UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 485

Entergy Services, Inc. and EWO Marketing, L.P.	**Docket Nos. ER03-583-000, ER03-583-001, ER03-583-002 and ER03-583-004**
Entergy Services, Inc. and Entergy Power, Inc.	**Docket Nos. ER03-681-000 ER03-681-001 and ER03-681-003**
Entergy Services, Inc. and Entergy Power, Inc.	**Docket Nos. ER03-682-000, ER03-682-001, ER03-682-002 and ER03-681-004**
Entergy Services, Inc. and Entergy Louisiana, Inc.	**Docket Nos. ER03-744-000, ER03-744-001 and ER03-744-002 (Consolidated)**

OPINION AND ORDER AFFIRMING IN PART AND REVERSING IN PART INITIAL DECISION AND DENYING REHEARING

(Issued September 27, 2006)

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OPINION NO. 485

APPEARANCES

J. Wayne Anderson, Esq., William S. Scherman, Esq., Gerard A. Clark, Esq., Kimberly H. Despeaux, Esq., Gerald L. Richman, Esq., Jeffrey A. Sherman, Esq., Matthew R. Suffern, Esq. and Kathryn A. Washington, Esq., on behalf of Entergy Services, Inc. and EWO Marketing LP

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Robin M. Nuschler, Esq., Frederick W. Peters, Esq. and Jack N. Bellinger, Esq. on behalf of Calpine Corporation

Michael R. Fontham, Esq., Dana M. Shelton, Esq., Paul L. Zimmering, Esq., Noel J. Darce, Esq. and Eve Kahao Gonzalez, Esq. on behalf of Louisiana Public Service Commission

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Jon L. Brunenkant, Esq., S. Lorraine Cross, Esq., Ray Cunningham, Esq. and James W. Moeller, Esq. on behalf of Suez Energy Marketing NA (successor to Tractebel Energy Marketing, Inc.)[1]

Donald A. Heydt, Esq., William J. Collins, Esq., Warren C. Wood, Esq. and Edith A. Gilmore, Esq. on behalf of Federal Energy Regulatory Commission Trial Staff

[1] Tractebel Energy Marketing, Inc. filed a notice of name change announcing its new name as "Suez Energy Marketing NA."

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FEDERAL ENERGY REGULATORY COMMISSION

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

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OPINION NO. 485

OPINION AND ORDER AFFIRMING IN PART AND REVERSING IN PART INITIAL DECISION AND DENYING REHEARING

(Issued September 27, 2006)

1. This case is before the Commission on exceptions to the Initial Decision (ID) issued in this proceeding by the presiding judge.[2] As explained by the presiding judge,[3] this proceeding involves eight power purchase agreements filed with the Commission for

[2] *Louisiana Public Service Commission v. Entergy Services, Inc.*, 111 FERC ¶ 63,077 (2005).

[3] ID at P 1.

approval by Entergy Services, Inc. (Entergy) and its affiliates.[4] The agreements consist of market-based sales of electric power and associated capacity from the aforementioned Entergy affiliates to two other Entergy affiliates[5] acquired under a request for proposals auction process conducted in the Fall of 2002 (2002 RFP) as well as affiliate power sales under an approved cost-based formula rate.

2. In this order, we affirm the presiding judge's finding that the four Entergy affiliate agreements obtained through the 2002 RFP are just and reasonable and not unduly discriminatory,[6] but limit the term of the Independent System Electric Union Station Unit 2 (Entergy Power ISES 2) contracts to ten years to coincide with the ten-year analysis used to justify these contracts.

3. With respect to the four affiliate contracts secured outside of the 2002 RFP, we affirm the presiding judge's findings that the *Southern California Edison Company on behalf of Mountainview Power Company, LLC*, 106 FERC ¶ 61,183 (2004) (*Mountainview)* standard does not apply to these agreements, and Entergy improperly used information obtained through the 2002 RFP process to price two Entergy Arkansas Wholesale Base Load (Entergy Arkansas Base Load) agreements. Accordingly, we affirm the presiding judge's finding that the two Entergy Arkansas Base Load agreements are unjust, unreasonable, and unduly discriminatory.

4. We affirm the presiding judge's remedy to remove the retained share of Grand Gulf from the resource mix of the Entergy Arkansas Base Load agreement with Entergy Louisiana. As a further remedy, we order the removal of the retained share of Grand Gulf from the resource mix of the Entergy Arkansas Base Load agreement with Entergy New Orleans. The parties are free to separately contract for the retained share of Grand

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[4] The Entergy affiliates here being referred to are: EWO Marketing LP (EWO Marketing), Entergy Power, Inc. (Entergy Power), Entergy Gulf States, Inc. (Entergy Gulf States) and Entergy Arkansas, Inc. (Entergy Arkansas).

[5] Entergy Louisiana, Inc. (Entergy Louisiana) and Entergy New Orleans, Inc. (Entergy New Orleans).

[6] These agreements include two three-year term (term ending June 2006) agreements from EWO Marketing's RS Cogen facility sold to Entergy Louisiana and Entergy New Orleans and two life-of-unit agreements from Entergy Power's Independent System Electric Union Station Unit 2 (Entergy Power ISES 2) facility also sold to Entergy Louisiana and Entergy New Orleans.

Gulf. We accept the two Entergy Gulf States River Bend 30 (Entergy Gulf States River Bend 30) agreements as just and reasonable and not unduly discriminatory.

5. With respect to the remaining issues, we summarily affirm the presiding judge's findings in the ID for the reasons set forth therein and deny the exceptions on those remaining issues.

6. In addition, we announce our expectations for future purchase power agreements (PPAs) conducted in traditional utility environments. The Commission agrees with Trial Staff that transmission should be considered as a price factor and that it is the delivered price of the resources that must be compared in evaluating which Request for Proposal (RFP) bids to select.[7] Thus, the relevant cost is the delivered price of the resource. We will apply this approach prospectively to avoid a regulatory effect on transactions already filed for Commission approval, *i.e.*, filed before the date of issuance of this order.

Background

A. Procedural Matters

7. On May 30, 2003, the Commission issued an order accepting the eight market-based rate agreements for filing, suspending them for a nominal period, allowing them to be effective subject to refund, and establishing hearing procedures.[8]

8. The Hearing Order set the following issues for hearing: (1) whether in the design and implementation of the 2002 RFP Entergy Services unduly preferred Entergy affiliates; (2) whether the analysis of the 2002 RFP bids unduly favored Entergy's affiliates, particularly with respect to evaluation of non-price factors; (3) whether Entergy Services selected the affiliates based upon a reasonable combination of price and non-price factors; (4) whether Entergy Services' reliance on bids made in the 2002 RFP to support the prices for the non-RFP agreements adequately demonstrates that Entergy Services did not unduly favor its affiliates when selecting the winning bids; (5) whether, and to what extent, the agreements impact wholesale competition; and (6) whether the agreements are just and reasonable and not unduly discriminatory.

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[7] Trial Staff exhibits are prefaced by the abbreviation (S or Staff). *See* S-47 at 5, Paragraph 18c (Joint Stipulation).

[8] Hearing Order at P 1.

9. The hearing was held between June 28 and December 1, 2004. As noted by the presiding judge, the record consists of 12,912 transcript pages and about 670 exhibits.[9] After completion of the hearings and the filing of briefs, the presiding judge issued the ID on June 30, 2005. Timely briefs on exceptions were filed by Calpine, Entergy, the Louisiana Public Service Commission (Louisiana Commission), Tractebel, and Trial Staff. The same parties subsequently filed reply briefs. In addition, State Regulators filed a brief opposing exceptions limited to a single issue raised by the Louisiana Commission.[10] The matter is now before the Commission for decision.

10. In the course of the hearing, when Trial Staff proffered the testimony of Sabina Joe, the attorneys for Entergy objected to her qualifications and moved to strike her testimony. Despite objections from Trial Staff and the other parties, the presiding judge ruled that her testimony should be excluded. When this matter reached the Commission, in an interlocutory appeal, the Commission held that the presiding judge had erred and that Witness Joe's testimony should not be excluded.[11] However, the Commission left it to the presiding judge to determine what weight to give to her testimony.[12] In response to this ruling, Entergy filed a request for rehearing asking the Commission to reverse itself and affirm the ruling of the presiding judge.

B. Case Summary

11. This matter began in 2003 when Entergy filed eight market-based rate agreements for Commission approval.[13] Four of the agreements were the result of a request for

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[9] ID at P 5.

[10] State Regulators are comprised of the Council of the City of New Orleans, the Arkansas Public Service Commission, and the Mississippi Public Service Commission. State Regulators filed no exceptions to the ID. State Regulators' brief opposed assertions by the Louisiana Public Service Commission (Louisiana Commission) that the resource allocations at issue in this proceeding were used to discriminate against Entergy Gulf States.

[11] *Entergy Services, Inc.; EWO Marketing LP; Entergy Power, Inc.; Entergy Louisiana, Inc.*, 109 FERC ¶ 61,108 at P 2, P 12 (2004) (October 2004 Order).

[12] October 2004 Order at P 12.

[13] The agreements were filed on different dates in four separate dockets. ID at P 3. The Commission consolidated all four dockets into one proceeding. *Entergy Services, Inc.*, 103 FERC ¶ 61,256 at P 1 (2003) (Hearing Order).

proposals that Entergy conducted during the fall of 2002.[14] The other four agreements were negotiated and executed outside of the 2002 RFP process.[15] However, Entergy originally relied on the 2002 RFP bids to support these negotiated market-based rate agreements.

12. The four RFP agreements include two contracts involving EWO Marketing purchasing power from RS Cogen LLC for resale to Entergy Louisiana and Entergy New Orleans (the EWO RS Cogen agreements). The other two RFP agreements involve two life-of-unit agreements to sell capacity from Entergy Power's Independence Steam Electric Station Unit 2 to Entergy Louisiana and Entergy New Orleans (the Entergy Power ISES 2 agreements).

13. The four non-RFP agreements include two life-of-unit purchases from Entergy Gulf States to Entergy Louisiana and Entergy New Orleans from Entergy Gulf States share of the River Bend Nuclear Station (the Entergy Gulf States River Bend 30 agreements). The remaining two non-RFP agreements are life-of-unit purchases from six of Entergy Arkansas' coal and nuclear units to Entergy Louisiana and Entergy New Orleans (the Entergy Arkansas Base Load agreements).

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[14] These include: two three-year Multi-Year Unit Contingent Call Options (MUCCOs) providing that EWO Marketing will purchase up to 206 MW from RS Cogen LLC for resale of approximately 156 MW to Entergy Louisiana and 50 MW to Entergy New Orleans and two life-of-unit agreements to sell up to 61 MW of capacity from Entergy Power's 14.73 percent interest in the coal fired Independence Steam Electric Station Unit 2 (Entergy Power ISES 2) to Entergy Louisiana and up to 60 MW to Entergy New Orleans.

[15] Two of these agreements are life-of-unit purchases from Entergy Gulf States to Entergy New Orleans for two-thirds of the output and from Entergy Gulf States to Entergy New Orleans for one-third of the output of Entergy Gulf States' unregulated 30 percent share of the River Bend Nuclear Station. The 30 percent interest (Entergy Gulf States River Bend 30), which was acquired through the bankruptcy of Cajun Electric Power Cooperative, Inc. (Cajun), comprises approximately 300 MW, so the division is approximately 200 MW to Entergy Louisiana and 100 MW to Entergy New Orleans. The remaining two agreements deal with life-of-unit purchases of base load capacity and associated energy from six of Entergy Arkansas' coal and nuclear (solid fuel) units. Entergy Louisiana and Entergy New Orleans are purchasing 110 MW each of capacity that had previously been designated for the wholesale market (Entergy Arkansas Base Load).

14. After the hearing commenced, the Commission approved a settlement involving Entergy's Service Schedule MSS-4 formula rates under its System Agreement.[16] The settlement expanded the application of Service Schedule MSS-4 to sales of purchased power between the Entergy operating companies. Entergy then changed its theory in this case, arguing that the four non-RFP contracts were justified on a cost basis because they followed the approved Service Schedule MSS-4 formula rate. The presiding judge allowed this and found that once Entergy had dropped its claim that the non-RFP PPAs prices were based on market prices, *Boston Edison Company re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) *(Edgar)* no longer applied. Although the new strategy to support the prices based on cost principles was adopted after the date of *Mountainview*,[17] the judge also found that *Mountainview* did not apply.

15. In the Initial Decision, the presiding judge made the following findings: (1) Entergy's design and implementation of the 2002 RFP, which resulted in selection of the Entergy Power ISES 2 and EWO RS Cogen agreements, was just and reasonable;[18] (2) Entergy's analysis of the 2002 RFP, in particular with respect to the evaluation of non-price factors, was just and reasonable;[19] (3) Entergy's decision to rely solely on price in its selection of the affiliate agreements, was reasonable;[20] (4) the Entergy Gulf States River Bend agreements, which Entergy contracted outside the 2002 RFP, were just and reasonable since they will be priced consistent with the Service Schedule MSS-4 cost-of-service rate formula,[21] and the design of the Entergy Arkansas Base Load agreements, also contracted outside the 2002 RFP, was unjust and unreasonable to the extent that Entergy adjusted their prices to "blend in" Grand Gulf retained share costs based on confidential RFP bid information;[22] (5) the agreements do not adversely affect wholesale

[16] *Entergy Services Inc.*, 111 FERC ¶ 61,035 (2005).

[17] *Mountainview* announced that prospectively, even cost-based sales to affiliates would need to satisfy the *Edgar* requirements (*see* 109 FERC ¶ 61,086 at P 30).

[18] ID at P 62.

[19] ID at P 86.

[20] ID at P 87.

[21] ID at P 135.

[22] ID at P 157.

competition, to the extent Entergy did not employ a safety net strategy;[23] and (6) overall, the subject agreements were just and reasonable, except for Entergy's affiliate abuse in pricing the Entergy Arkansas Base Load contracts.

Discussion

I. Introduction

16. The discussion of the agreements and issues is as follows. Part I of the order is this short introduction to the issues. Part II of the order will describe Entergy's RFP process and the four agreements selected under this process. Next we discuss design and implementation issues associated with the process, followed by a discussion of Entergy's analysis of the bids, which discusses a number of issues that were addressed in the hearing, such as the treatment of price and non-price factors.

17. In Part III, the order addresses the four agreements selected outside the RFP process. We discuss the decision Entergy made midway through the hearing to no longer support these agreements pursuant to its market-based rate authority, but instead to price the four agreements under the recently approved cost-based rate formula in MSS 4 of the Entergy System Agreement. The order then explains how the presiding judge found that neither the *Edgar* nor the *Mountainview* standards of review applied to these agreements. This part concludes by affirming the presiding judge's findings that (1) the two Entergy Gulf States River Bend agreements are just and reasonable, and (2) because Entergy improperly used information obtained through the 2002 RFP process to price the two Entergy Arkansas Base Load agreements, they are, therefore, unjust, unreasonable, and unduly discriminatory. Thus, the Commission orders the removal of the retained share of Grand Gulf from Entergy Arkansas Base Load agreements.

18. Part IV addresses a number of miscellaneous issues. These issues include: (1) whether Entergy used market power to favor its affiliates; (2) whether Entergy improperly employed a safety net strategy; (3) whether the allocation of capacity and energy under the agreements to the operating companies are just and reasonable; (4) jurisdictional issues involving the agreements; and (5) the credibility of a Trial Staff witness.

[23] ID at P 27.

II. Entergy's 2002 RFP Process

19. The origins and planning that led to the issuance of the 2002 RFP are discussed in the ID.[24] As explained by the presiding judge, from the mid-1980s through most of the 1990s, Entergy met its resource needs with company-owned generation.[25] By 2002, the planning environment had become more certain and Entergy adopted a set of planning principles that resulted in a Strategic Supply Resource Plan for 2003 through 2012 (Supply Plan).[26] Entergy states that its "overall objective is to provide reliable and economical supply of capacity to meet retail customer requirements over the planning horizon."[27] Entergy further testifies that its

> [s]ystem must plan for both reliability and economics, and thus must maintain a supply portfolio in each of its major planning regions that, in conjunction with available transmission capacity can provide each area with the required reliability as well as economical sources of power.[28]

20. The presiding judge explains that Entergy created a portfolio approach to resource acquisition in its Supply Plan that resulted in a multi-year resource contracting strategy.[29] It is within this context that the 2002 RFP was developed.

21. The presiding judge also explains that the Louisiana Commission provided a series of RFP guidelines for its jurisdictional utilities in its Market Based Mechanism Order (MBM Order). These requirements included an informational filing to be made at the Louisiana Commission, with the Louisiana Commission then working with the utility on a technical and consultative basis. The Louisiana Commission also receives bid results and internal evaluations.[30] The draft of the 2002 RFP was filed for public comment on

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[24] ID at P 28-51.

[25] ID at P 28.

[26] Entergy Services, Inc. exhibits are prefaced by the abbreviation (ETR). ETR-1 at 24-25.

[27] ETR-1 at 26.

[28] ETR-1 at 32.

[29] ID at P 29.

[30] ID at P 31.

September 27, 2002.[31] It was widely published through the trade press and email notices. Pursuant to the Louisiana Commission guidelines, public conferences were held with Louisiana Commission staff and potential bidders, after which written comments were submitted. Entergy posted its final version of the 2002 RFP on October 31, 2002.[32]

22. In the 2002 RFP, Entergy sought varied sources and types of generation capacity.[33] For a long-term bid to qualify it had to be available within a three-year window.[34] Entergy received 133 offers from 30 bidders for 38 resources. Most of these bids qualified for consideration. However, a small number of non-conforming bids were rejected. For example, one bid was rejected because it could not meet the three-year window availability requirement stated in the 2002 RFP as being necessary for consideration.[35]

23. The 2002 RFP noted that Entergy would hire an Independent Monitor (IM) to oversee the RFP process. The IM was selected by Entergy's outside counsel. Entergy testified that the two main qualifications used to select the IM were, first, experience in supply-side procurement processes and practices and, second, the IM had to be free of any prior relationship with Entergy or any of its affiliates.[36] The IM oversaw the 2002 RFP development, design, bid evaluation, and subsequent negotiations between Entergy and the bidders.

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[31] ETR-1 at 47.

[32] ID at P 31-32.

[33] Included were generation products that could be provided through short-term and limited-term purchase agreements or through the acquisition of long-term resources; price-stable resources including solid fuel generation or efficient gas-fired capacity or cogeneration facilities with fixed-price long-term gas contracts; life-of-unit resources either through actual ownership in an existing generating facility or through life-of-unit power purchase agreements; and dispatchable load-following capacity from efficient generation that could be placed under the control of Entergy System dispatchers.

[34] ID at P 32-33, ETR-1 at 46-47.

[35] ETR-1 at 51.

[36] ETR-1 at 49.

24. At the time the 2002 RFP was solicited, the Louisiana Commission did not require utilities to hire an IM to oversee an RFP process.[37] Entergy testified that the IM monitored the information flow between Entergy employees and the bidders. The IM was also responsible for opening and redacting all the bid proposals in order to ensure that all bidders were treated equally.[38]

25. Entergy states that it worked in conjunction with the Louisiana Commission during the implementation of the 2002 RFP. Entergy testified that the majority of the bids lacked some of the data required for Entergy to conduct its planned analysis of the bids. For example, bidders applied varying assumptions to their heat rates. Because of this, and because obtaining new data from the bidders was not practical, Entergy testifies that it decided to substitute a generic heat rate. Entergy did discuss this issue, as well as other implementation adjustments, with both its IM and the Louisiana Commission prior to the economic evaluation of the bids.[39]

26. A stated key objective of Entergy's RFP was to lower the overall production costs of the Entergy operating companies.[40] Thus, the evaluation process reviewed the bids with the economic evaluation being the foremost deciding factor.[41] Qualitative evaluations of various factors considered non-economic in this RFP were performed to provide additional information that would help: (1) rank proposals with similar economic impacts; (2) identify issues for negotiation with a bidder; and (3) identify disqualifying factors (such as a resource not meeting the three-year window availability requirement).[42] Among the requirements that Entergy placed in its 2002 RFP was a requirement that any generating resource selected must qualify as a firm network resource. Entergy explained in the 2002 RFP that transmission issues would be evaluated independently from

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[37] ID at P 38.

[38] ETR-80 at 17-18.

[39] ID at P 36, ETR-80 at 12-14.

[40] Entergy explained to market participants at its October 15, 2002 technical conference that "[b]idders [were] encouraged to focus on price and operational terms that have the greatest impact on total production costs for the product offered." Entergy Brief Opposing Exceptions at 53.

[41] ETR-14 at Appendix G, § 1.5.

[42] ETR-1 at 52.

Entergy's Transmission Organization due to affiliate information sharing restrictions and the length of time it would take for the Transmission Organization to provide its determinations on the bids. The economic evaluation of the bids assumed no additional costs would be incurred to qualify a resource as a network resource.[43] Entergy's 2002 RFP also notes that it prefers resource options with no or very low costs to qualify as firm network resources.[44]

27. The economic evaluation used a screening model that calculated the net present value of the expected production costs[45] of each of the resources bid at various capacity factors. Each proposal was then analyzed assuming its inclusion in the Entergy System's resource portfolio over the period of the offer. PROSYM is the production cost simulation model that Entergy used to forecast potential savings or incremental costs to the Entergy operating companies for each resource evaluated, which does not evaluate deliverability.[46]

28. Entergy's RFP process evaluated the non-economic factors in order to identify distinguishing characteristics or areas of concern such as fuel supply, and transmission.[47] The IM reviewed the specific algorithms and procedures associated with these factor evaluations.[48] The factor evaluation was provided to the bidders in the RFP.[49] Entergy testified that the non-economic factor evaluation scores did not result in the elimination of any bid from further consideration. The economic evaluations led to clear choices that Entergy decided rendered consideration of the non-economic factors unnecessary.[50]

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[43] Entergy Initial Brief at 28.

[44] ETR-14 at § 3.3.1.

[45] The economic evaluation included the cost of the proposal or carrying charges on acquisition prices, fuel costs, heat rate curves, dispatch flexibility, and O&M costs. ID at P 35.

[46] ETR-1 at 52-53.

[47] ETR-1 at 53.

[48] *Id.*

[49] ETR-14, Appendix G, § 3.

[50] ETR-1 at 54.

29. After considering the summaries of the economic evaluations, the Entergy operating committee selected eight proposals from seven potential resources that met the System's needs and provided the most economic benefits to Entergy Operating Company customers. These included three short-term proposals and five long-term proposals that made it to Entergy's short list of bids to be evaluated further. Negotiations were successful for two of the three short-term proposals, one of which was to a non-affiliate, Duke Hinds. The other was for power from an affiliate, EWO Marketing's, RS Cogen unit, for which two agreements were signed, one with Entergy New Orleans and one with Entergy Louisiana. Negotiations were unsuccessful with the other unaffiliated bidder for a short-term resource. Additional analyses and discussions were held with the short-listed long-term bidders. The long-term resources chosen from the short-list included the acquisition of the unaffiliated Perryville facility and power from Entergy Power's ISES 2 unit, for which two agreements were signed, one with Entergy New Orleans and one with Entergy Louisiana. Entergy testified that all of the post-bid discussions and negotiations were conducted with the direct participation and oversight of the IM.[51]

A. Design and Implementation Issues

30. The presiding judge found that the design and implementation of the 2002 RFP was just and reasonable. He stated that "[w]ith respect to concerns regarding the types of generation requested in a limited time frame, Entergy properly states that the Fall 2002 RFP is merely the first opportunity in a series of RFPs that will be conducted to implement the goals outlined in the SSRP [Strategic Supply Resource Plan]."[52] The presiding judge explained that Entergy had the right to disqualify bids that do not meet its criteria and that any corrections made to the bids after submittal were typographical in nature, and would be applied regardless of affiliation.[53]

31. As discussed in more detail later in this order, the presiding judge found that Entergy's handling of the firm network resource requirement in the 2002 RFP was just and reasonable, including Entergy's decision to qualify some resources via delisting and redispatch.[54] The presiding judge states that Entergy properly put bidders on notice that it reserved the discretion to determine how to qualify the bids as network resources. The

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[51] ETR-1 at 55-57.

[52] ID at P 62.

[53] *Id.*

[54] ID at P 63.

presiding judge reasons that Entergy knows its system and that it is well within its rights to give itself the flexibility to make decisions that make the most economic sense for the company and its ratepayers.[55] The presiding judge notes that Entergy states on brief that resources could qualify as firm network resources through a variety of means and not solely through the construction of transmission network upgrades.[56] Entergy's OATT provides that network service can be achieved through redispatch, delisting, or network upgrades, and Entergy testified that nothing in the RFP suggests that bidders would not have equal rights to all options under Entergy's OATT. The presiding judge points out that a non-affiliate, Duke Hinds, was granted firm network service status through redispatch. The presiding judge further points to Entergy's statement that requiring bidders to qualify for firm network resource status through the construction of network upgrades alone would violate Order No. 2003,[57] which provides that generators only have to pass a regional deliverability test.[58]

32. The presiding judge finds that, while the IM had difficulties maintaining the confidentiality of the bids, the accidental disclosure of the identity of the Entergy Power ISES 2 bid, an affiliate bid, had no demonstrable impact on the outcome of the 2002 RFP.[59] The presiding judge concludes that the design and implementation of the 2002 RFP that resulted in the selection of the Entergy Power ISES 2 and EWO RS Cogen affiliate contracts was just and reasonable and free from affiliate abuse.[60]

33. The intervenors filed exceptions that raised a number of objections to the presiding judge's finding that the 2002 RFP was properly designed and implemented and that the resources obtained under these agreements were obtained at a just and reasonable price. For example, Calpine argues that the presiding judge's failure to find that all of the

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[55] *Id.*

[56] Entergy Initial Brief at 26, 31-33.

[57] *Standardization of Generator Interconnection Agreements and Procedures,* Order No. 2003, *FERC Stats. & Regs.* ¶ 31,146 (2003), *order on reh'g,* FERC Stats. & Regs. ¶ 31,160 (2004) (Order No. 2003-A), *order on reh'g,* 109 FERC ¶ 61,287 (2004) (Order No. 2003-B), *order on reh'g,* 111 FERC ¶ 61,401 (2005) (Order No. 2003-C).

[58] ID at P 58.

[59] ID at P 65.

[60] *Id.*

agreements were unjust and unreasonable cannot be reconciled with his finding that Entergy engaged in affiliate abuse in the design parameters by Entergy and in the awarding of the agreements at issue.

34. While Trial Staff does not propose that any of the PPAs be rejected,[61] they argue that various actions or decisions by Entergy in the design of their RFP and in their evaluation of the bids combined to create an environment in which affiliate preference occurred.[62]

35. Entergy and the State Regulators argue that the presiding judge properly decided that the 2002 RFP was properly designed and implemented and that the resources obtained under these agreements were obtained at a just and reasonable price. The Louisiana Commission, in main part, agrees.

Commission Determination

36. After reviewing the ID, the parties' briefs, and the record, we agree with the presiding judge and find that the design and implementation of Entergy's 2002 RFP process, while not without flaws worked in this instance.

37. The Commission recognizes that the main objective of Entergy's 2002 RFP, as part of Entergy's portfolio approach, was to work toward meeting the overall objective of Entergy's Supply Plan, which is to provide reliable and economical supply of capacity to meet retail customer requirements over its ten year planning horizon.[63] This objective was met. The 2002 RFP process obtained resources that met Entergy's reliability and economic needs, including fuel diversity, fuel security and price stability.

38. The Commission also recognizes that Entergy's subsidiaries are vertically integrated. In states where the utility is required or allowed to own and use generation assets to serve its retail customers, the utility generally has a supply resource planning and procurement obligation. Public utilities, such as Entergy, must evaluate their circumstances and implement a responsible plan for assuring that its retail customers have least-cost, reliable capacity and energy. A public utility with a vertically integrated

[61] Trial Staff Initial Brief at 93.

[62] Trial Staff Initial Brief at 24.

[63] ETR-1 at 46.

industry structure cannot release itself from these obligations, which are essential to fulfilling its responsibilities to retail customers under state oversight and regulation.

39. As to contentions by Calpine, Tractebel, and Trial Staff that the design and implementation of Entergy's RFP was flawed, while we expect the process used by Entergy to conduct future RFPs will be superior to the process it used in this proceeding, we find, nonetheless, that the 2002 RFP was adequate to ensure just and reasonable rates and, while not perfect, did not rise to the level of affiliate abuse.

40. Entergy solicited bids through its 2002 RFP in 2002. At that time, the Commission had not yet issued *Allegheny*. As noted above, *Allegheny* provides guidance regarding the standards the Commission would use prospectively to evaluate whether an RFP met the *Edgar* criteria.[64] Therefore, we find that *Allegheny* does not govern here.

41. At the time of the 2002 RFP, Entergy was not required by the Louisiana Commission to use an IM, nor, as noted above, had the Commission established *Allegheny's* four guidelines, which emphasize, among other matters, oversight. The oversight principle looks to an independent third party to design the solicitation, administer bidding, and evaluate bids prior to the company's selection. We accept the presiding judge's reasoning that while the IM did not adequately maintain the confidentiality of the affiliate Entergy Power ISES 2 bid, this accidental disclosure of the identity of the resource had no demonstrable impact on the outcome of the 2002 RFP process. Accordingly, we affirm the presiding judge's finding that, in the context of this RFP, the IM performed her role in a reasonable fashion and within the scope of employment for which the IM was hired.[65]

42. For agreements filed since the issuance of *Allegheny*, in addition to the oversight principle, we note the principle of transparency and emphasize that the competitive solicitation process should be open and fair. As discussed in *Allegheny*, we recommend

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[64] The guidelines set forth in *Allegheny* are transparency (the process must be open and fair); definition (the products sought must be precisely defined); evaluation (standardized criteria must be used in the evaluation and applied uniformly to all bids/bidders); and oversight (an independent third party must be employed). *Id.* at P 22. In addition, the *Allegheny* order made clear that it was providing guidance on how the Commission would be reviewing future RFPs to determine if they complied with the *Edgar* criteria. *Id.* at P 22.

[65] ID at P 50.

the free flow of information to all parties. Relevant information should be released to all potential bidders at the same time.

43. We also remind Entergy of the definition principle. For example, if there are changes in product specifications, such as transmission requirements, re-bids should be allowed.[66] We note that Entergy's portfolio approach appears to be an appropriate way of achieving its objectives to fulfill its supply acquisition needs over time and appears, at this time, based on the record evidence, not to be one that excludes products that tend to favor its affiliates.

B. Analysis of the Bids

44. The presiding judge found that Entergy properly considered non-price factors in its evaluation of the 2002 RFP bids, and found that Entergy's analysis of the 2002 RFP was just and reasonable.[67] The presiding judge rejected the concerns raised by Trial Staff, Calpine, and Tractebel regarding the evaluation of non-price factors. He found that Entergy made it clear to all of the participants in the 2002 RFP that the non-price factors would be used to identify distinguishing characteristics or areas of concern associated with the proposals (*i.e.*, the non-price factors were diagnostic) and would not be used to disqualify any bids from further selection, properly placing the emphasis on the evaluation of the price terms. The bids that were selected by Entergy represented the lowest cost bids that were presented to Entergy for evaluation. Because there were no rejected bids that had similar price terms to the bids that were ultimately selected, the presiding judge found that Entergy was correct in its decision to analyze the non-price terms but not rely on them to decide which bids would be awarded contracts. [68]

i. Waiver of the Firm Network Resource Requirement

45. The presiding judge singles out transmission factors in the 2002 RFP for discussion. The presiding judge explains that the RFP stated that the economic evaluation of the bid proposals would proceed on the assumption that there are zero costs for a proposal to qualify as a firm network resource.[69] The presiding judge notes Trial

[66] *Allegheny* at P 27.

[67] ID at P 86.

[68] The presiding judge effectively states that *Edgar* can be satisfied on price factors alone, which in this case are the costs of energy and capacity. ID at P 87-88.

[69] ID at P 89.

Staff's objections to the waiver of the firm network resource requirement, stating that they argued that in order to ensure the deliverability of all of the resources selected and to prevent the exercise of transmission market power, the requirement for firm network service had to be retained. Entergy's argument in support of its waiver is also discussed by the presiding judge. Entergy states that the waiver was limited to a resource pre-qualifying as a firm network resource prior to the commencement of service and that all selected resources eventually qualified under Entergy's OATT.[70]

46. The presiding judge finds that Entergy's handling of the firm network resource requirement was just and reasonable and free from affiliate abuse. He agrees with Entergy that there is nothing in its OATT or in the RFP that specifies that all resources had to qualify for firm network resource status through the construction of network transmission upgrades alone. The presiding judge explains that Entergy, as system operator, could qualify resources as firm network resources via a variety of means, including delisting and redispatch. Further, the presiding judge reasons that, if the goal of Entergy's process is to obtain new capacity for its system at terms that are favorable to the system's ratepayers, it would appear counterintuitive to insist that firm network service can only be acquired through the construction of network upgrades, which is arguably the most expensive approach. The presiding judge states the record does not support arguments that contend that Entergy applied the options of delisting and redispatch in a discriminatory manner.[71] The presiding judge finds that Entergy's determination that bids could be qualified as firm network resources through network upgrades, delisting, or redispatch was just and reasonable.[72]

47. Further, the presiding judge finds that Entergy's decision to consider transmission costs outside of the selection of winning bids in the 2002 RFP process is just and reasonable and does not constitute affiliate abuse. The presiding judge reasons that because Entergy treated non-affiliate and affiliate proposals alike within its control area, Entergy was not in error in its evaluation methods. The presiding judge states that the record demonstrates that the affiliate proposals that were selected have such a high value over the next best bids as to outweigh any reasonable potential transmission upgrade costs or redispatch penalties that may be associated with those bids.[73]

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[70] ID at P 90.

[71] ID at P 91.

[72] ID at P 101.

[73] ID at P 92.

48. Trial Staff argues on exception that the issue before the presiding judge is not solely whether the lowest price contracts were chosen, but whether the best deals were selected through a transparent RFP process.[74] Trial Staff further argues that if the RFP's network resource requirement had been handled properly (*i.e.,* as a price-factor), additional bidders may have submitted bids, and existing bidders may have submitted bids with different terms.[75] Trial Staff states that "[t]he relevant consideration in the selection of least cost bids in an RFP must be the delivered cost of energy to the consumer, not simply the price of energy from the resource itself.[76]

49. Calpine argues that the presiding judge's findings and conclusions with regard to Entergy's analysis of price and non-price terms are in error because "Entergy's alleged consideration of non-price factors solely for diagnostic purposes violates *Edgar*."[77] Specifically, Calpine states that Entergy's bid ranking did not include transmission costs associated with delivery of the resources. They argue that Entergy cannot claim that the bids selected were the lowest cost resources because the transmission costs associated with delivering the power were not included in the total costs compared.[78]

50. In its Brief on Exceptions, Tractebel professes that one of Entergy's more egregious instances of affiliate preference was the granting of network transmission status to its affiliates.[79] Tractebel argues that the ID glosses over Entergy's discrimination by, for example, relying on procedures (*i.e.,* delisting and redispatching) that were unknown to participants as being an available means of qualifying as a firm network resource under Entergy's OATT.[80] Subsequent to the 2002 RFP solicitation, Entergy updated its OATT to include an applicable provision to enable delisting and redispatching as a means of qualifying as firm network service.

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[74] Trial Staff Brief on Exceptions at 25.

[75] *Id.* at 27.

[76] *Id.*

[77] Calpine Brief on Exceptions at 51.

[78] *Id.* at 6.

[79] Tractebel Brief on Exceptions at 23.

[80] *Id.* at 23-24.

51. Entergy argues in its Brief Opposing Exceptions that the primary concern of *Edgar* is "[t]o prevent a transfer of benefits from utility rate payers to utility shareholders by preventing a traditional utility from favoring affiliates through power purchase agreements where the affiliate is not the least-cost supplier."[81] Thus, Entergy argues that to avoid awarding PPAs that result in improper intra-corporate transfers, *Edgar* focuses on whether the affiliated supplier is the low-cost supplier.[82] With regard to Entergy's handling of the firm network resource requirement, Entergy explains that through the 2002 RFP and the RFP solicitation process Entergy put bidders on notice that it retained "substantial flexibility in determining whether, when and how to qualify the winning resources as network resources."[83]

ii. Perryville and Evangeline

52. In the ID, the presiding judge explains the outcome for two non-affiliate proposals, Perryville and Evangeline. Entergy short-listed the bids from both Perryville and Evangeline.[84] Perryville was eventually acquired by Entergy after lowering its price considerably from its initial proposal. Evangeline, which is located in the CLECO control area, required arrangements to wheel the power to the Entergy control area. Those wheeling costs were included in Evangeline's economic analysis because transmission costs outside Entergy's control area could not be managed by a means available to Entergy, such as the delisting or redispatching of other resources. Negotiations with Evangeline were eventually terminated by mutual consent.[85]

53. The presiding judge found that Entergy's evaluations of Perryville and Evangeline were free from affiliate abuse and were just and reasonable. The presiding judge determined that Perryville entered into negotiations and agreement with Entergy, of its own accord and that Entergy's ratepayers are the recipients of that bargain. Accordingly, he does not find reason to disturb this result. The presiding judge also determined that it was appropriate for Entergy to include the wheeling costs in the evaluation of the

[81] Entergy Brief Opposing Exceptions at 50.

[82] Entergy Brief Opposing Exceptions at 50.

[83] *Id* at 65.

[84] ID at P 104.

[85] ID at P 106 and 111.

Evangeline proposal because Evangeline is located outside of Entergy's control area. In conclusion, the presiding judge finds that Entergy's selection of Perryville and its handling of Evangeline's wheeling costs did not constitute affiliate abuse. He found no evidence suggesting that any non-affiliate bid was rejected due to Entergy manipulating its evaluation of transmission costs.[86]

54. Calpine disagrees with the presiding judge and argues that the evidence fails to support the presiding judge's conclusions regarding the Perryville transaction. In Calpine's view, contrary to the presiding judge's findings, the transaction was not shown to be above suspicion and free from affiliate abuse because though its negotiations with Perryville it, in effect, was allowing a re-bid of a bid that failed to make the short list.[87]

55. Trial Staff argues that, not only did Entergy never offer to delist existing resources or otherwise qualify Perryville as a firm network resource Entergy required that the Perryville bidders pay the cost of transmission upgrades by reducing their price. In Trial Staff's view, this conduct constitutes affiliate abuse. Trial Staff did not argue that Evangeline should have been selected by Entergy.[88]

iii. Entergy's Use of the PROSYM Production Model

56. As noted above, PROSYM was the production cost simulation model that Entergy used to forecast potential savings or incremental costs to the Entergy operating companies for each resource evaluated.[89] Trial Staff argued that the PROMOD HMC model more accurately reflects transmission cost impacts and should have been used for examination of the bids.[90] Entergy argued that the record shows that the transmission effects were considered in a thorough and reasonable manner that was practical under the circumstances. Entergy reiterates that each resource was assumed to be deliverable and that the transmission costs necessary to make the resource deliverable were either zero or the same for all resources.[91]

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[86] ID at P 113.

[87] Calpine Brief on Exceptions at 53.

[88] ID at P 109.

[89] ETR-1 at 52-53.

[90] Trial Staff Brief on Exceptions at 12 and 52.

[91] Entergy Brief Opposing Exceptions at 68.

57. The presiding judge discusses the record evidence noting that witnesses representing diverse interests testified that the use of the PROMOD HMC in the 2002 RFP bid evaluation to determine short-list bids would require numerous assumptions and would only serve to introduce speculation and guesswork into the evaluation process. [92] He cites the testimony of Trial Staff witness Ballard that the number and choice of variables required to successfully and accurately model the long term costs of delisting and redispatching resources would be a source of extensive administrative litigation and as such would not provide any additional clarity. He finds, therefore, that Entergy's use of the PROSYM production model to examine the bids prior to the selection of bids reasonable.[93]

Commission Determination

58. As discussed herein, the Commission has examined whether the prices obtained through the agreements are a product of behavior that rises to the level of affiliate abuse and as such adversely affects customers or wholesale competition. We find, with the exception of the Entergy Arkansas Base Load agreements that the contracts are just and reasonable and not unduly discriminatory. The outcome of this proceeding affirms the state regulators' conviction that no other contracts were presented that offer more favorable rates to their ratepayers than those provided through these contracts.

59. *Edgar* requires a showing that proposed affiliate agreements for which approval of market based rates is sought are free from the potential for self-dealing. Entergy is a traditional utility (*i.e.*, vertically integrated) and as such has the incentive to favor its affiliates in a market-based transaction because of profits that can accrue to its shareholders.[94]

60. In the instant case, Entergy has chosen the lowest cost suppliers from among the competing agreements. *Edgar* offered several means by which an affiliate agreement could pass the market value standard.[95] By issuing an RFP, Entergy had the opportunity to present evidence that would establish that Entergy chose the lowest priced options. As

[92] ID at P 100-101.

[93] ID at P 64.

[94] *Edgar* at 62,168.

[95] *Edgar* at 62,168-69.

the presiding judge stated, the evidence presented in this case demonstrates that the affiliate proposals selected have such a high value over the next best bids as to outweigh any reasonable potential transmission upgrade costs or redispatch penalties that may be associated with those bids.[96]

61. As explained above, the Commission recognizes that Entergy issued its RFP in 2002. The Commission had not yet issued *Allegheny*, which provided guidance through its evaluation principle on the standards by which we would review the evaluation of market-based sales resulting from RFP processes.[97] Thus, as discussed under Design and Implementation Issues above, we will evaluate Entergy's 2002 RFP evaluation process based on the requirements the Commission established in *Edgar*.

62. In evaluating the 2002 RFP, Entergy altered its evaluation criteria in several instances.[98] The most notable was its waiver of its firm network resource requirement. The 2002 RFP required resources to qualify as network resources at the time of delivery, however, Entergy later "stated that the failure of a resource to qualify as a network resource would not disqualify the bidder, but only would give rise to an 'exceptions discussion' with Entergy."[99] The Commission recognizes the observance of the need for an element of flexibility to deal with circumstances at hand. We also recognize that circumstances such as these can be mitigated up front with careful, clear construction of an RFP's evaluation criteria. This can, for example, involve utilizing a stakeholder process to develop parts or all of an RFP. In this way, potential bidders would have the opportunity to express concern and, importantly, offer ideas as to how to specify and evaluate various criteria. To illustrate, had Entergy engaged in such a process it could have stated in its RFP that it would employ a generic heat rate in its evaluation criteria, knowing that bidders were going to have concerns about expressing the heat rate of the generator. Clear evaluation criteria will ensure that the RFP does not give an advantage to the affiliate, informational or otherwise.

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[96] ID at P 92.

[97] *Allegheny* at P 22.

[98] For example, Entergy also chose to use generic data for certain criteria after finding that the bidder-supplied data was inadequate for many proposals. Entergy vetted its discretionary choices through the IM and the Louisiana Commission and they agreed with Entergy's revised approach. ID at P 36. We accept these decisions in the instant case. The record indicates that these choices did not materially affect the outcome of the selection process.

[99] Entergy Brief Opposing Exceptions at 65.

63. We affirm the presiding judge's finding that the imposition of a requirement in an RFP that qualification as a firm network resource can only be achieved through the construction of network upgrades is unreasonable.[100] Such a requirement could prevent a utility from obtaining the full economic benefits of a resource. As we stated in Order No. 2003, generators do not have to qualify as network resources solely through the construction of transmission upgrades.[101] We also affirm the presiding judge in his finding that Entergy qualified the winning resources in a nondiscriminatory manner, treating affiliate and non-affiliates similarly with both benefiting from Entergy's approach.

64. Looking forward, we offer additional guidance with respect to the deliverability of power procured through an RFP process conducted by utilities in traditional utility environments, such as Entergy. In an effort to ensure a fair and unbiased deliverability assessment and designation of a facility as a network resource, the Commission believes that transmission should be considered as a price factor. It is the delivered price of the resources that must be compared in evaluating which RFP bids to select.[102] Thus, the relevant cost is the delivered price of the resource. This expectation will be applied prospectively to avoid a regulatory effect on transactions already filed for Commission approval, *i.e.*, filed as of the date of this order.

65. We also affirm the presiding judge's findings in the ID regarding Entergy's handling of the Perryville and Evangeline resources. We reject Calpine's and Trial Staff's arguments and uphold the presiding judge in his determination that Perryville entered into negotiations with Entergy of its own accord, and in his determination that the third-party wheeling costs for Evangeline were appropriately factored into Entergy's evaluation analysis. As discussed above, we note that as part of the delivery cost of a resource, third-party transmission costs should be considered in a proper evaluation of RFP bids.

66. We affirm the presiding judge's finding that there is no reason to disagree with Entergy's use of the PROSYM production model to examine the bids prior to the selection of bids. The record shows that diverse parties (Entergy and Trial Staff) agree that the variables required for input into the PROMOD HMC would be a source of

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[100] ID at 102.

[101] Order No. 2003-A at P 544-545, Order No. 2003-B at P 70.

[102] *See* S-47 at 5, Paragraph 18c (Joint Stipulation).

extensive administrative litigation and, given the evaluation process in the instant case, would not provide additional clarity to the RFP's initial selection process.

C. Was Entergy's Use of a Ten-Year Analysis to Evaluate Long-Term Bids Reasonable?

67. The presiding judge found Trial Staff's criticism of Entergy's use of a 10-year analysis period without merit. He found that Entergy correctly defends the use of a 10-year period of analysis as a method to ensure the reliability of the data used in calculating the relative value of each of the long-term bids. The presiding judge states that the record is devoid of evidence that would suggest that this process discriminated against non-affiliate bids.[103]

68. In its exceptions, Calpine disagrees with the presiding judge and argues that there are a number of potential cost pass-through events that could occur during the life of the contracts that would allow Entergy's affiliate to increase the capacity price well above its initial 10-year period level.[104]

69. In its exceptions, Trial Staff also disagrees with the presiding judge. Trial Staff states that the presiding judge failed to recognize the inherent problems with Entergy's use of a truncated 10-year bid analysis. Trial Staff states that Entergy erroneously used a 10-year period of analysis to evaluate its life-of-unit and acquisition bids to determine whether they made the short list or were eliminated from consideration. Under this methodology, Entergy considered only the initial ten year of bid cost and artificially eliminated from consideration all costs beyond the initial 10-year period.

70. Trial Staff argues that this flawed approach distorts the bid's value and cost to the ratepayer in two ways. First, this truncated bid analysis is biased in favor of older, more depreciated (*i.e.*, those with lower fixed costs) plants with lower fixed costs over newer plants with higher fixed costs. Trial Staff points out that the new plants might have a remaining life of 30 years while the relatively older plants may require costly refurbishment in 15 years to fulfill the life-of-unit need. However, under Entergy's approach, the value and cost of the resource beyond an initial 10-year period is not even

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[103] Trial Staff's concerns regarding cost escalators are moot in light of the adoption of Service Schedule MSS-4 pricing for the Entergy Arkansas Base Load and Entergy Gulf States River Bend 30 agreements because the new pricing sets those contracts at cost.

[104] Calpine Brief on Exceptions at 9.

considered before eliminating bids. Second, Trial Staff argues that the truncated 10-year analysis approach to evaluating long-term bids fails to disclose the true cost of the bid to the ratepayer and creates an opportunity for affiliate abuse. Trial Staff further states that, to game the bid, a bidder would submit a low-ball bid price for the first ten years of the contract and then jack-up the price for the subsequent years of the bid.[105]

Commission Determination

71. With regard to Entergy's use of a truncated 10-year bid analysis, the Commission agrees with Trial Staff and Calpine that the presiding judge overlooked the problem created by Entergy's use of a 10-year analysis to evaluate life-of-unit contract bids. The Commission also finds that the use of a 10-year period of analysis raises more problems than simply the data reliability issue identified by the presiding judge. Entergy states that 10 years was a sufficiently long period over which to evaluate long term proposals for the purpose of determining which proposal should be included on the shortlist. Entergy also states that a 10-year period was long enough to reasonably ensure that any short-term anomalies did not skew results. Entergy argues that requiring the long-term cost information in the initial bid packages from all bidders would be burdensome, and unnecessary.[106] In fact, Entergy's use of a 10-year period of analysis is a fundamental component of its resource evaluation methodology.

72. The Commission finds that Trial Staff correctly points out the methodology problem of a 10-year period of analysis. Trial Staff states that for a life-of-unit or an acquisition, the objective of the bid evaluation is to determine the least-cost bid over the entire period covered by the purchase, and therefore the period of analysis should be the life of the unit offered.[107] The Commission agrees. Using 10-year period as a benchmark for a life-of-unit product is a questionable methodology.

73. The Commission also rejects Entergy's argument that 10 years is a sufficiently long period over which to evaluate long term proposals for the purpose of determining which proposal should be included on the shortlist. As Trial Staff points out, the initial evaluation (used to generate a short list for life-of-unit proposals) is a critical step that determines whether bids are eliminated from further consideration.[108] Under Entergy's

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[105] *See* Trial Staff Brief on Exceptions at 71-72.

[106] ETR-60 at 84.

[107] S-7 at 60-62.

[108] S-7 at 60-62.

methodology, long-term (more than 10 years) low-cost bids by firms that are not affiliated with Entergy may be permanently eliminated from the process in the beginning, which may create an opportunity that favors Entergy's affiliates.

74. The Commission finds that, since Entergy uses a 10-year period of analysis to evaluate bids, any mismatch between Entergy's bid selection and the analysis used to make those selections can best be eliminated by restricting its Entergy Power ISES 2 PPA to a 10-year period. Therefore, we will direct Entergy to modify the contract term to a 10-year power purchase. As the 10-year power purchase contracts expire, Entergy can solicit more bids for another 10 years out, or, at its option, it can modify its methodology when the 10-year contracts expire, and choose replacements using a life-of-unit analysis.

D. Misuse of Confidential Bid Information

75. The presiding judge took issue with Entergy's use of confidential information it obtained in RFP bids. He stated,

> [t]he problem I find with the inclusion of the retained Grand Gulf share also implicates the issue of how high in the Entergy System hierarchy can the functions of having knowledge of and authorizing affiliate agreements come together with the functions of knowing the non-affiliate resource bids into an RFP and selecting the affiliate and non-affiliate resources. Mr. Harlan's [Entergy's Senior Vice President – System Planning] role in this part of the process was problematical in the case of deciding to add the Grand Gulf retained share. *He was the one who knew the competing non-affiliate bids while also the one with responsibility for confecting and pricing the affiliate EAI WBL [Entergy Arkansas Base Load] PPA proposal with that retained share, and recommending it to the Entergy Operating Committee*.[109]

76. While a number of the intervenors agreed that Entergy took advantage of its access to this confidential information, they offer different solutions than prescribed by the presiding judge. For example, Calpine argues that Entergy's misuse of confidential information should invalidate all agreements. Calpine further argues that Entergy's actions show that the processes it used to select affiliate resources constitutes affiliate abuse in violation of the Commission's precedent in *Edgar*, and the non-discrimination standards of the FPA with respect to all of the agreements (not merely the Entergy Arkansas agreements). Calpine states that it was error for the presiding judge to assume

[109] ID at P 213 (emphasis added).

that Mr. Harlan's misconduct was limited to the Entergy Arkansas Base Load agreements. Calpine also argues that Mr. Harlan's functional role and involvement in both the 2002 bid selection for Entergy Operating Company buyers (including having knowledge of the resources bid into the RFP, including price information regarding such resources) was inherently in conflict with his functional role of pursuing the sale of affiliated power outside the RFP, to the same Entergy buyers. Tractebel argues that, when evidence was presented that officers of Entergy Corporation had reviewed the confidential bid data from the 2002 RFP before deriving final prices for Entergy Gulf States River Bend 30 and Entergy Arkansas Base Load at trial, Entergy naturally needed a plausible rationale for pricing those contracts outside of the RFP and alleged the suspect prices were derived from operating costs, based on an accounting model proprietary to Entergy.

77. The Louisiana Commission agrees that Entergy misused confidential information it obtained in RFP bids but cautions that the Commission should be careful that customers do not end up being harmed unintentionally by a decision aimed at curbing Entergy's misconduct.

78. Trial Staff argues that, during the RFP, Entergy had access to confidential bid information that was to be used solely for evaluating the RFP bids. However, Trial Staff argues that, as the presiding judge found, Entergy improperly used this bid information to determine how much of the uneconomic Grand Gulf retained share it could package with other Entergy Arkansas resources and still beat the prices bid in the RFP.

79. State Regulators state that, although the presiding judge found that confidential bid information was improperly used by Entergy in the pricing of the Entergy Arkansas Base Load PPAs, in that the Entergy Gulf States River Bend 30 is comprised of only one resource, which is priced at cost pursuant to Service Schedule MSS-4, the access to confidential bid information did not influence the pricing of the Entergy Gulf States River Bend 30 PPAs.[110]

Commission Determination

80. The Commission is extremely concerned about the treatment of confidential bid information by senior Entergy management during the RFP.[111] As discussed below, we affirm the presiding judge's finding that the power sales from Entergy Arkansas to

[110] State Regulators Brief on Exceptions at 33.

[111] ID at P 214.

Entergy Louisiana and Entergy New Orleans (*i.e.*, the sales made under the Entergy Arkansas Base Load agreements) are being made at sales prices that are unjust and unreasonable and that affiliate abuse occurred because of the improper handling of sensitive pricing information by senior Entergy management. Based on the record, it appears that Mr. Harlan, as Sr. Vice President of System Planning for Entergy Services, Inc., [112] both supervised and participated in the evaluation of the non-affiliate bids and also was involved in the preparation of Entergy's bid.[113] As such, his participation in these activities and the sharing of bid information violates the information sharing prohibition of Entergy's Code of Conduct.[114]

81. The participants in this proceeding argued that the Commission should adopt a variety of possible remedies to address Entergy's behavior in the RFP process, such as cancel all the PPAs. Although Mr. Harlan's behavior violated the Codes of Conduct, it

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[112] Mr. Harlan had overall responsibilities relating to policy and planning issues associated with generation and related issues. His duties included overseeing Entergy Services, Inc.'s Energy Management Organization, which developed both the long-range resource plans and shorter-term resource operation plans for the Entergy Operating Companies. *See* Affidavit of Mr. David C. Harlan submitted in Docket No. ER03-583 on July 18, 2003.

[113] According to Witness Mohl, both he and Harlan were involved in the development of the Entergy Arkansas Base Load PPA contracts. *See* Transcript at 1115.

[114] Entergy's Code of Conduct provides that if any non-public market information is disclosed, directly or indirectly, by the operating companies to Energy Power Marketing Corporation, such information shall be publicly and simultaneously disclosed. Entergy Power Marketing Corp., Code of Conduct, submitted on May 13, 1997 in Docket No. ER97-3014-000. In this case, information was disclosed by the operating companies to Mr. Harlan, who then disclosed it to the affiliate. Thus, there was an indirect sharing of information by the operating companies in violation of the Code of Conduct.

We note that, from the wholesale purchase perspective, the selection of the Entergy affiliate supplier also created an undue preference on the part of the Entergy operating companies. However, our review here under the FPA is the reasonableness of the sales price by the affiliate, not the reasonableness or prudence of the purchase, which in this context is a matter for state review. Thus, any undue preference by the Entergy operating companies in the selection of the affiliate's power to supply retail customers, in the particular context presented, is a matter for state regulators to determine.

appears that the ratepayers were not harmed as a result of his behavior.[115] For the reasons discussed earlier, the Commission will not invalidate all the PPAs. But, as discussed in greater detail below, the Commission will require Entergy to remove the retained share of Grand Gulf from the Entergy Arkansas Base Load PPA sold to Entergy Louisiana, and will extend that remedy to the Entergy Arkansas Base Load PPA sold to Entergy New Orleans.

82. The Commission's enhanced civil penalty authority under the Energy Policy Act of 2005 (EPAct of 2005) is not applicable to violations of rules or orders under the Federal Power Act that occurred before August 8, 2005.[116] Therefore, the Commission does not have the authority to assess a civil penalty for Entergy's 2002 violations of its Code of Conduct. However, the Commission puts Entergy on notice that if such violations occur in the future, the Commission will consider civil penalties as a potential remedy. Moreover, as the Commission stated in the Enforcement Policy Statement, a factor to be considered in determining the appropriate penalty is whether a company has a history of violations.[117] Finally, as discussed herein, going forward, we expect Entergy to adhere to the guidelines issued in *Allegheny* and will consider invalidating, as not just and reasonable, wholesale sales contracts that are the result of affiliate abuse.

III. The Non-RFP Agreements

A. Standard of Review

83. Entergy initially filed four market-based agreements that were negotiated and executed outside of the 2002 RFP process. Two of these agreements are life-of-unit

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[115] The Codes of Conduct are designed to protect captive ratepayers of investor-owned public utilities. *Heartland Energy Service, Inc., et al.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

[116] In EPAct of 2005, Congress authorized the Commission to assess civil penalties up to $1,000,000 per day for each day of violations of Part II of the Federal Power Act or any provision of any rule or order thereunder. *See* section 1284(e)(1), amending FPA section 316A(a) of EPAct of 2005, P.L. No. 109-58, 199 Stat. 594 (2005).

[117] As discussed in the October 2005 Policy Statement on Enforcement, the Commission will consider a variety of factors, as articulated in the policy statement, including the nature and seriousness of the violations, in determining the severity of penalties to be imposed for violations. *Enforcement of Statutes, Orders, Rules and Regulations*, 113 FERC ¶ 61,068 (2005) (Policy Statement on Enforcement).

purchases of energy and capacity from Entergy Gulf States, Inc.'s unregulated 30 percent share of the River Bend Nuclear Station. One is a purchase of approximately 200 MW from Entergy Gulf States, Inc. to Entergy Louisiana; the other is a purchase of approximately 100 MW from Entergy Gulf States, Inc. to Entergy New Orleans. The other two agreements are life-of-unit purchases of energy and capacity from Entergy Arkansas' coal and nuclear (solid fuel) units[118] that had previously been designated for the wholesale market (Entergy Arkansas Base Load). These two agreements are purchases of approximately 100 MW each from Entergy Arkansas to Entergy Louisiana and Entergy New Orleans.[119]

84. In the Hearing Order, the Commission stated that the process by which Entergy reviewed these agreements raised questions as to whether they were free from affiliate abuse.[120] During the course of the hearing Entergy revised its position, agreeing to use the revised provisions of Service Schedule MSS-4 to reprice these four agreements.[121] Entergy argued that those agreements priced at cost-based rates are no longer subject to review under the *Edgar* standard.

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[118] ID at P 12. Entergy Arkansas' Base Load PPA resources consist of portions of several coal and nuclear base load units that Entergy Arkansas either operates or has an interest in. The retained share of Grand Gulf slice of base load capacity and energy included in this mix of resources is excluded from Entergy Arkansas' rate base. Through a 1985 settlement agreement with its retail regulators, Entergy Arkansas agreed to have its shareholders rather than its ratepayers take responsibility for the "retained share" of Grand Gulf. ID at fn 24.

[119] ID at P 2.

[120] Hearing Order at P 52.

[121] On April 14, 2005, the Commission conditionally approved the contested settlement in *Entergy Services, Inc.*, 111 FERC ¶ 61,035 (2005) (*MSS-4 Settlement Order*). The settlement "resolves all issues that were set for hearing in the above-captioned docket relating to whether Entergy's proposed revisions to Service Schedule MSS-4 of the Entergy System Agreement, which would amend the existing cost-based formula rate and expand the application of the schedule to the sale of purchased power between operating companies, are just and reasonable. *Id.* at P 1. Entergy has agreed to use the revised provisions of Service Schedule MSS-4 to re-price the Entergy Gulf States River Bend 30 agreements and Entergy Arkansas Base Load agreements at cost. ID at n.6.

85. In February of 2003, the Commission issued *Mountainview*, which, among other things, stated that, prospectively, cost-based rates filing between affiliates will be scrutinized under the *Edgar* standard as well as market-based rate filings between affiliates. Entergy argues that the *Mountainview* decision is clear in that the application of the policy is prospective from the date of its issuance, February 25, 2004. Entergy made its initial filing of these four agreements at market-based rates in 2003, well before the issuance of *Mountainview*.[122]

86. In the ID, the presiding judge agrees with Entergy's argument finding that these four agreements as re-priced under Service Schedule MSS-4 of Entergy's System Agreement are not subject to examination under the *Edgar* standard. Further, the presiding judge agrees with Entergy, finding that *Mountainview* is also not applicable.[123] The presiding judge made this finding because he agreed with Entergy that the four agreements that deal with the sales from the Entergy Arkansas Base Load and Entergy Gulf States River Bend 30 resources are not and should not be subject to *Edgar* for two reasons. First, he found that the Service Schedule MSS-4 Settlement repriced the Entergy Arkansas Base Load and Entergy Gulf States River Bend 30 agreements from market-based rates to cost-based rates, thereby making those agreements exempt from review under the criteria in *Edgar*. Second, he agreed with Entergy that the *Mountainview* decision is clear that the Commission would apply its policy of reviewing cost-based sales only to those transactions filed on or after February 25, 2004, making it inapplicable to the Entergy Arkansas Base Load and Entergy Gulf States River Bend 30 agreements.[124]

87. Trial Staff maintains that the presiding judge erred in these findings and that Entergy cannot avoid Commission review of its affiliate transactions under *Edgar* by switching the transactions to a "cost basis" during litigation.

88. Trial Staff argues that Entergy cannot avoid scrutiny of its affiliate sales under the *Edgar* standard by changing its proposed pricing scheme midstream in litigation and, then, as a result, claiming the standard no longer applies to the transactions because of the change. Trial Staff argues that the Commission should not allow Entergy to escape scrutiny of its affiliate transactions through creation of a "moving target." Trial Staff argues that, both Entergy (in its applications to the Commission for approval of the

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[122] Entergy Initial Brief at n. 42.

[123] ID at P 86.

[124] Entergy Initial Brief at 16-17.

Entergy Gulf States River Bend 30 and Entergy Arkansas Base Load agreements) and the Commission (in its Hearing Order) clearly understood that Entergy had based its justification of these transactions on a comparison with the market prices of the 2002 RFP bids. In any event, Trial Staff argues that no cost of service was presented justifying the rates as just and reasonable and Entergy's revised proposal should trigger a *Mountainview* review of the basis of Entergy's costs.

89. The presiding judge rejects Trial Staff's assertion that because the Entergy Gulf States River Bend 30 costs have never been regulated and examined by the Commission[125] they should not be able to flow through Service Schedule MSS-4 and instead should be examined by requiring Entergy to make a section 205 filing under the Federal Power Act. The presiding judge explains that the Service Schedule MSS-4 Settlement's formula pricing is designed to produce just and reasonable rates and would, by virtue of it being a formula rate, be subject to Commission oversight. Further, parties can challenge the rates and in so doing force further examination by filing under section 206 of the Federal Power Act.[126] In conclusion, the presiding judge found that the Entergy Gulf States River Bend 30 and Base Load agreements are just and reasonable and not unduly discriminatory as re-priced under Service Schedule MSS-4 of the Entergy System Agreement.[127]

Commission Determination

90. The Commission addressed the criteria for evaluating cost-based affiliate sales in *Mountainview*. In contrast to *Edgar*, which dealt with questions involving affiliate sales at market-based rates, in *Mountainview*, the Commission extended the *Edgar* criteria to all affiliate sales with a term of one year or longer, regardless of whether the sales involved market-based rates or cost-based rates. The Commission announced that it would apply this new policy prospectively (starting February 25, 2004).

91. The issue here is whether the Commission's precedent in *Mountainview*, which was announced in that case to apply prospectively, should apply to Entergy's cost-based

[125] In its Initial Brief, Trial Staff points out that the investment costs of Entergy Gulf's 30 percent interest in the River Bend Nuclear Station at St. Francisville, Louisiana (Entergy Gulf States River Bend 30) resources have never been regulated by the Commission. ID at P 129.

[126] ID at P 130.

[127] ID at P 135.

agreements. Trial Staff essentially is arguing that Entergy's approach is designed to circumvent *Mountainview* and avoid a review of the contracts under the *Edgar* criteria.

92. In April 2005, the Commission approved the Service Schedule MSS-4 Settlement that was entered into between the Entergy operating companies and the Arkansas Public Service Commission, the Louisiana Public Service Commission, and the Council of the City of New Orleans.[128] The settlement resolved all issues relating to whether Entergy's proposed revisions to Service Schedule MSS-4 of the Entergy System Agreement. Service Schedule MSS-4 amends the existing cost-based formula rate and expands the application of the schedule to the sale of purchased power between operating companies. Thus, the contracts Entergy originally filed as market-based could be re-priced under this newly approved Service Schedule MSS-4. Entergy chose to change its course and re-priced these four market-based contracts according to Service Schedule MSS-4's cost-of-service rate formula. As explained below, the Commission accepts this shift in strategy and affirms the presiding judge's finding that *Mountainview* is not applicable to the four agreements entered into prior to the issuance of *Mountainview*, selected outside of the 2002 RFP process and re-priced under Service Schedule MSS-4.

B. Inclusion of the Retained Share of Grand Gulf

93. The presiding judge found that due to the improper handling of confidential bid information with regard to the retained share of Grand Gulf in the Entergy Arkansas Base Load PPAs resource mix, these agreements are unjust and unreasonable and constitute affiliate abuse. The judge explains the series of events that led to Entergy altering its initial plan to sell the Entergy Arkansas agreement resources without including the retained share of Grand Gulf to selling the Entergy Arkansas agreement resources including the retained share of Grand Gulf. Following the bids resulting from the 2002 RFP, Entergy knew with relative precision how to price the retained share of Grand Gulf. The presiding judge ruled that this improper handling of the retained share of Grand Gulf constituted affiliate abuse.[129]

94. Further, the presiding judge rejects Entergy's claim that it had no discretion to change the cost-based price of the Entergy Arkansas Base Load resources, citing that Entergy did, in fact, change the price of its Entergy Arkansas Base Load resources by adding the retained share of Grand Gulf to the mix.[130] As a remedy, the presiding judge

[128] *MSS-4 Settlement Order*.

[129] ID at P 157.

[130] ID at P 158.

orders that 19 MW of the retained share of Grand Gulf be removed from the Entergy Arkansas Base Load PPA sold to Entergy Louisiana, with the remainder re-priced as prescribed by Service Schedule MSS-4. However, the presiding judge states that he will not require that the retained share of Grand Gulf be removed from the Entergy Arkansas Base Load PPA sold to Entergy New Orleans because the Council of the City of New Orleans, as the retail regulator, wanted the retained share to remain in its agreement due to the price and fuel diversity advantages that would accrue to its ratepayers.[131]

95. The Louisiana Commission argued that Entergy's withholding of the fact that these resources were going to be available created the chance for self-dealing that is prohibited by *Edgar*.[132] The Louisiana Commission argued that withholding this information allowed Entergy to increase the ratio of the higher-priced Grand Gulf unit contained in the mix of resources in the Entergy Arkansas Base Load, thereby increasing the price of the PPA to just below the lowest bid received in the 2002 RFP for a comparable resource.[133] In contrast, the Louisiana Commission believes that inappropriate access to bid data did not compromise the pricing of the Entergy Gulf States River Bend 30 because those agreements are comprised of only one resource that is priced at cost. With the Service Schedule MSS-4 Settlement, the Louisiana Commission dropped its objections to the pricing of the Entergy Gulf States River Bend 30 agreements.[134]

96. Trial Staff recommends that the Entergy Gulf States River Bend 30 and Entergy Arkansas Base Load agreements be repriced at cost under Service Schedule MSS-4 with the caveat that the portion of Grand Gulf retained share in the Entergy Arkansas Base Load PPA must be stripped out.[135] Trial Staff adds that, even though a utility selects the least-cost option, that selection and that least-cost price may still be the product of affiliate abuse and therefore unjust and unreasonable. Thus, if an affiliate least-cost bid wins through abusive practices (such as the addition of the Grand Gulf retained share to the Entergy Arkansas Base Load price noted below), it harms competition and may in the long-run lead to a non-competitive market with higher prices to ratepayers.

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[131] ID at P 211.

[132] *Id*. at 92-93.

[133] Louisiana Commission Initial Brief at 93-95.

[134] *Id*. at 97.

[135] *Id.* at 12.

97. Calpine argues that Mr. Harlan's functional role and involvement in both the 2002 bid selection for Entergy Operating Company buyers (including having knowledge of the resources bid into the RFP, including price information regarding such resources) was inherently in conflict with his functional role of pursuing the sale of affiliated power outside the RFP, to the same Entergy buyers.

98. Calpine states that the presiding judge's piecemeal approach to remedying the Entergy Arkansas Base Load agreements by re-pricing the Grand Gulf slice of those agreements is statutorily insufficient. A market-based contract between affiliates cannot be partially just and reasonable and partially unjust and unreasonable. If, as here, the contract is the product of affiliate abuse, the contract is, by definition, unjust and unreasonable.

99. Tractebel argues that Entergy filed the affiliated contracts for approval at the Commission because Entergy Corporation's various market-based rate tariffs required Entergy to seek prior Commission approval, pursuant to Section 205 of the Federal Power Act,[136] before implementing an intra-affiliate sale at market-based rates. Tractebel argues that Entergy did not make a cost-of-service rate filing under 18 CFR 35.12, Subpart B that sets out the documents to be submitted for a cost-of-service rate filing.

100. The Louisiana Commission states that the remedy imposed by the ID calls for stripping out the 19 MWs of the relatively expensive Grand Gulf Retained Shares from the Entergy Louisiana Base Load PPA, and pricing the remaining capacity pursuant to Service Schedule MSS-4. The remedy should be modified to reflect current market conditions to ensure that the affiliate abuse is cured in a manner that will not harm ratepayers or reward Entergy shareholders. The remedy should allow Entergy Louisiana's ratepayers the option of either; 1) obtaining the Entergy Arkansas capacity without the Grand Gulf Retained Share, or 2) buying the Retained Share at the average cost of the other Entergy Arkansas capacity. Entergy Louisiana's ratepayers should be allowed to pursue the economic option at the Louisiana Commission's discretion.[137]

101. Further, the Louisiana Commission states that the affiliate contracts should not be disapproved, because disapproval would provide a windfall to Entergy stockholders, but the contract terms should be modified to exclude the fruits of affiliate abuse. The

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[136] Tractebel argues that such a condition is applicable to all market-based rate sales to electric utility affiliates with franchised service areas, citing *First Energy Operating Companies*, 111 FERC ¶ 61,032 (2005).

[137] Louisiana Commission Brief on Exceptions at 80.

Louisiana Commission argues that the remedies imposed for Entergy's affiliate abuse and discriminatory conduct should put rate payers in the position that they would have been in, had Entergy followed the rules. The Louisiana Commission further argues that Entergy should not be allowed to benefits from its own misconduct. The Louisiana Commission states that if the FERC were to reject the contract, Entergy could resell theses resources into the current wholesale market. Instead, the contracts should be reformed to eliminate the fruits of affiliate abuse.[138]

Commission Determination

102. While we recognize that these PPAs are re-priced at cost and, as a consequence, the ability to control price is eliminated, the Commission affirms the judge's finding that, as a result of the improper handling of the retained share of Grand Gulf included in the Entergy Arkansas Base Load resource mix, these PPAs are unjust and unreasonable and the result of affiliate abuse. The presiding judge applied a remedy to the Entergy Arkansas Base Load PPA sold to Entergy Louisiana that required the removal of the retained share of Grand Gulf from that PPA's resource mix. We extend that remedy to the Entergy Arkansas Base Load PPA sold to Entergy New Orleans, also requiring the removal of the retained share of Grand Gulf from that PPA's resource mix. The retained share of Grand Gulf can be separately contracted for at the cost-based price of $46 per MWh, a price that the Louisiana PSC had approved for the Louisiana PSC-jurisdictional retained share of Grand Gulf owned by Entergy Louisiana.

103. The Commission affirms the presiding judge's finding that the Entergy Gulf States River Bend 30 PPAs are just and reasonable and not unduly discriminatory as repriced under Service Schedule MSS-4 of the System Agreement. Further, we affirm the presiding judge's determination that it is not necessary for Entergy to file with the Commission under section 205 of the Federal Power Act for approval of the Entergy Gulf States River Bend 30 costs as Trial Staff recommended.[139] As the judge explained, "[t]he MSS-4 Settlement produced just and reasonable rates which would be applied to the River Bend 30 capacity and, in turn, would always result in oversight (*i.e.*, regulation) by the Commission."[140]

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[138] Louisiana Commission Brief on Exceptions at 31.

[139] ID at 125.

[140] ID at 130.

104. As discussed earlier, with respect to future activities, should the Entergy operating companies violate its Code of Conduct with respect to non-public information improperly being conveyed to its affiliates, either directly or indirectly, the Commission will consider the imposition of civil penalties. Additionally, the Commission will consider invalidating a jurisdictional sales contract that is the result of such affiliate abuse.

105. Our action on Entergy's agreements fulfills the need for a "searching inquiry"[141] with respect to affiliate transactions.

IV. Other Issues

A. Did Entergy Improperly Use Market Power To Favor Its Affiliates?

106. Calpine and Tractebel also present an argument that the Commission's approval of the affiliate agreements would cause harm to wholesale markets through the effects of Entergy's exercise of market power. Witness Roach defines an exercise of market power as when a company "profitably raises prices, for a sustained period of time, above the level that would otherwise prevail in a competitive market."[142] As part of his analysis of the competitive effects, Witness Roach provides his definitions for the relevant geographic market and product type.[143]

107. Calpine and Tractebel submit that the exercise of market power by Entergy is embodied in the affiliate preferences in the design of the 2002 RFP, the affiliate preferences in the selection process, and the affiliate preferences extending outside of the 2002 RFP.[144] Furthermore, Witness Roach reads *Edgar* to hold that, even if no affiliate abuse is found, Entergy must demonstrate that it does not have market power.[145] In short, Witness Roach argues that Entergy's exercise of market power constitutes an affiliate

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[141] *Louisville Hydro-Electric Company,* 1 FPC 130, 133 (1933).

[142] Calpine Corporation exhibits are prefaced by the abbreviation (CAL). CAL-1 at 56.

[143] *Id*.

[144] Calpine/Tractebel Initial Brief at 98.

[145] CAL 12 at 48.

abuse and that Entergy's market power must be examined as part of the Commission's determinations in this case.[146]

108. Trial Staff witness Dr. Linda Boner disagrees with Witness Roach's conclusion that *Edgar* requires Entergy to make a showing that it lacks market power even if no affiliate abuse is found. Dr. Boner states that *Edgar* requires an applicant to make a showing of a lack of market power only when the applicant does not have blanket market-based rate authority.[147] Because Entergy holds blanket market-based rate authority, Dr. Boner concludes that Entergy does not have to make a separate showing regarding market power.[148] Dr. Boner notes that although Entergy's compliance with the Supply Margin Assessment Order (SMA Order), measuring Entergy's market power, is currently pending before the Commission, Entergy's compliance with that order and the issue of Entergy's market power in general is beyond the scope of this proceeding as per the Hearing Order.[149]

109. The presiding judge determined that this proceeding was not the proper forum to investigate whether Entergy has market power. Rather, the Commission has made it clear that the market power issue will be discussed in another proceeding, and has established another docket in which these issues are being reviewed.[150] Therefore, he found that he need not rule on the question of whether the approval of the affiliate agreements would cause damage to the wholesale markets by allowing Entergy to exercise market power.

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[146] CAL-1 at 56; CAL-12 at 33, 48.

[147] *Edgar* at 62,167.

[148] S-3 at 5.

[149] *See AEP Power Marketing*, 97 FERC ¶ 61,219 (2001), *order on reh'g*, 107 FERC ¶ 61,018 (2004), *order on reh'g*, 108 FERC ¶ 61,026 (2004). *See also* Hearing Order at P 59 (directing that inquiries into Entergy's market power will be dealt with in another proceeding).

[150] ID at P 27.

Commission Determination

110. We affirm the presiding judge's decision on this point. These market power issues have been addressed or are currently pending before the Commission for determination in other proceedings. Therefore, there is no need to address them here.

B. Did Entergy's Agreements Improperly Employ a Safety Net Strategy?

111. As explained by the presiding judge in the ID, in *Cinergy Services, Inc., et al.*, 102 FERC ¶ 61,128 (2003) (*Cinergy*), the Commission identified the possible existence of a safety net whereby a franchised utility could acquire the generation of its merchant generation affiliates in periods of declining market demand so as to guarantee a certain price for the affiliate's capacity. *Cinergy* stated that this behavior could constitute a barrier to entry since the affiliated generation would not be subject to the price discipline of a free, competitive market. In *Cinergy*, the Commission identified the possible existence of a safety net whereby a franchised utility could acquire the generation of its merchant generation affiliates in periods of declining market demand so as to guarantee a certain price for the affiliate's capacity. The Commission stated that this behavior could constitute a barrier to entry since the affiliated generation would not be subject to the price discipline of a free, competitive market.[151]

112. Tractebel argued in its protest that the affiliate transactions at issue in this proceeding allow Entergy to create a "safety net" so as to give affiliated units an advantage over unaffiliated merchant generators.[152] Accordingly, the Commission stated in the Hearing Order that it was concerned with the possibility that the affiliate transactions could have the effect of creating a safety net, thereby adversely impacting wholesale competition.[153]

113. In response to Calpine and Tractebel's concerns about the creation of a safety net, Entergy cites the Commission's precedent in *Ameren Generating Company and Union Electric Company*, 108 FERC ¶ 61,081 (2004) (*Ameren*). Entergy argues that the *Ameren* precedent establishes that once there has been a finding that the affiliate purchases are not priced above what the market will bear and that there is no evidence of economic preference, then there is no basis for concerns about the creation of a safety

[151] *Cinergy* at P 23.

[152] Hearing Order at P 40.

[153] *Id.* at P 48-51.

net.[154] Entergy argues that, in *Ameren*, the Commission agreed that once there has been a determination that the acquisition of affiliated facilities was fairly decided on the basis of price and non-price factors, affiliate abuse did not occur and there is no evidence of the exercise of a safety net.[155]

114. As explained in the ID, the State Regulators support Entergy's position that the affiliate agreements do not create a safety net. Dr. Berry, testifying for the Arkansas Commission, states that he does not think that it would be possible for the PPA transactions to create a safety net due to the multiple layers of state retail regulation that Entergy must successfully navigate in order to obtain approval for the transactions. Noting that the City of New Orleans has approved all four of the agreements and the Louisiana Commission has approved two of the four, Berry argues that it is not reasonable to conclude that state retail regulators would approve these transactions if less costly alternatives were available.[156]

115. The presiding judge finds convincing Trial Staff's argument that the approval of the affiliate agreements has not created a safety net. Trial Staff offers two reasons why it is unpersuaded by the argument by Calpine and Tractebel that an Entergy affiliate could "enter a low bid in order to obtain a PPA award and that later, in the event it found the transaction to be uneconomic, Entergy Services would acquire (or reacquire) the underlying assets – presumably at an above-market price – in order to obtain rate base recovery from rate payers at the inflated acquisition price."[157] First, Trial Staff argues that Entergy as an overall enterprise initially would enjoy no economic advantage as it would be selling power at below-market costs, with the savings presumably passed on to the ratepayers. Second, Trial Staff points out that the argument that Entergy would later (if it was advantageous) be able to reacquire the affiliate's assets at an inflated price, necessarily presumes that the Commission would fail to apply the *Edgar* standards to Entergy's proposed reacquisition.

116. The presiding judge also placed importance on Calpine's witness Roach agreement (under cross-examination) that, if the *Edgar* standards are employed by the Commission, then there can be no successful implementation of Calpine and Tractebel's safety net

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[154] Entergy Initial Brief at 86 n.274.

[155] *Ameren* at P 46.

[156] *See* Ex. AC-1 at 6-7.

[157] Trial Staff Reply Brief at 45.

scenario whereby an affiliate acquisition would be approved by the Commission at an above-market price.[158] The presiding judge also found persuasive Trial Staff's argument that the evidence suggests that any increased business risk that the markets are disfavoring comes not from a safety net strategy but from the uncontracted nature of the generation being financed.[159]

117. In the ID, the presiding judge agreed with Trial Staff that, while the economic incentives may be present for Entergy to attempt to engineer a safety net through the affiliate agreements, the Commission's oversight through the exercise of the *Edgar* principles, combined with the oversight of the various State Commissions, prevent the possibility of harm to competitive markets through a safety net. Furthermore, he found that there has been no empirical evidence entered into the record that would suggest that harm can be done to the financial markets via the employment of a safety net strategy. Accordingly, he found that there was sufficient evidence in the record to conclude that a safety net strategy has not been employed by Entergy via the affiliate agreements and no harm will occur to the competitive wholesale markets from the Commission approval of the subject affiliate agreements.

118. In their Brief on Exceptions, Calpine and Tractebel argue that the real concern is not that Entergy would attempt to abrogate a PPA if the contract was losing money, but that Entergy could agree to a reformation of the contract that would allow it to acquire the affiliate's assets in order to bring the assets into Entergy's rate base. Doing so would provide the utility with an insurance policy or "safety net" against possible market downturns that none of the unaffiliated merchant generators have the luxury to enjoy.[160]

119. They argue that the utility need not be successful in its efforts to re-acquire the affiliated assets because even the prospect of relief has the effect of making the market not as attractive for non-affiliates. Accordingly, debt investors may require a cost of capital premium from non-affiliates to compensate for the increased risk, thereby discouraging investment in this sector.[161] Witness Roach points to a Standard & Poor's report entitled "Regulated Operations Back in Fashion for U.S. Electric Utilities," arguing that there is reason for concern that investors will be pushed to favor affiliates

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[158] Tr. 8950-51.

[159] *See generally* S-56, S-57 and S-58.

[160] Calpine/Tractebel Initial Brief at 104.

[161] CAL-1 at 58 (Roach); Calpine/Tractebel Initial Brief at 105.

over non-affiliates since the non-affiliates are subject to more frequent market downgrades in their debt ratings.[162]

Commission Determination

120. In *Ameren*, the Commission discussed a concern with "safety net" transactions, involving transfers of merchant generation to an affiliated franchised electric utility when the market declines, thus giving the affiliated merchant a "safety net" not available to merchant generators not affiliated with a franchised utility. The Commission was concerned that the existence of a safety net could affect the incentive of new merchant generators to invest in new facilities, erecting a barrier to entry that could harm the competitive process.[163]

121. However, in *Duke Energy* we explained that for a profit-maximizing firm to have an incentive to pay an inflated price for an asset (in that case, a power purchase agreement), it must be able to pass on those inflated costs to captive, cost-based ratepayers.[164] In addition, *Duke Energy* clarified that the "safety net" concern discussed in *Ameren* is restricted to vertical foreclosure through regulatory evasion, which is relevant only if a utility can pass inflated costs onto captive cost-based customers.[165] In *Duke Energy* we also noted that, in such circumstances, there are a number of ways to show that no such affiliate preference occurred, including review of competitive solicitation processes by the relevant state commissions.[166]

122. We agree with the presiding judge and Trial Staff that under the circumstances of this case, the concerns about Entergy's ability to employ a "safety net" strategy to obtain an advantage over its competitors seem unrealistic and far fetched.

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[162] CAL-1 at 58-59.

[163] *See Duke Energy Corporation Cinergy Corp*., 113 FERC ¶ 61,297 at n. 99 (2005) (*Duke Energy*).

[164] *Id.* at P 115.

[165] *Id.* at P 116.

[166] *Id.*

C. Entergy's Allocation of the Agreements

1. Allocation Issue

123. In the ID, the presiding judge considered Entergy's allocation of the agreements. He found that the allocations among the operating companies are just and reasonable and not unduly discriminatory.[167] He explained that the allocation was made to help achieve a rough equalization of the total production costs of the operating companies by allocating some of the costs of lower cost resources to operating companies with higher total production costs. This has the effect of somewhat increasing the total production costs of the operating companies now enjoying relatively lower total production costs.

124. This approach was supported by Trial Staff, and by the State Regulators whose ratepayers would receive some rate relief under this approach, and was challenged by the Louisiana Commission, whose ratepayers would not immediately benefit from this approach.[168] Specifically, the Louisiana Commission states that Entergy's overall allocation of solid fuel resources discriminates against Entergy Gulf States because it transfers Entergy New Orleans' high gas generation cost to Entergy Gulf States to achieve Entergy shareholder objectives.

125. In this regard, the Louisiana Commission contends that Entergy's resource allocation unduly prefers Entergy New Orleans and discriminates against Entergy Gulf States because it transfers excessive costs through MSS-3. Rather than simply lowering Entergy New Orleans production costs, the Louisiana Commission argues that, an allocation based on adjusted responsibility ratios, or baseload deficiencies, would produce better production cost results than the Entergy allocation; and that Entergy allocated the new resources not to minimize production cost differences, but to settle with New Orleans and achieve corporate objectives at the retail level.[169] The Louisiana Commission also believes that, putting aside System Agreement principles, Entergy's proposal does not adequately remedy the discrimination in production costs among the operating companies.

126. The Louisiana Commission proposed its own resource allocation which the presiding judge rejected. The Louisiana Commission excluded 56 MW of the Grand Gulf

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[167] ID at P 210.

[168] Louisiana Commission Brief on Exceptions at 54.

[169] *Id.*

capacity from the total Entergy Arkansas Base Load offer of 220 MW, reducing it to 164 MW. The Louisiana Commission argued that at least 38 MW of Grand Gulf capacity, which was retained by Entergy's stockholders should be excluded from the offer since "permitting the resale of this uneconomic capacity would relieve the shareholders of a burden they agreed to accept." The presiding judge found that the four agreements total 520 MW of capacity which Entergy Louisiana and Entergy New Orleans were assigned 310 and 210 MW, respectively. The presiding judge found that the Louisiana Commission's proposal would drastically change that assignment.

127. Specifically, the Louisiana Commission's proposal would allocate Entergy Gulf States River Bend 30 capacity of 300 MW and Entergy Arkansas Base Load capacity of 164 MW (excluding Grand Gulf capacity of 56 MW from the PPA wholesale base load capacity of 220 MW) to the Louisiana Entergy operating companies (Entergy New Orleans, Entergy Louisiana, and Entergy Gulf States-LA) on a relative load responsibility basis using 2003 monthly demands. The presiding judge found that of a total capacity of 464 MW, Entergy New Orleans would receive only 14 MW instead of 210 MW of PPA capacity, which the CNO has already approved. The presiding judge also found that shifting megawatts from Entergy New Orleans has a large cost impact on New Orleans ratepayers. The presiding judge found that the Louisiana Commission is concerned with Entergy's PPA allocation since it believes that some of the Entergy Gulf States River Bend 30 capacity and Entergy Arkansas base load capacity should also be assigned to Entergy Gulf States-LA under the system agreement.

Commission Determination

128. As we found in Opinion No. 480, the purpose of the System Agreement, among other things, is to roughly equalize costs among the Entergy operating companies. However, because the Entergy System was found to no longer be in rough production cost equalization, as determined in that proceeding, the Commission found it appropriate to implement a remedy (*i.e.*, bandwidth) to achieve rough production cost equalization. We affirm the presiding judge's approval of Entergy's allocation of capacity because the allocation appears reasonable. Moreover, to the extent that the allocations we affirm here (with regard to the agreements) do not achieve rough production cost equalization among the operating companies, Opinion No. 480 has established a bandwidth remedy that will ensure rough production cost equalization among the Energy operating companies. Accordingly, we also affirm his rejection of the Louisiana Commission's proposed alternative allocation of capacity. In this regard, we agree with the presiding judge that the Louisiana Commission's alternative allocation proposal "runs counter to the goal of at

least roughly equalizing the production cost of the operating companies to eliminate discrimination."[170]

2. Right of First Refusal

129. In rejecting the Louisiana Commission's position on the allocation issue, the presiding judge relied in part on section 3.05 of the System Agreement.[171] The residing judge stated that the purpose of section 3.05 is to give the remaining operating companies the opportunity to purchase surplus capacity from another operating company at a cost-based rate prescribed in Service Schedule MSS-4. Specifically, the presiding judge found that section 3.05 does not apply to a sale like the Entergy Arkansas Base Load agreements, which are not off-system sales, but a sale from one Entergy operating company to two other Entergy operating companies.

130. The Louisiana Commission argues that the ID erroneously abrogates the right of first refusal contained in section 3.05 of the Entergy system agreement by holding that the right only arises after excess capacity has been sold on a long term basis to a third party.[172] The Louisiana Commission states that according to the presiding judge, the "right of first refusal" only arises if the capacity has actually been sold off-System in a long-term transaction. But at that point, there could be no capacity available to acquire under section 3.05.

131. The Louisiana Commission states that the ID misinterprets the plain language of section 3.05 and improperly abrogates the right of first refusal. It further states that section 3.05 requires an operating company with excess capacity to offer the right of first refusal whenever it "desires" to "sell all or any portion of such excess generating capacity." In the view of the Louisiana Commission, this section does not require that the company with excess capacity actually enter into a third party transaction; indeed, the Louisiana Commission argues it would be nonsensical to provide a "right of first refusal" to capacity that already has been sold. Additionally, the Louisiana Commission states that section 3.05 contains no language limiting the "right" to situations in which the company with excess capacity contemplates an off-system sale, as opposed to a discriminatory sale to one or two other companies.

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[170] *See* ID at P 185.

[171] ID at P 175.

[172] *Id.* at 33.

132. Thus, the Louisiana Commission concludes that the presiding judge erroneously ruled that section 3.05 does not apply to short-term sales of excess capacity by an operating company to third parties. The Louisiana Commission maintains that section 3.05 makes no distinction between short-term and long-term sales and there is no other basis to justify such a distinction.

133. In response to these arguments, the presiding judge found that section 3.05 does not apply to a sale like the Entergy Arkansas Base Load agreements which are not off-system sales, but a sale from one Entergy operating company to two other Entergy operating companies. The Louisiana Commission argued that the earlier sales of at least some of the capacity now included in the Entergy Arkansas Base Load triggered the section 3.05 right of first refusal. The presiding judge found that the one-month opportunity type sales begun by *Entergy Arkansas* in 2002 after losing North Little Rock as a customer did not trigger a right of first refusal for the life of unit Entergy Arkansas Base Load agreements. Also, the presiding judge found that if the Louisiana Commission wanted to complain that a right of first refusal for one-month sales should have been offered by *Entergy Arkansas* and accepted by other operating companies beginning in early 2002, it should have filed a complaint at that time.

Commission Determination

134. We agree with the presiding judge's finding that the section 3.05 right of first refusal was not triggered by the short-term capacity sales included in the Entergy Arkansas Base Load agreements. The Louisiana Commission argues that the presiding judge made no analysis of the language of section 3.05 in determining that the right of first refusal was not triggered by *Entergy Arkansas*'s desire and efforts to sell its excess capacity. However, the presiding judge found that one-month capacity sales begun by *Entergy Arkansas* in 2002 after losing North Little Rock as a customer did not trigger a right of first refusal for the life of unit Entergy Arkansas Base Load agreements. We agree with the presiding judge that section 3.05 was not triggered by the one-month capacity sales. The Louisiana Commission could have filed a complaint at that time, but did not do so. In any event, even assuming *arguendo*, as the presiding judge did, that the right of first refusal was triggered, Section 3.05 does not give any guidance on how an operating company's surplus capacity be apportioned among the other operating companies. However, the most important goal is to keep the operating companies within rough production cost equalization.

D. Jurisdictional Issue

135. As discussed by the presiding judge in the ID,[173] while the Louisiana Commission concedes that the Commission has jurisdiction to approve the pricing and proposed allocations of the PPAs, it argues that this federal jurisdiction does not preempt state jurisdiction to approve sales or purchases of capacity. The Louisiana Commission states that the Commission itself has determined that the decision to approve or disapprove the sale of generating capacity rests within state jurisdiction. In a case similar to this one, the Commission, in 1990, held that it had no jurisdiction to review the prudence of *Entergy Arkansas*'s sale of capacity that had been excluded from the Arkansas retail rate base; instead, it found that the Arkansas Commission had authority to review the sale.[174] The Louisiana Commission argues that Entergy Gulf States' choice to sell the Entergy Gulf States River Bend 30 rather than devote it to its own customers represents a classic example of the type of decision not preempted by the Commission, as determined in *Pike County Light and Power Co. v. Pennsylvania Public Utility Commission*, 77 Pa. Cmwlth. Ct. 268, 245 A.2d 735 (1983)(*Pike County*).[175]

136. The Louisiana Commission argues that the ID improperly suggests that approval of the allocation plan preempts the Louisiana Commission's jurisdiction to determine whether Entergy Gulf States should have sold the Entergy Gulf States River Bend 30 rather than devoting it to retail service. The Louisiana Commission states that the Commission's ruling intrudes on a matter exclusively within state jurisdiction. The Louisiana Commission argues that this Commission has the authority to determine the proper allocation of resources acquired by Entergy and the allocation of wholesale costs on the system, but not to determine whether a utility may make a sale or purchase of a generating unit or its output.[176]

137. The presiding judge rejected the Louisiana Commission's arguments and found that the PPAs at issue, including Entergy Gulf States River Bend 30, did not constitute an asset disposal of all or part of a generating facility, which would trigger state jurisdiction.[177]

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[173] ID at P 136, 137.

[174] *See Entergy Services, Inc.*, 51 F.E.R.C. ¶ 61,376 (1990).

[175] Louisiana Commission Brief on Exceptions at 73.

[176] *Id.* at 5.

[177] ID at P 136.

Commission Determination

138. As explained above, the presiding judge found that the Commission has jurisdiction to determine that the pricing and allocation provisions of the sale of the River Bend 30 power are just and reasonable because the agreements at issue in this proceeding, including the River Bend 30 agreements, provide for the sale of power from generating facilities, which is subject to the Commission's jurisdiction, and do not represent an asset disposal of all or part of a generating facility, which is within the exclusive jurisdiction of the states.[178] We agree. This case involves the sale of power from a jurisdictional facility, not the sale of that facility.

139. Moreover, we find that the Louisiana Commission's reference to *Pike County* inapposite. In that case, the court held that in making determinations about retail rates, state Commissions may not question the reasonableness of FERC-approved wholesale rates. In formulating retail rates, however, a state commission may question the utility's resource purchase decisions unless the utility had no legal right to refuse to make a particular purchase.[179]

E. Entergy's Request for Rehearing

140. Following a *voir dire* examination of Trial Staff witness Ms. Sabina U. Joe on October 18 and 19, 2004, Entergy's counsel moved to strike Ms. Joe's testimony and exhibits on the ground that she did not qualify as an expert witness on affiliate abuse, RFPs, or bid analysis. Following argument, the presiding judge granted the motion, striking Ms. Joe's testimony and exhibits. Trial Staff then made a motion under Rule 715 for leave to take an interlocutory appeal of the presiding judge's ruling.[180] The presiding judge denied Trial Staff's motion and, based on this denial, Movants filed a motion for interlocutory appeal, which the Commission granted.[181] In granting Trial Staff's interlocutory appeal, the Commission overruled the presiding judge and determined that,

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[178] ID at P 136.

[179] See *Pike County*, 77 Pa. Cmwlth. Ct. at 273-274, 465 A.2d at 737-738; *Nantahala Power & Light Co., et al. v. Thornburg*, 476 U.S. 953 at 965-967 (1986); and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 at 369 (1988).

[180] Rule 715 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.715 (2006).

[181] *Entergy Services, Inc. and EWO Marketing LP, et al.*, 109 FERC ¶ 61,108 (2004) (October 2004 Order).

under the Commission's Rules of Practice and Procedure, the testimony of Trial Staff Witness Joe should not have been excluded and overturned the presiding judge's ruling on this issue. The Commission found that,

> [i]n administrative proceedings before the Commission, the Commission's preference is that evidence be admitted unless the information has no possible relationship to the controversy, is irrelevant, or immaterial, or unduly repetitious. *See* Rule 509 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.509 (2004). Such factors are not present here. [182]

141. The Commission also expressed the concern that the presiding judge's ruling, if affirmed, would effectively eliminate from the evidentiary record relevant testimony, depriving the Commission of a full and complete record on which to rule comprehensively on competitive solicitation procedures in the Entergy market in a timely manner. The Commission also explained that,

> [i]f the presiding judge's ruling is not immediately corrected, it could give rise to disputes over the admissibility of evidence based on perceived flaws in the qualifications of Trial Staff witnesses in other cases, rather than maintaining a focus on the weight to be accorded to the evidence these witnesses offer and the merits of the issues the Commission has set for hearing.[183]

142. As explained above, Entergy filed a request for rehearing of the Commission's ruling on this issue. In its rehearing request, Entergy argues that the Commission's October 2004 Order effectively rules that each Trial Staff witness is automatically qualified to testify on complex electric, gas, and oil issues, without respect to that witness's specific training and experience.[184] Entergy argues that, under the Commission's Rule 509(b)(3),[185] parties may not file formal exceptions to a presiding judge's evidentiary rulings. Thus, Entergy argues, the Commission erred when it granted

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[182] October 2004 Order at P 7.

[183] *Id.* at P 6.

[184] Rehearing Request at 3.

[185] Rule 509(b)(3) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.509(b)(3) (2006).

Trial Staff's motion for interlocutory appeal. Entergy argues that Trial Staff's available recourse under the Commission's rules was to challenge the presiding judge's ruling later in the proceeding under the Commission's Rule 711.[186] In addition, Entergy argues that the Commission should have considered its answer, which spelled out these arguments, before it granted Trial Staff's motion.

143. The Commission's decision to admit Ms. Joe's testimony allowed room for the presiding judge to determine the appropriate weight to be given to her testimony. The presiding judge ultimately found Trial Staff witness Joe's testimony in this case was entitled to virtually no weight.[187]

144. Trial Staff and Calpine opposed this ruling. Calpine argued that the presiding judge erred by giving no weight to the testimony of Trial Staff witness Joe. Calpine argued that the Commission has already found that Ms. Joe was qualified to offer her expert opinion on the issues to which she testified, including affiliate abuse issues relating to the agreements.

145. By contrast, State Regulators argue that the presiding judge's rejection of Trial Staff witness Sabina Joe's testimony is fully supported by the record. They state that Trial Staff fails to cite any precedent for this novel proposition, as it is antithetical to fundamental precepts of American jurisprudence, including hearings conducted by the Commission's administrative law presiding judges. They argue that the Commission accords substantial deference to an administrative law presiding judge's findings as to a particular witness' knowledge, expertise and credibility.[188] Likewise, Entergy supports the presiding judge's rejection of Trial Staff witness Sabina Joe's testimony, noting that the Commission accords substantial deference to a presiding judge's findings as to a particular witness' knowledge, expertise and credibility.

146. The Louisiana Commission states that the Commission should uphold Trial Staff's exception to the presiding judge's ruling concerning Trial Staff witness Sabina Joe, but not in its entirety. The Louisiana Commission states that Ms. Joe was qualified to examine Entergy's RFP records and other evidence and provide factual and opinion testimony as to whether Entergy met the affiliate abuse standards established by the

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[186] Rule 711 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.711 (2006).

[187] ID at P 118.

[188] State Regulators Brief Opposing Exceptions at 37.

Commission. The Louisiana Commission argues that the presiding judge's findings as to her credibility are not well supported and may have reflected a different standard for FERC Trial Staff as opposed to other witnesses. However, the Louisiana Commission argues that the presiding judge's ruling was correct, insofar as Ms. Joe offered highly specific, prescriptive procedures to be used in resource planning.[189]

147. Trial Staff argues the presiding judge erred by finding that Trial Staff witness Joe lacks the knowledge, expertise and credibility to give expert testimony in this case and that her testimony is entitled to virtually no weight.[190]

Commission Determination

148. Entergy cautions that the effect of our ruling in the October 2004 Order is that each Trial Staff witness will be automatically qualified to testify on complex electric, gas, and oil issues, without respect to that witness's specific training and experience and urges that we reverse our ruling to avoid this consequence. However, under Rule 509 of the Commission's Rules of Practice and Procedure, the testimony of witnesses presented at our administrative hearings should be admitted unless the information has no possible relationship to the controversy, is irrelevant, or immaterial, or unduly repetitious.

149. We reject Entergy's argument, as the Commission's decision is fully consistent with the broad parameters of Rule 509. Second, as we explained in the October 2004 Order, nothing in this finding restricts the authority of the presiding judge to evaluate the weight to be given to this testimony. Moreover, the approach suggested by Entergy and the presiding judge in this proceeding would have serious negative consequences and even if we accept *arguendo* Entergy's characterization of the consequences of freely admitting the testimony of Trial Staff witnesses, these consequences would be far less harmful than the alternative of foreclosing Trial Staff and other parties from presenting useful and needed information, that might otherwise not be available, that the Commission might rely on to make an informed and proper decision on the record.

150. Third, as to Entergy's contention that Rule 509 does not allow exceptions to evidentiary rulings, this argument overlooks the explicit language that provides that this does not foreclose a participant from raising, as an issue, the validity of the ruling on evidence later in the proceeding, consistent with Rule 711. Trial Staff's filing of an

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[189] Louisiana Commission Brief Opposing Exceptions at 35.

[190] Referring to ID at P 118.

interlocutory appeal is not inconsistent with the rights of parties to file exceptions, briefs on exceptions, etc., under Rule 711.

151. Fourth, as to Entergy's argument that the Commission did not consider its answer before granting Trial Staff's motion for interlocutory appeal, we are clearly considering that answer here and the timing of our consideration clearly did not cause Entergy irreparable harm, given the fact that Entergy's vigorous cross examination persuaded the presiding judge that he should not give weight to Ms. Joe's testimony.

152. As to the proper weight to be afforded Ms. Joe's testimony, in our Interlocutory Order we directed the presiding judge to admit Ms. Joe's testimony. However, we gave the presiding judge the discretion to determine the weight he would give that testimony, and he did. The presiding judge ruled that Ms. Joe's testimony was entitled to virtually no weight. Effectively, this means that the ID does not rely on this evidence in reaching its conclusions.

153. Entergy's *voir dire* made much of the fact that Ms. Joe's job experience did not include overseeing or participating in requests for proposals. While this lack of experience would be relevant if Ms. Joe were applying for a position as an independent monitor, it is not relevant to her ability to compare Entergy's RFP process with the criteria enunciated by the Commission and evaluate whether Entergy complied with the Commission's directives and guidance on affiliate abuse. Moreover, her experience as a rate analyst for the Commission's technical staff gives her knowledge and experience that should not cavalierly be discounted. Thus, the Commission considered the evidence presented by Ms. Joe, the Trial Staff witness in this proceeding.

The Commission orders:

(A) The findings made by the presiding judge in the ID are hereby affirmed in part and reversed in part, as discussed in the body of this order.

(B) Entergy's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.