]

4. According to the Application, Harbinger currently owns approximately nine percent of the outstanding voting shares of Mirant.[8] Harbinger states that Mirant is a holding company only with respect to EWGs, QFs, or FUCOs,[9] and that Harbinger acquired shares of Mirant pursuant to the blanket authorization granted in 18 C.F.R. § 33.1(c)(2).

5. Harbinger owns 100 percent of Kelson Holdings, LLC (Kelson), which indirectly owns four large EWGs in the southern and western United States.[10] Specifically, Kelson owns Cottonwood Energy Company LP, which owns a 1,230 MW natural gas-fired generation facility in Deweyville, Texas; Dogwood Energy LLC, which leases a 610 MW natural gas-fired generation facility in Pleasant Hill, Missouri; Magnolia Energy LP, which owns a 925 MW natural-gas fired generation facility in Ashland Mississippi; and

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[6] Application at 3. Harbinger notes that there are several other separate private investment funds or investment vehicles comprised of institutional and private investors that invest in energy-related assets trade using the "Harbinger" or "Harbert" names. It states that these include Harbert Management & Investment, Inc., Harbinger Independent Power Fund I, LLC, Harbinger Independent Power Fund II, LLC and Harbinger Independent Power Fund III, LLC. Harbinger submits that the assets held by these funds are not discussed in this Application as they do not fall within the definition of affiliate set forth in 18 C.F.R. § 366.1 (2008). Further, Harbinger submits that the funds are structurally separate from, and invest and operate independently from, Harbinger's funds. Harbinger states that the Commission has accepted representations by parties that generation assets should not be considered affiliated with such parties when the assets are held by separate financial institutions and investment funds that do not have an interest of greater than five percent voting shares in such assets. *Id*. at 3 (citing *Triton Power Michigan, LLC*, 117 FERC ¶ 62,142 (2006)).

[7] *Id*. at 1.

[8] *Id*. at 6-7.

[9] *Id*. However, contrary to Harbinger's suggestion that Mirant owns only EWGs, QFs, or FUCOs, Mirant also owns a power marketer. *See, infra* P 29.

[10] Harbinger Master Fund owns a two-thirds interest in Kelson and Harbinger Special Situations Fund owns a one-third interest in Kelson.

Redbud Energy LP,[11] which owns a 1,230 MW natural gas-fired generation facility in Luther, Oklahoma.[12]

6. Harbinger owns interests in two FUCOs that operate in Canada, and it owns King City, L.P., which owns a QF and leases it to Calpine King City Cogeneration, LLC. An affiliate of Harbinger owns less than ten percent of Horsehead Corporation, a manufacturing company which owns two 55 MW generating facilities that it uses for self-supply and which may make wholesale sales at market-based rates. Harbinger owns Kelson Energy III LLC, which recently obtained market-based rate authority[13] and has a pending section 203 application relating to the proposed acquisition of Southaven Power, LLC, a 810 MW natural gas-fired electric generation facility located in Southaven, Mississippi. [14] Harbinger also owns less than 10 percent of the Class A (non-voting) shares of U.S. Power Generating Company (US PowerGen).[15]

7. According to the Application, Harbinger owns approximately 21 percent of the outstanding voting shares of Calpine Corporation (Calpine) pursuant to the authorization

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

[12] Application at 4. Harbinger's May 9, 2008 Application submitted in Docket No. EC08-87-000 provides different values for the plant capacity of each of the four EWGs owned by Kelson. It states that the plant capacity for Cottonwood Energy Company LP is 1,233 MW, the plant capacity for Dogwood Energy LLC is 620 MW, the plant capacity for Magnolia Energy LP is 807 MW, and the plant capacity for Redbud Energy LP is 1,194 MW. *Id*. at 7.

[13] *Id*. (citing *Kelson Energy III, LLC*, Docket No. ER08-446-000 (Feb. 14, 2008) (unpublished letter order)).

[14] After Harbinger submitted the instant Application, Kelson Energy III LLC requested that the Commission cancel its market-based rate tariff. *Kelson Energy III LLP*, 123 FERC ¶ 61,303 (2008) (accepting Kelson's notice of cancellation). In addition, the section 203 application regarding the proposed acquisition of Southaven Power, LLC has been withdrawn. Southaven Power, LLC May 14, 2008 Filing, Docket No. EC08-49-000 (providing notice that transaction will not be consummated).

[15] Application at 6.

granted by the Commission in connection with Calpine's emergence from bankruptcy proceedings.[16]

B. Description of the Proposed Transaction

8. Harbinger states that its percentage ownership of Mirant shares may increase to ten percent or more of the outstanding shares of Mirant for two separate reasons. First, Mirant has announced share buy-backs that would reduce the amount of outstanding Mirant shares (Mirant Buy-Back). This could cause Harbinger's current shares to represent ten percent or more of the outstanding shares because they are part of a smaller pool of shares. Second, Harbinger states that it may purchase additional shares of Mirant common stock for investment purposes (Incremental Purchases) (collectively, Proposed Transaction). Thus, Harbinger seeks approval under FPA section 203 to own up to twenty-five percent of Mirant's common stock.[17] In separate orders issued concurrently with this order, we grant Harbinger's request for approval under section 203 to acquire between 10 and 20 percent of the outstanding voting securities of Entegra Power Group LLC (Entegra),[18] subject to certain conditions, and its request for approval under

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

[17] *Id*. at 2.

[18] *Entegra Power Group LLC*, 125 FERC ¶ 61,143 (2008). According to Harbinger's Joint Application For Approval Under Section 203 of the Federal Power Act filed May 9, 2008, Docket No. EC08-87-000, Entegra is a Delaware limited liability company that holds indirectly all of the equity interests in Gila River Power, L.P. and

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Section 203 to acquire up to 20 percent of the outstanding voting securities of Sunoco, Inc.[19]

9. Harbinger explains that since the Mirant Buy-Back is expected to proceed in one or more tranches, its percentage holdings may increase incrementally one or more times once they meet or exceed the ten percent mark. Harbinger also states that it may purchase additional shares of Mirant stock. Harbinger states that because it cannot control the timing of increases in its holdings, it requests that the Commission consider Harbinger authorized to hold in excess of ten percent of the outstanding Mirant shares as of the date of its Application.[20]

10. Harbinger states the Proposed Transaction will not give Harbinger the ability to control the ability of Mirant's generating capacity to reach the market, or to control the decision-making over sales of electric energy, and it will not have discretion over how and when power generated by Mirant's facilities will be sold. According to Harbinger, the Schedule 13G it has filed with the Securities and Exchange Commission (SEC) in connection with its acquisition of Mirant shares shows that it did not acquire shares of Mirant in order to obtain control over Mirant. Rather, the share acquisition was a passive investment.

Union Power Partners, L.P., which are exempt wholesale generators (EWGs). These EWGs are wholly owned by EPG LLC, which in turn, is wholly owned by Entegra TC LLC (Entegra TC), and the Blocker Entities. The Blocker Entities are wholly owned by Entegra TC which, in turn, is wholly owned by Entegra. Each current owner of the equity interests in Entegra is a bank, institutional investor, financial institution, investment company or related entity that is not primarily engaged in energy-related business activities. In the May 9, 2008 application, Harbinger states that it acquired securities of Entegra totaling less than five percent of the outstanding securities of Entegra, and may close on shares up to 9.99 percent while that application was pending.

[19] *Harbinger Capital Partners Master Fund I, Ltd.*, 125 FERC ¶ 61,144 (2008).

[20] *Id*. at 8. We note that section 203(a)(2) addresses in the first instance purchasing, acquiring or taking certain securities with a value in excess of $10 million. It does not directly address the effects of share buy-backs. While Mirant's actions could cause Harbinger to hold more than ten percent of Mirant's outstanding voting securities, this is not the result of an acquisition specified in section 203(a)(2). In the event the share buy-back results in holdings of Mirant by Harbinger that raise concerns under section 203, the Commission may issue supplemental orders as appropriate.

11. Harbinger seeks confirmation that an entity that is a holding company solely due to ownership of EWGs, QFs, or FUCOS can use the blanket authorization set forth in section 33.1(c)(8) of the Commission's regulations to acquire additional shares of a holding company that owns only EWGs, QFs, or FUCOs and in which the acquiring holding company holds an interest.[21] It is unclear to Harbinger whether this blanket authorization can be used to permit additional share acquisitions once its interest in Mirant meets or exceeds ten percent. It states that this is "because Applicants would then be considered holding companies as to Mirant and would be purchasing 'additional shares' of EWGs, rather than shares of 'additional' EWGs."[22] Harbinger asserts that a reasonable interpretation of the blanket authorization under section 33.1(c)(8) supports the conclusion that Harbinger should be allowed to purchase additional shares of EWGs in which they already have an interest pursuant to the blanket authorization. Thus, Harbinger submits that the section 33.1(c)(8) blanket authorization should permit it to acquire shares in Mirant that meet or exceed ten percent in one or more of a series of transactions, such as is envisioned in the Proposed Transaction.

12. On April 14, 2008, Harbinger filed a copy of a Schedule 13G filing made with the SEC on February 19, 2008 (Schedule 13G Filing). Harbinger made this filing to report its aggregate 9.5 percent interest in Mirant's outstanding voting securities.

13. On April 24, 2008, Harbinger filed a supplement to its Application informing the Commission that subsequent to filing the Application it began to acquire units of Entegra Power Group LLC (Entegra), and may continue to acquire up to 9.9 percent of the Entegra units under the blanket authorization set forth in 18 C.F.R. § 33.1(c)(2)(ii).

II. Notice of Filing and Responsive Pleadings

14. Notice of the Application was published in the *Federal Register*, 73 Fed. Reg. 16,665 (2008), with interventions and protests due on or before April 11, 2008. Mirant filed a timely motion to intervene. Calpine filed a timely motion to intervene and conditional protest. On April 18, 2008, Harbinger filed an answer to Calpine's protest.

15. Notice of Harbinger's supplement to its Application was published in the *Federal Register*, 73 Fed. Reg. 24,273 (2008), with interventions and protests due on or before May 5, 2008. None were filed.

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[21] *Id*. at 2-3.

[22] *Id*. at 10.

16. On June 26, 2008, Commission staff issued a deficiency letter requesting that Harbinger provide additional information on how filing a Schedule 13G with the Commission in and of itself provides a basis to conclude that the Proposed Transaction will not result in any adverse effect on competition, rates, and regulation or lead to cross-subsidization. The deficiency letter also requested that Harbinger explain how it would notify the Commission of a change in its investment purpose or intent with regard to Mirant, as well as how Harbinger would view a requirement that it maintain its eligibility to file Schedule 13G with the SEC as a condition to authorization of the Proposed Transaction. Staff also requested that Harbinger provide for each market the amount of horizontal overlap of generation owned or controlled by firms in which it holds an interest, including the proposed additional interest in Mirant. Finally, staff requested that Harbinger provide Exhibit M with the necessary verifications required by 18 C.F.R. § 33.2(j) (2008), or explain why Exhibit M is not required.

17. Harbinger responded to the deficiency letter on July 28, 2008 (Response to Deficiency Letter). In this response, Harbinger explains that if it were to change its investment intent with respect to Mirant and become ineligible to file SEC Schedule 13G concerning its Mirant shares, the SEC would require that Harbinger file within ten days a Schedule 13D to report the change in intent. Harbinger states that if it acquires twenty percent or more of Mirant's common stock, it would become ineligible to file a Schedule 13G with the SEC.[23] Harbinger also provides Exhibit M with the necessary verifications and submits an affidavit (Affidavit), which includes a competitive analysis of the three balancing authority areas where Mirant's subsidiaries own and operate electric plants and Harbinger also maintains investment interests.

18. Notice of Harbinger's response to the Commission's June 26, 2008 deficiency letter was published in the *Federal Register*, 73 Fed. Reg. 46,619 (2008), with interventions and protests due on or before August 18, 2008. None were filed.

A. Protest

19. In its conditional protest, Calpine states that to approve the Application as filed, the Commission would need to agree that the Proposed Transaction will not convey control over Mirant and its electric generation subsidiaries to Harbinger for FPA section 203 purposes. Calpine does not object to approval of the Proposed Transaction, provided the Commission makes clear that the same "control" analysis will apply in the market-based rate setting and that Calpine, which Harbinger is assumed to control, is not deemed to be under common control with Mirant. Calpine maintains that attributing control over Mirant and its generation assets to Harbinger for market-based rate purposes would have

[23] Response to Deficiency Letter at 8 (citing 17 C.F.R. § 240.13d-1(c)(3)).

potentially significant consequences for Calpine, as it could call the market-base rate authority of Calpine subsidiaries into question in several markets.[24] Calpine also states that approving the Application without clarifying that any findings made would apply equally in the market-based rate setting would be inconsistent with the public interest because jeopardizing the market-based rate authority of Calpine's subsidiaries would adversely impact competition.[25] Calpine also submits that if Harbinger were deemed to control both Mirant and Calpine following the Proposed Transaction, the Application would be patently deficient because it fails to address overlaps in generation owned or controlled by Calpine and Mirant in the California Independent System Operator Corp. (CASIO), New York Independent System Operator, Inc. (NYISO), ISO New England, Inc. (ISO-NE), and PJM Interconnection, LLC (PJM) markets.[26]

20. Calpine also argues that it is unclear how the Commission could approve the Proposed Transaction on the grounds that Harbinger does not control Mirant for section 203 purposes and yet view Mirant as controlled by Harbinger for market-based rate purposes.[27] Calpine therefore requests that the Commission expressly confirm that the same control analysis will apply in both the section 203 and the market-based rate settings, and that Calpine will not have to view Harbinger as controlling Mirant for purposes of Calpine's market-based rate obligations. Calpine also asks the Commission to make clear that it will not be required either to: (i) file a notification of change in status in connection with the Proposed Transaction or (ii) attribute control over Mirant and its subsidiaries to Harbinger for purposes of future market power studies, irrespective of whether a notification of change is status is required.[28]

B. Answer

21. In its answer, Harbinger agrees with Calpine that Harbinger's interest in Calpine does not permit Harbinger to control Calpine's subsidiaries. Harbinger states that neither Calpine's nor Mirant's shareholders make decisions regarding where, when, and how wholesale power sales are made or regarding how jurisdictional activity is conducted.[29]

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[24] Calpine April 11, 2008 Protest at 5.

[25] *Id*. at 8.

[26] *Id*. at 6-7.

[27] *Id*. at 7.

[28] *Id*.

[29] Harbinger April 18, 2008 Answer at 4.

Harbinger states that any finding of lack of control for section 203 purposes should be valid for section 205 purposes as well, however, Harbinger states that the instant proceeding is not a section 205 proceeding in which the concerns Calpine raises need to be addressed.[30] In addition, Harbinger states that because it can acquire ten percent or more of the outstanding shares of Mirant pursuant to one or more blanket authorizations without a separate Commission order granting section 203 authorization, it believes that any control or Appendix A considerations are not relevant to its ability to proceed with the Proposed Transaction.[31]

III. Discussion

A. Procedural Issues

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene of Mirant and Calpine serve to make them parties to this proceeding.

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

B. Standard of Review Under Section 203

24. Section 203(a)(4) requires the Commission to approve a transaction if it determines that it will be consistent with the public interest.[32] The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[33] Section 203 also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."[34] The Commission's

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[30] *Id*. at 6.

[31] *Id*. at 7.

[32] 16 U.S.C. § 824b (2006).

[33] *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

[34] 16 U.S.C. § 824b(a)(4) (2006).

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.[35]

C. Analysis Under Section 203

1. Effect on Competition – Horizontal Market Power

a. Harbinger's Analysis

25. Harbinger submits that the Proposed Transaction presents no horizontal market power concerns because Harbinger will not have any ability to control Mirant. To support this argument, Harbinger states that under Mirant's bylaws, Mirant's Board of Directors manages and directs its business and affairs, and in matters where stockholders have voting rights, decisions are by majority vote. Harbinger thus argues that its ownership of up to 25 percent of Mirant's outstanding securities does not give it unilateral ability to control corporate decisions set for vote by Mirant. Harbinger states that it has no common directors with Mirant, no advisory members on the Mirant board, and no non-public right to receive information or reports from Mirant. Harbinger also states that it has no role in guiding, influencing, or controlling Mirant's operating decisions with regard to aspects of the day-to-day management and control of its public utility subsidiaries. Harbinger therefore submits that separate prior Commission approval under FPA section 203 should not be required because it is not proposing to acquire control over Mirant.[36]

26. Harbinger argues that Mirant, like other similar holding companies, does not generally provide shareholders the opportunity to vote on decisions such as whether and when to run electric generating plants, or the prices at which power will be sold. Harbinger thus argues that as a minority shareholder it has no opportunity to exercise market power with respect to the output of Mirant's electric generating facilities.[37] Harbinger also argues that the Commission has effective mechanisms in place to monitor market abuse through its reporting requirements such as the Electric Quarterly Reports.[38]

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[35] 18 C.F.R. § 33.2(j) (2008).

[36] Application at 11-12, 13; Response to Deficiency Letter at 2-3.

[37] Response to Deficiency Letter at 3.

[38] *Id*. at 4 (citing *Lockyer v. British Columbia Power Exchange Corp.*, 122 FERC ¶ 61,260, at P 25 (2008) (citing *Enron Power Marketing*, 65 FERC ¶ 61,305, at 62,406 (1993); *Market-based Rates for Wholesale Sales of Electric Energy, Capacity and*

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Additionally, Harbinger notes that Mirant's facilities are located in the balancing areas of Regional Transmission Organizations (RTOs) or Independent System Operators (ISOs), where they are subject to effective market monitoring provisions that are designed to prevent, mitigate, and monitor the exercise of market power.[39]

27. Harbinger states that it is interested in Mirant's activities solely from the perspective of protecting its investment, and it has no interest in directing management in day-to-day operational activities. Harbinger represents that it will not have the ability to manage, direct or control the day-to-day wholesale power sales activities conducted by Mirant relating to Mirant's public utility subsidiaries, or have other rights that would constitute control.[40] Harbinger also represents that it will commit to the Commission, as a condition of approval of the original application that, absent a future notification filing with the Commission, it will not cast any votes or take any actions that dictate the price at which power is sold from Mirant's generating facilities or that direct how and when power generated by the facilities will be sold.[41]

28. In addition, Harbinger represents that it is willing to make certain commitments to alleviate the Commission's concerns with regard to its investments in public utility securities. Specifically, Harbinger commits to file with the Commission a quarterly report of Harbinger's public utility holdings held during the previous quarter stated in terms of the number of shares held as of the end of the quarter and as a percentage of the outstanding shares, subject to a threshold of five percent. It represents that its investment advisor will retain detailed books and records of securities trades and holdings on behalf of Harbinger for a period of not less than five years. Harbinger also represents that it will file with the Commission the Schedule 13G filings made with the SEC that are relevant to the authorizations granted in the instant proceeding.[42]

29. In the Affidavit submitted with its response to the deficiency letter, Harbinger provides a competitive analysis of the three markets in which Mirant's subsidiaries own and operate electric plants where Harbinger also maintains investment interests. The

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Ancillary Services by Public Utilities, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, at P 365 (2008)).

[39] *Id.*

[40] Application at 11-12.

[41] Response to Deficiency Letter at 3.

[42] *Id.* at 5-6.

three markets analyzed are CAISO, NYISO, and ISO-NE.[43] In the analysis, Harbinger's ownership interests arise from its approximately 24 percent ownership of the outstanding voting securities of Calpine. The analysis assumes that Harbinger controls all of Calpine's and Mirant's generating assets, except those whose production is committed to others under long-term sales commitments.[44] Based on the summer rating of the generating assets included in the analysis, net of Calpine's long-term sale obligations, the analysis shows that the Proposed Transaction would result in: (i) a 7 percent market share and an increase in the Herfindahl-Hirschman Index (HHI)[45] of 12 in CAISO; (ii) a 6 percent market share and an increase in the HHI of 16 in ISO-NE; and (iii) a 4 percent market share and an increase in the HHI of 6 in NYISO.[46] Harbinger argues that the changes in the HHI are beneath the threshold change level of 50 used to evaluate whether a proposed merger or acquisition may have an adverse competitive impact. Harbinger thus states that the results of the analysis show that in markets where Harbinger and Mirant each have generating assets, there is a *de minimis* overlap. Accordingly, Harbinger's analysis concludes that the competitive impact of the assumed combination of the assets associated with the Proposed Transaction is *de minimis*, and it would have no competitive impact on the markets.[47]

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[43] Cavicchi Aff. ¶ 3. The competitive overlap in PJM was not analyzed because Calpine has current generating plant ownership of less than 100 MW in PJM. *Id*.

[44] *Id*. ¶ 4; n.3.

[45] The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered moderately concentrated; and markets where the HHI is greater than or equal to 1,800 points are considered highly concentrated. The Commission has adopted the Federal Trade Commission/Department of Justice Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of less than 50 points, even in a highly concentrated markets post merger are unlikely to have adverse competitive consequences and ordinarily require no further analysis. U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552 (1992), *revised*, 4 Trade Reg. Rep (CCH) ¶ 13,104 (April 8, 1997).

[46] Cavicchi Aff. ¶¶ 5, 6.

[47] *Id*. ¶ 6.

b. Commission Determination

30. As a preliminary matter, the blanket authorization set forth in 18 C.F.R. § 33.1(c)(8) grants authorization under section 203(a)(2) for Harbinger to acquire additional shares in Mirant. The blanket authorization permits a person that is a holding company solely with respect to one or more EWGs, FUCOs, or QFs to acquire under FPA section 203(a)(2) "the securities of additional EWGs, FUCOs, or QFs." Because the blanket authorization permits the acquisition of securities of additional EWGs, FUCOs, or QFs, it also is reasonable to interpret it to permit a qualifying holding company to increase its investment in EWGs, FUCOs, or QFs whose securities it has already acquired.

31. Nevertheless, as the Commission stated in Order No. 669-B, even when the blanket authorization in 18 C.F.R. § 33.1(c)(8) applies to the holding company's acquisition under FPA section 203(a)(2), FPA section 203(a)(1) requires Commission approval if a transaction results in a change of control of an EWG that is a public utility owned by the holding company whose securities are being acquired.[48] The Proposed Transaction would result in a disposition of up to a 25 percent interest in Mirant. Because the disposition of 10 percent or more of voting interests could result in a change of control of a public utility, we will assert jurisdiction over the Proposed Transaction under section 203(a)(1).

32. Having found that the Proposed Transaction could result in a change in control over Mirant, we turn to whether there will be an adverse effect on competition in terms of horizontal market power as a result of the Proposed Transaction. While we have found that Harbinger has the ability to control Calpine,[49] Harbinger's market power analysis shows that the changes in market concentration increases the HHI by less than 50 points in all seasons/load conditions, indicating no failure of the Commission's competitive analysis screen.

33. Therefore, based on the facts presented, we find that the Proposed Transaction will not adversely affect competition in terms of horizontal market power.[50] Harbinger has

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[48] Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 at P 44.

[49] *See Entegra Power Group, LLC*, 125 FERC ¶ 61,143 (2008**)** (issued concurrently with this order).

[50] We note that in a concurrent order we are approving Harbinger's request to acquire interests in Sunoco. That approval does not affect the market power analysis regarding Harbinger's acquisition of Mirant that we approve here. In that order, we find the horizontal overlap between Mirant and Sunoco to be *de minimis*. *See Harbinger*

(continued)

made the representation that it will not have the ability to manage, direct or control the day-to-day wholesale power sales activities conducted by Mirant relating to Mirant's public utility subsidiaries, or have rights that would constitute control. Since we have already found that the Proposed Transaction could give Harbinger the ability to exercise control of Mirant, we will interpret Harbinger's representation to be a commitment that it will not exercise any ability it could have to control. We further accept its commitment that it will file with the Commission the Schedule 13G filings made with the SEC that are relevant to the authorizations granted in the instant proceeding.[51] We also accept Harbinger's commitment that it will not cast any votes or take any actions that dictate the price at which power is sold from Mirant's generating facilities or that direct how and when power generated by the facilities will be sold unless it makes an appropriate filing under section 203 and that filing is accepted by the Commission. In addition, we accept Harbinger's commitment to have its investment advisor retain detailed books and records of securities trades and holdings on behalf of Harbinger for a period of not less than five years. We will require Harbinger to file with the Commission, for informational purposes, within 45 days of the end of each calendar quarter, a quarterly report of utility holdings by both Harbinger Master Fund and Harbinger Special Situations Fund stated in terms of the number of the shares held at the end of the quarter and as a percentage of the outstanding shares.

34. As noted above, Calpine has filed protests that an assumption here that it is controlled by Harbinger may have adverse implications for Calpine's market-based rate authorization. We appreciate these concerns, and in response we offer the following points. First, we note that the issue of what constitutes control for FPA section 203 and market-based rate purposes is the subject of a petition for guidance filed by the Electric Power Supply Association on September 2, 2008 in Docket No. PL09-3-000 (originally docketed as Docket No. EL08-87-000). This is an issue of significance to the industry that the Commission intends to address in Docket No. PL09-3-000. Second, we will relieve Calpine of its obligation to make a market-based rate change of status filing pertaining to the Proposed Transaction, pending the outcome of Docket No. PL09-3-000or any other proceeding the Commission may initiate to address the issues raised in Docket No. PL09-3-000. By taking this approach, the Commission is able to process Harbinger's application at this time without imposing an additional reporting burden on Calpine.

Capital Partners Master Fund I, Ltd, 125 FERC ¶ 61,144, at P 25 (2008).

[51] *See supra* P 27-28.

2. Effect on Competition – Vertical Market Power

35. Harbinger argues that the Proposed Transaction presents no vertical market power concerns and that no vertical competitive screen analysis is required.[52] Harbinger states that neither it nor any of its affiliates own or control any electric transmission facilities, except for facilities used to interconnect generating facilities with the transmission grid, or inputs to electricity production in any relevant market. In addition, Harbinger states that neither it nor any of its affiliates otherwise possess any ability to erect barriers to entry for new generation.

36. Based on the facts presented, we find that the Proposed Transaction does not raise any vertical market power concerns.

3. Effect on Rates

37. Harbinger submits that the Proposed Transaction will not adversely affect rates. Harbinger states that wholesale sales of electric energy, capacity, and ancillary services will continue to be made at market-based rates or pursuant to the terms of other rate schedules on file with the Commission, and that the Proposed Transaction will have no effect on the rates for such sales. Further, Harbinger states that Mirant is not and does not own a traditional utility with captive retail or wholesale customers, and does not provide unbundled transmission service.[53]

38. We agree that the Proposed Transaction will not have an adverse effect on rates, and note that no customer argues otherwise.

4. Effect on Regulation

39. Harbinger states that the Proposed Transaction will not have any adverse effect on the effectiveness of federal or state regulation, and will not impair the ability of the Commission to regulate rates for wholesale sales or the ability of state regulators to regulate retail transactions.[54]

40. We note that no party alleges that regulation would be impaired by the Proposed Transaction. Based on the facts presented, we find that the Proposed Transaction will not

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[52] Application at 13-14 (citing 18 C.F.R. § 33.4(a)(2)(i) (2008)).

[53] *Id*. at 14.

[54] *Id*.

adversely affect regulation. We also note that no state commission has intervened in this proceeding.

5. Cross-subsidization

41. Harbinger states that, based on the facts and circumstances known to Harbinger or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. Harbinger verifies that the Proposed Transaction will not result in: (1) transfers of facilities between a traditional public utility associate company that has captive ratepayers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) new issuances of securities by traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) new affiliate contracts between non-utility associate companies and traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under FPA sections 205 and 206.[55]

42. Harbinger also notes that the Commission has recognized three classes of transactions that are unlikely to present cross-subsidization concerns and adopted three "safe harbors" that can be used to demonstrate in section 203 cases that there will be no cross-subsidization, absent concerns identified by the Commission or evidence from interveners that there is a cross-subsidy problem based on the particular circumstances presented.[56] Harbinger states that the Proposed Transaction falls within the "safe harbor" for transactions that do not involve a franchised public utility with captive customers, a circumstance where the Commission has recognized that there is no potential for harm to customers.[57]

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[55] Response to Deficiency Letter at Attachment 2.

[56] *Id*. (citing *FPA Section 205 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 15 (2007); *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008)).

[57] *Id*.

43. Based on the facts presented, we find that the Proposed Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise. As discussed above, we also find that the Proposed Transaction will not adversely affect competition, rates or regulation. Therefore, we authorize the disposition to Harbinger of up to 25 percent of Mirant's outstanding voting securities.

The Commission orders:

(A) We hereby grant authorization under section 203(a)(1) for the disposition of up to 25 percent of the outstanding voting securities of Mirant, as discussed in this order.

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

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

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

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

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

(G) Harbinger 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) Harbinger shall file with the Commission, for informational purposes, within 45 days of the end of each calendar quarter, a quarterly report that lists holdings of Mirant by both Harbinger Master Fund and Harbinger Special Situations Fund, stated in terms of the number of the shares held at the end of the quarter and as a percentage of the outstanding shares.

(I) Harbinger shall file with the Commission, for informational purposes, any filing they make at the SEC pertaining to Mirant on Schedule 13G or Schedule 13D and shall file these documents with the Commission at the same time they file them with the SEC. Any changes in the information provided on the initial Schedule 13G or 13D must be reflected in an annual amended filing due within 45 days of the end of each calendar

year. Applicants shall file with the Commission any comment or deficiency letters received from the SEC that concerns Schedule 13G- or 13D-related compliance audits conducted by the SEC. Such filings shall be made in this docket or in appropriate sub-dockets of this docket.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.