

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell

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

ORDER ACCEPTING AND SUSPENDING POWER PURCHASE AGREEMENTS,
SUBJECT TO REFUND, ESTABLISHING HEARING PROCEDURES, DENYING
PRIVILEGED TREATMENT, AND CONSOLIDATING DOCKETS

(Issued May 30, 2003)

Summary

1. In this order, we will accept, suspend, and set for hearing eight proposed long-term, power purchase agreements (PPAs) filed by Entergy Services, Inc. (Entergy Services),¹ and its affiliates EWO Marketing LP (EWOM), Entergy Power, Inc. (EPI), Entergy Gulf States, Inc. (Entergy Gulf), and Entergy Arkansas, Inc. (Entergy Arkansas) (together, "Applicants"). As discussed below, we will accept the PPAs for filing, suspend them for a nominal period, to become effective on June 1, 2003, as requested, subject to refund, and establish hearing procedures. We will deny the requests for privileged treatment of the PPAs. This order also consolidates the instant dockets. This order benefits customers by ensuring a timely inquiry into whether the PPAs are just and reasonable.

¹In this order, Entergy Services, Inc., Entergy Operating Companies and Entergy Corporation are referred to collectively as "Entergy".

I. Background

A. Proposals

1. Docket Nos. ER03-583-000, ER03-583-001 and ER03-583-002

2. On February 28, 2003, as supplemented on March 3, 2003, May 12, 2003, and May 14, 2003, Applicants submitted for filing two executed long-term PPAs which provide for the sale of capacity and energy by EWOM to Entergy Louisiana, Inc. (Entergy Louisiana) and Entergy New Orleans, Inc. (Entergy New Orleans) at market-based rates (EWOM PPAs). The EWOM PPAs were the result of a Fall 2002 request for proposals (RFP) by Entergy Services, acting as agent for the Entergy Operating Companies.²

3. While EWOM has authorization to make sales at market-based rates, it is submitting the EWOM PPAs at issue for approval because they involve market-based rate sales to affiliates with franchised service territories.³ In addition, Entergy Services, on behalf of the Operating Companies, has authority from the Commission to sell energy and power at market-based rates.⁴ Entergy, a public utility serving retail customers located in Arkansas, Louisiana, Mississippi and Texas, and EWOM, a power marketer, are subsidiaries of Entergy Corporation, a registered public utility holding company under the Public Utility Holding Company Act of 1935.

4. The EWOM PPAs provide that EWOM will purchase up to 206 MW of electric power from RS Cogen LLC (RS Cogen) for resale to Entergy Louisiana and Entergy New Orleans. RS Cogen is a 425 MW natural gas-fired, combined-cycle power electric plant located at Lake Charles, Louisiana, and is owned equally by Entergy and PPG Industries.

2. Docket Nos. ER03-681-000 and ER03-681-001

5. On March 31, 2003, as supplemented on May 12, 2003 and May 14, 2003, Applicants filed an executed long-term PPA that provides for the sale of capacity and

²Entergy has five subsidiaries that are public utilities with franchised service territories: Entergy Arkansas; Entergy Gulf; Entergy Louisiana; Entergy Mississippi, Inc.; and Entergy New Orleans (collectively Operating Companies).

³See unpublished letter order issued on January 25, 2001, in Docket Nos. ER01-666-000 and ER01-666-001.

⁴See Entergy Services, Inc., 58 FERC ¶ 61,234, order on reh'g, 60 FERC ¶ 61,168 (1992).

energy by EPI to Entergy Louisiana at market-based rates (EPI-Entergy Louisiana PPA). The EPI-Entergy Louisiana PPA also resulted from Entergy Services' Fall 2002 RFP.

6. The EPI-Entergy Louisiana PPA is what Entergy Services describes as a "life-of-unit purchase."⁵ EPI will sell up to 61 MW of electric power to Entergy Louisiana from its 14.37 percent interest in the Independence Steam Electric Station Unit 2 coal fired generation facility (Independence 2) located in Newark, Arkansas.⁶

3. Docket Nos. ER03-682-000, ER03-682-001 and ER03-682-002

7. On March 31, 2003, as amended on April 1, 2003, April 2, 2003, May 12, 2003 and May 14, 2003, Entergy Services filed three executed long-term PPAs between EPI and Entergy New Orleans (EPI-Entergy New Orleans PPA), and between Entergy Gulf and Entergy New Orleans (Entergy Gulf-Entergy New Orleans PPA) and Entergy Arkansas and Entergy New Orleans (Entergy Arkansas-Entergy New Orleans PPA), respectively. Entergy New Orleans is the buyer in all three PPAs. The EPI-New Orleans PPA was the product of Entergy Service's Fall 2002 RFP. Applicants state that the Entergy Arkansas and Entergy Gulf PPAs were negotiated and executed outside of the Fall 2002 RFP process.

8. The Entergy Gulf-Entergy New Orleans PPA provides for Entergy Gulf to sell up to 100 MW to Entergy New Orleans from its thirty percent interest in the River Bend Nuclear Station at St. Francisville, Louisiana (River Bend)⁷ for the life of the unit. The Entergy Arkansas-Entergy New Orleans PPA provides for Entergy Arkansas to sell up to 110 MW to Entergy New Orleans from its solid fuel units, for the life of the units.

9. Applicants request that the PPAs be accepted for filing and made effective no later than June 1, 2003.

4. Docket Nos. ER03-744-000 and ER03-744-001

10. On April 14, 2003, as amended on May 12, 2003 and May 14, 2003, Applicants submitted for filing two executed long-term PPAs for the sale of capacity and energy by Entergy Gulf to Entergy Louisiana at market-based rates (Entergy Gulf-Entergy Louisiana

⁵"Life-of-Unit Purchase" is described in the application as a transaction in which the buyer is provided a contractual ownership of a generating unit(s) or a specified amount of capacity in a generating unit(s) for the remaining life of the unit. See Appendix A, p. A-9.

⁶Independence 2 has an 800 MW coal-fired generating unit.

⁷River Bend has a maximum capacity of 936 MW.

PPA) and Entergy Arkansas to Entergy Louisiana (Entergy Arkansas-Entergy Louisiana PPA). Applicants state that the Entergy Gulf and Entergy Arkansas PPAs were negotiated and executed outside of the Fall 2002 RFP process.

11. The Entergy Gulf-Entergy Louisiana PPA provides for Entergy Gulf to sell 200 MW of electric power to Entergy Louisiana from its thirty percent interest in the River Bend station located in St. Francisville, Louisiana, for the life of the unit. The Entergy Arkansas-Entergy Louisiana PPA provides for Entergy Gulf to sell 110 MW of electric power to Entergy Louisiana, Inc. from its solid fuel units (base load capacity sale), for the life of the units.

B. Description of Selection Process

1. RFP Process

12. Applicants state that four of the eight PPAs⁸ resulted from a selection process initiated by Entergy Services' issuance of an RFP for suppliers to provide the Operating Companies with power for up to 2,150 MW of mid-term and long-term capacity and energy to meet expected reliability needs. Applicants claim that the RFP process was fair, impartial, and did not favor affiliates of Entergy Services. According to Applicants, the RFP process further ensures that the Operating Companies are not transferring benefits from their own customers to any competitive affiliate⁹ or the shareholders of an affiliate. Applicants state that an independent consulting firm, Lexecon, Inc. (Lexecon), monitored the RFP process at all times and that the evaluation process was confidential and not shared with other bidders or affiliates. Applicants claim that the RFP process meets the Commission's standards for sales between affiliates as articulated in Edgar.¹⁰

2. Non-RFP Process

13. Entergy Services states that it disclosed to the market its intent to evaluate the feasibility and cost-effectiveness of "non-retail rate base" Operating Company resources

⁸The four PPAs are: two EWOM PPAs, EPI-Entergy Louisiana PPA, and EPI-Entergy New Orleans PPA.

⁹Applicants define competitive affiliate in the RFP context as an affiliate of Entergy Corporation (excluding Entergy Services and the Operating Companies) with market-based rate authority.

¹⁰See Boston Edison Re: Edgar Electric Energy Company, 55 FERC ¶ 61,382 (1991) (Edgar).

outside the RFP process. The Entergy New Orleans PPAs with Entergy Arkansas and Entergy Gulf non-RFP PPAs, as well as the Entergy Louisiana PPAs with Entergy Gulf and Entergy Arkansas, represent the Operating Company resources obtained outside the RFP process. Entergy Services claims that the prices in the subject PPAs represent the market price and are "competitive with prices for comparable and contemporaneous [life-of-unit] services offered by non-affiliates in the region . . . when compared to the short-listed [life-of-unit] proposals."¹¹ Entergy Services claims that it compared the subject PPAs to Entergy Services' initial screening of 26 life-of-unit or acquisition proposals in its Fall 2002 RFP. According to Entergy Services, this evaluation shows that the PPAs are "economically attractive when compared to the other [life-of-unit] proposals received in response to the Fall 2002 RFP not only from an average production cost standpoint but also in consideration of the stable price characteristics associated with solid fuel generation (coal and nuclear)."¹²

II. Notice of Filing and Pleadings

A. Entergy and EWOM (Docket No. ER03-583-000, et al.)

14. Notice of Applicants' amended filing was published in the Federal Register, 68 Fed. Reg. 27,997 (2003), with protests and motions to intervene due on or before May 23, 2003. The Louisiana Commission filed a notice of intervention. Dynegy Power Marketing, Inc. (Dynegy Marketing) filed a timely motion to intervene raising no substantive issues. Dominion Virginia Power (Dominion Virginia), Tractebel Energy Marketing, Inc. (Tractebel), TECO Power Services Corporation (TECO), Electric Power Supply Association (EPSA), and Calpine Corporation (Calpine) (collectively, Protestors) filed timely motions to intervene, comments, and protests. Several Protestors ask the Commission to consolidate Docket No. ER03-583-000 with Docket Nos. ER03-681-000 and ER03-682-000. Calpine and TECO additionally requested that the Commission issue a protective order. On March 26, 2003, the Arkansas Public Service Commission (Arkansas Commission) filed a motion for late intervention. On April 11, 2003, InterGen Services, Inc. (InterGen), filed a motion to intervene out of time. Entergy Services filed an answer on April 8, 2003 and April 28, 2003. The Arkansas Public Service Commission (Arkansas Commission) and the Mississippi Public Service Commission (Mississippi Commission) filed a joint Answer in Opposition To Motions For Hearing and Protective Orders on April 28, 2003. On April 16, 2003 and April 22, 2003, Arkansas Electric Energy Consumers, Inc. (Arkansas Consumers) and NRG Companies (NRG) respectively filed motions to intervene out of time, raising no substantive issues.

¹¹Entergy Services Filing in Docket No. ER03-682-000 at 15.

¹²Id., Affidavit of David C. Harlan, at 8, and Attachment 1.

15. Protestors generally express strong doubts regarding the transparency of what Entergy Services characterizes as a non-discriminatory RFP process, and maintain that Applicants' analysis does not comport with the Commission's orders in Edgar and Ocean State.¹³ Protestors submit that: (1) Applicants have not shown that the winning affiliate bids are the best alternative identified through the RFP process; (2) the Commission cannot determine whether the PPAs are just and reasonable because Entergy has not demonstrated that the RFP criteria are unbiased and that it implemented the selection factors in a fair and non-discriminatory manner; and (3) Entergy Services has not shown that it has taken steps to mitigate its generation market power, in accordance with prior Commission orders.

16. Protestors (TECO and Tractebel) also explain that the PPAs are related to a pending complaint before the Commission regarding the allocation of system costs among the Operating Companies, which is governed by the Entergy System Agreement (System Agreement). The System Agreement provides for coordinated operation on a single system basis of the generation and bulk transmission facilities of the Operating Companies. Protestors state that the Commission should consolidate the instant proceedings with Entergy's numerous, sequential filings to transfer generating assets among and between Entergy's utilities and its unregulated affiliates and set the instant dockets for hearing.¹⁴

B. Entergy and EPI (Docket No. ER03-681-000, et al.)

17. Notice of Applicants' amended filing was published in the Federal Register, 68 Fed. Reg. 17,794 (2003), with protests and motions to intervene due on or before April 21, 2003. The Mississippi Commission, the Council of the City of New Orleans (New Orleans Council), the Arkansas Commission and the Louisiana Commission filed notices of intervention, with the Arkansas Commission and the New Orleans Council filing comments in support of Entergy's proposal, and the Louisiana Commission protesting. InterGen,

¹³See Ocean State Power II, 59 FERC ¶ 61,360 (1992), order denying reh'g and granting clarification, 69 FERC ¶ 61,146 (1994) (Ocean State).

¹⁴See Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation, 98 FERC ¶ 61,135 (2002).

Arkansas Consumers, TECO, Dynegy,¹⁵ Louisiana Energy Users Group (Louisiana Users)¹⁶ and Sempra Energy Resources (Sempra) filed motions to intervene raising no substantive issues. TECO, EPSA, Calpine, Tractebel, Dominion Virginia, and Occidental Chemical Corporation (Occidental) filed timely motions to intervene, comment and protest. Several Protestors ask the Commission to consolidate Docket No. ER03-681-000 with Docket Nos. ER03-583-000 and ER03-682-000. On April 22, 2003, NRG and Arkansas Electric Cooperative Corporation (Arkansas Cooperatives)¹⁷ filed motions for late intervention, raising no substantive issues.

18. Protestors restate many of the same issues they raise in Docket No. ER03-583-000, including: (a) whether Entergy Services has demonstrated that its RFP process was truly transparent and non-discriminatory; (b) whether Entergy Services has demonstrated that it should be permitted to engage in market-based rate transactions or that it has mitigated transmission market power; (c) whether it is clear from the record that Entergy did not limit transmission access for IPPs, thus skewing the RFP in favor of its affiliates; and (d)

¹⁵Dynegy Marketing, Calcasieu Power, LLC and Dynegy Midstream Services, Inc. (Dynegy).

¹⁶Louisiana Users consists of: Air Liquide America Corporation, Air Products and Chemicals, Inc., BASF Corporation, CII Carbon, LLC, ChevronTexaco Companies, Colonial Pipeline Company, ConocoPhillips Global Gas and Power Inc., DSM Elastomers Americas, E.I. Du Pont De Nemours and Company, ExxonMobil Chemical Company, General Motors Corporation, Georgia Gulf Corporation, Georgia-Pacific Corporation, Inland Paperboard and Packaging Company, International Paper Company, Monsanto Company, Pioneer Americas, Inc., PPG Industries, Praxair, Inc., Riverwood International USA, Inc., and Vulcan Materials Company.

¹⁷Arkansas Cooperatives' sixteen distribution cooperative members are: Arkansas Valley Electric Cooperative Corp. (Ozark, Arkansas); Ashley-Chicot Electric Cooperative, Inc. (Hamburg, Arkansas); C&L Electric Cooperative Corp. (Star City, Arkansas); Carroll Electric Cooperative Corp. (Berryville, Arkansas); Clay County Electric Cooperative Corp. (Corning, Arkansas); Craighead Electric Cooperative Corp. (Jonesboro, Arkansas); First Electric Cooperative Corp. (Jacksonville, Arkansas); Mississippi County Electric Cooperative, Inc. (Blytheville, Arkansas); North Arkansas Electric Cooperative, Inc. (Salem, Arkansas); Ouachita Electric Cooperative Corp. (Camden, Arkansas); Ozarks Electric Cooperative Corp. (Fayetteville, Arkansas); Petit Jean Electric Cooperative Corp. (Clinton, Arkansas); Rich Mountain Electric Cooperative, Inc. (Mena, Arkansas); South Central Arkansas Electric Cooperative, Inc. (Arkadelphia, Arkansas); Southwest Arkansas Electric Cooperative Corp. (Texarkana, Arkansas); and Woodruff Electric Cooperative Corp. (Forest City, Arkansas).

whether Entergy Services' request for privileged treatment is consistent with the FPA. Protestors also request that the Commission reject the PPAs or, at a minimum, set the filing for evidentiary hearing.

C. Entergy and EPI (Docket No. ER03-682-000, et al.)

19. Notice of Applicants' amended filing was published in the Federal Register, 68 Fed. Reg. 17,793 (2003), with protests and motions to intervene due on or before April 23, 2003. The Mississippi Commission, the New Orleans Council, the Arkansas Commission and the Louisiana Commission filed notices of intervention, with the Arkansas Commission and New Orleans Council filing comments in support of Entergy's proposal and the Louisiana Commission protesting. InterGen, Arkansas Consumers, Louisiana Users, Dynegy Marketing, NRG, Arkansas Cooperative, TECO and Sempra filed timely motions to intervene raising no substantive issues. TECO, EPSA, Calpine, Tractebel, Dominion Virginia and Occidental filed timely motions to intervene, comment, and protest.

20. The parties raise many of the same arguments as discussed above in Docket Nos. ER03-583-000 and ER03-681-000 in support of rejecting the PPAs or suspending the filings and setting them for hearing and consolidating dockets.

D. Entergy Louisiana (Docket No. ER03-744-000, et al.)

21. Notice of Applicants' amended filing was published in the Federal Register, 68 Fed. Reg. 19,803 (2003), with protests and motions to intervene due on or before May 5, 2003. The New Orleans Council, the Arkansas Commission and the Louisiana Commission filed notices of intervention, with the Arkansas Commission and the New Orleans Council filing comments in support of Entergy's proposal and the Louisiana Commission protesting the filing. Arkansas Consumers, Louisiana Users, Dynegy Marketing, NRG, and Arkansas Cooperative filed timely motions to intervene raising no substantive issues. Williams Energy Marketing and Trading Company also filed a timely motion to intervene. EPSA, Calpine, Dominion Virginia, Tractebel, TECO, and Occidental filed timely motions to intervene, comment, and protest.

22. The parties raise the same arguments as discussed above in Docket Nos. ER03-583-000, ER03-681-000 and ER03-682-000 in support of rejecting the PPAs or suspending the filings and setting them for hearing and consolidating dockets. Tractebel also requests that the Commission consolidate a related rate-filing by Entergy in Docket No. ER03-753-000 with the instant dockets.¹⁸

¹⁸On May 16, 2003 the City Council of New Orleans filed a motion for expedited

III. Request For Information

23. On May 2, 2003, Commission staff issued a deficiency letter to Entergy Services concerning the instant dockets and requesting further information on the RFP process as well as further information on how Entergy Services negotiated the non-RFP PPAs.

24. On May 12, 2003, as supplemented on May 14, 2003, Entergy Services filed a response to the Commission's deficiency letter.

25. Notice of Applicants' response was published in the Federal Register, 68 Fed. Reg. 27,997 (2003), with protests and motions to intervene due on or before May 23, 2003. Louisiana Users filed a timely motion to intervene raising no substantive issues. The Arkansas and Mississippi Commissions filed comments in support of approval of the PPAs. Tractebel, Calpine and TECO filed protests to the deficiency response. Tractebel, TECO, Calpine and the Arkansas and Mississippi Commissions generally raise the same arguments as discussed above in Docket Nos. ER03-583-000, ER03-681-000 and ER03-682-000. Calpine further filed a motion for release of non-redacted versions of the PPAs and non-redacted versions of the data request responses, issuance of a protective order and a motion for extension of time to respond. Applicants filed answers to the protests.

IV. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁹ the timely notices of intervention and motions to intervene serve to make the entities that filed them parties to these proceedings. The Commission will grant the motions for late intervention filed by the Arkansas Consumers, NRG, Arkansas Cooperative and InterGen given their interest in this proceeding, the early stage of the proceeding and the absence of any undue prejudice or delay.

¹⁸(...continued)
consideration of these dockets.

¹⁹18 C.F.R. § 385.214 (2003).

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,²⁰ prohibits an answer to a protest unless otherwise permitted by the appropriate authority. We find good cause to accept the answers and therefore will allow them.

B. Market-Based Sales to Affiliates

1. RFP Process

28. In support of their filing, Applicants state that the bidding process that Entergy Services initiated involved the participation of Entergy affiliates as well as many other unaffiliated bidders and that an independent consultant monitored the RFP process. Applicants claim that the PPAs resulted from a competitive bidding process and a comparative evaluation process of non-affiliated proposals. Applicants assert that these processes satisfy the Commission's concerns regarding affiliate abuse.

29. Protestors argue that Applicants have failed to demonstrate that the PPAs are the result of a transparent, non-discriminatory RFP process. For example, they argue that the criteria that Entergy Services used to evaluate bids are vague, and the third party monitor, Lexecon, was paid by the same entity (Entergy Services) that determined the parameters of the third party review. In addition, due to Entergy Service's knowledge of its system and location of affiliate assets, Calpine states that Entergy was in a position to know the identity of the bidder prior to evaluating bids.

30. EPSA argues that although Entergy Services enlisted the services of Lexecon to monitor the RFP, Lexecon only monitored the RFP process,²¹ and neither Entergy Services nor Dr. Tierney of Lexecon provides any "objective quantification in the submittal which establishes clearly that the [Entergy affiliate] RS Cogen is indeed the legitimate winner."²² EPSA also argues that because Dr. Tierney did not evaluate the technical specifications of the RFP, there is no evidence that allows for a determination of whether the RFP bid criteria or the evaluation of the bids themselves are just and reasonable and non-discriminatory.

31. Calpine argues that it is unclear whether, in evaluating bids from merchant generators, Entergy Services factored in the merchant's ability to access Entergy's transmission system. Calpine states that "capability evaluations performed by the

²⁰18 C.F.R. § 385.213(a)(2) (2003).

²¹EPSA Protest at 5 (emphasis in the original).

²²Id.

transmission factor evaluator [of the RFP] and Entergy transmission operations should be made available to all applicable bidders to ensure no direct or indirect bias is given to affiliated generators due to the status of transmission service from these facilities being already well established.²³ Calpine argues that Entergy could disallow certain bids based solely on the "unknown" of non-affiliated generators being able to utilize long-term transmission service to fulfill the desired bid request.

32. Finally, Calpine alleges that the credit requirements of the RFP are overbroad and onerous. Specifically, Calpine takes issue with Entergy Services' demand for a letter of credit equal to \$104,000,000 in connection with a bid for a three-year, 605 MW tolling agreement, while offering no security at all for its own significant payment obligations. Calpine submits that because of the confidential status of the evaluation process, and bid proposals, it is unclear whether Entergy Services applied this requirement equally to affiliates. In addition, Calpine alleges that information required from bidders in the RFP is commercially sensitive and not necessary for bid evaluation. For example, Calpine states that Entergy asked for detailed operational specifications about bidders' assets with which Entergy directly competes, such as data on heat rates, start up costs, fuel contracts, fuel storage, and pipeline connections, among other sensitive data.

33. In its answer, Entergy Services argues that the PPAs resulted from a competitive bidding process specifically structured and conducted to ensure that affiliate favoritism did not occur. Entergy Services submits that the majority of the generation resources procured during the RFP process to date are from non-Entergy resources. It states that 76 percent of the capacity was awarded to non-affiliates while affiliate proposals represent 20 percent of the 1,494 MW resources acquired to date through the Fall 2002 RFP and Supplemental RFP in Winter 2002/2003.

2. Non-RFP PPAs

34. Regarding the two non-RFP PPAs, EPSA states that Entergy must provide a vigorous assessment of price and nonprice terms for these transactions and that this assessment must include sufficient detail to permit affected parties to verify that the transactions are not tainted by affiliate abuse. TECO, EPSA and Calpine argue that the Commission should not approve the non-RFP PPAs without a complete demonstration that they are the product of a fair, non-discriminatory, and non-preferential process. TECO argues that Applicants have provided no compelling evidence that the non-RFP PPAs are comparable either to contemporaneous non-affiliated contracts or to non-affiliated offers to sell similar products in the same market.

²³Calpine Protest at 8.

35. With regard to the non-RFP PPAs, Entergy Services contends that the prices in those PPAs with Entergy New Orleans and Entergy Louisiana are based on the bids made in the RFP, represent the market price, and are competitive with prices for comparable and contemporaneous services offered by non-affiliates.

3. Market Power

36. Dominion Virginia, EPSA, TECO and Calpine note that the Commission has determined in AEP²⁴ that Entergy possesses generation market power. They express their concern that the PPAs could further enhance Entergy's generation market power. EPSA contends that the Commission should condition any approval of the PPAs on meaningful and significant market mitigation. It further argues that, under the circumstances, any request by Entergy for market-based rate approval for the PPAs would be unjust and unreasonable.

37. TECO and Calpine submit that Entergy has not as yet complied with the Commission's directives in AEP to employ a third party to administer its OASIS site. They maintain that approval of the proposed transaction would have a compounding effect for Entergy's competitors. Calpine submits that equal access to Entergy's transmission system will only be possible when Entergy has complied with the Commission's directives in AEP or has turned over its transmission assets to an independent third party such as a regional transmission organization (RTO).

38. Calpine argues that Entergy is unable to: (a) fairly evaluate bids based on available transmission capability; or (b) treat non-affiliated units as competing network resources in meeting load and load growth. EPSA submits that Entergy exercises transmission market power by allowing affiliate responders like RS Cogen to use transmission capacity reserved to serve Entergy's native load growth or future network resource designation, while unaffiliated responders are unable to prequalify for network resources.

39. In a similar argument, Tractebel and EPSA urge the Commission to inquire into the competitive effects of Entergy's purchases from its affiliates on Entergy's ongoing generator operating limits (GOL) program.²⁵ Tractebel claims that if the Commission

²⁴See AEP Power Marketing, Inc., et al., 97 FERC ¶ 61,219 at 61,971 (2001) (AEP), reh'g pending.

²⁵The GOL is the MW value up to which a generating facility, or group of generating

(continued...)

approves the proposed PPAs, Entergy can, "in combination with its generator operator limit program and supplemental GOL proposal, convey substantial transmission advantages on Entergy and greatly increase the market power of Entergy and all its affiliates."²⁶

40. Tractebel believes that through the use of intra-corporate transactions (ownership of facilities changing hands within a single, corporate family), Entergy is creating a prohibited "safety net" which would give Entergy a competitive advantage over unaffiliated merchant generators.²⁷ According to Tractebel, this "safety net" would be created through Entergy's transfer of generation to its utility affiliates where it would then receive both energy and capacity payments.

4. State Commissions

²⁵(...continued)

facilities, can ordinarily be operated on a short-term basis on Entergy's transmission network without compromising local transmission reliability and without requiring a system impact study. Entergy's OATT contains the procedures and methodology for determining a generator's GOL. See Entergy Services, Inc., 102 FERC ¶ 61,281 (2003).

²⁶Tractebel protest at 8. Tractebel raised similar concerns in Entergy's supplemental GOL filing ("Internal GOLs").

²⁷In this regard, the Commission stated in Cinergy:

"The ability of a franchised utility to assume its affiliated merchant's generation when market demand declines gives the merchant a "safety net" that merchant generators not affiliated with a franchised utility lack. The existence of such a "safety net" may affect the incentive of new merchant generators to invest in new facilities and, given the likelihood of the recovery of capital investment through rate base treatment, gives the franchised utility a competitive advantage in making market-based sales of the plant's generation that is not available to merchant generators unaffiliated with franchised utilities. The safety net could, therefore, be a barrier to entry that harms the competitive process in general and raises prices to customers in the long run because affiliated merchant generation with a safety net option will not be subject to the price discipline of a competitive market." Cinergy Services, Inc., et al., 102 FERC ¶ 61,128 at P (2003) (Cinergy).

41. The Louisiana Commission filed a protest stating that it has in place orders requiring its approval of one of the PPAs at issue (pursuant to which EPI will sell up to 61 MW to Entergy Louisiana) and requiring that the process followed for acquisition of capacity meets certain prescribed needs. The Louisiana Commission further states that a docket is currently pending before it to consider Entergy Louisiana's request, including three other purchase power agreements, but hearings have not yet been conducted. The Louisiana Commission states that it is concerned about the inter-company allocation of the proposed PPAs and questions why, under Entergy's SSRP, the company with the largest need (Entergy Gulf) is being allocated none of the base load capacity Entergy plans to acquire.

42. The Arkansas and Mississippi Commissions and the New Orleans Council support Entergy's proposal. They argue that the Commission should view Entergy Service's proposal in the context of other pending litigation involving the Entergy System.²⁸ The New Orleans Council contends that the PPAs at issue here, if approved, may alleviate its concerns in Docket No. EL01-88-000, because the PPAs under consideration here would increase the diversity of the fuel base for the supply of electricity to the City of New Orleans. The Arkansas Commission argues that unless a bid exists in the proprietary information that shows that one or more parties were willing to sell an equivalent resource at a lower price, the Commission should promptly approve the PPAs, because retail customers in Arkansas could see an annual savings in excess of \$20 million.

C. Entergy Services Response to the May 2 Deficiency Letter

43. On May 12, as supplemented on May 14, 2003, Entergy Services submitted its response to the May 2 deficiency letter. In its response, Entergy Services continues to claim that all of the eight PPAs were awarded based on the lowest cost to the retail customers of the Operating Companies, and that its selection represents the lowest overall cost choice among comparable alternatives. Entergy Services restates that it analyzed and awarded the PPAs in a non-discriminatory, non-preferential manner, with no favoritism shown to any Entergy Services affiliate. Entergy Services also asserts that the PPAs will benefit the native load rate payers of the Operating Companies, and that the Commission should approve them as in the public interest. Entergy Services claims that there is widespread support for approving these PPAs among the relevant State or local public utility commissions. Entergy Services states that the Staff of the Louisiana Commission has filed testimony before the Louisiana Commission stating that the RS Cogen and Independence 2 PPAs are the lowest cost resources and recommended that the Louisiana Commission

²⁸The Commission set for hearing a complaint filed in Docket No. EL01-88-000 in which the Louisiana Commission and the New Orleans Council allege that the wholesale cost allocations under Entergy's System Agreement are unjust, unreasonable, and unduly discriminatory. That proceeding is still pending before an Administrative Law Judge (ALJ).

approve them. Entergy Services claims that the Louisiana Commission's pleadings do not oppose approval of these PPAs.

44. Entergy Services also provides additional information in its response to the May 2 deficiency letter. First, Entergy Services submits a formula to calculate the Incremental Credit Exposure from individual proposals. Second, Entergy Services asserts that it did not disallow or change the ranking of any bid based on the result of the transmission evaluation. It claims that it used the transmission factor evaluation to flag any obvious transmission bottlenecks that a resource impacted. Third, Entergy Services provides qualifications that were used in selecting the independent third party monitor, including that other than Lexecon's participation as the independent, third-party monitor of the Entergy Services RFP process (beginning with the Fall 2002 RFP), Lexecon has had no business arrangements with any Entergy Services affiliates, and has not previously had any arrangement with any Entergy Services affiliates.

D. Commission Determination

45. As the Commission stated in Edgar, "where affiliates are entering agreements for which approval of market-based rates is sought, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted."²⁹ In Edgar, the Commission held that in analyzing market-based rate transactions between an affiliated buyer and seller, the Commission must ensure that the buyer has chosen the lowest cost supplier from among the options presented, taking into account both price and nonprice terms. The Commission noted several ways for a utility to show it has not unduly favored its affiliates. One type of evidence is direct head-to-head competition between the seller and competing unaffiliated suppliers either in a formal solicitation or in an informal negotiation process. When such evidence is presented, the Commission seeks assurance that: (1) the solicitation or negotiation was designed and implemented without undue preference for the affiliate; (2) the analysis of the bids or responses did not favor the affiliate, particularly with respect to evaluation of nonprice factors; and (3) the affiliate was selected based on some reasonable combination of price

²⁹Edgar, 55 FERC at 62,167. The Commission explained that its "concern with the potential for affiliate abuse is that a utility with a monopoly franchise may have an economic incentive to exercise market power through its affiliate dealings. The potential abuses include such practices as affiliates selling products to a franchised utility at excessive prices . . . which are examples of market power that is exercised to the disadvantage of captive customers and other potential nonaffiliated power suppliers." Id. n. 56.

and nonprice factors.³⁰ If the affiliate is not the lowest priced option, the applicant must provide sufficient justification for why the affiliate was chosen over alternative nonaffiliated sellers.

46. An alternative type of evidence would be the prices which nonaffiliated buyers were willing to pay for similar services.³¹ The Commission would also consider benchmark evidence showing the prices, terms and conditions of sales that nonaffiliated sellers have made. This evidence could include purchases made by the buyer, or by other buyers in the relevant market.³²

47. The Commission has become increasingly concerned about affiliate transactions and their potential impact on wholesale competition. In Ameren Energy Marketing Company, 99 FERC ¶ 61,226 (2002), the Commission set for hearing a case in which Ameren Energy Marketing Company (AEM) proposed to make sales to its franchised utility affiliate, Union Electric Company d/b/a AmerenUE (AmerenUE). The power sales agreement between AEM and AmerenUE was the result of an RFP initiated by AmerenUE. AEM argued that its proposal was consistent with several prior Commission orders granting authority to make such sales.³³ Specifically, AEM argued that the bidding process initiated by AmerenUE involved the participation of AEM and many other bidders and that an independent consultant evaluated the bids. AEM claimed that the PSA resulted from a competitive process, and that there was benchmark evidence of market value of contemporaneous sales by non-affiliate sellers for similar services in the relevant market. AEM asserted that these factors satisfied the Commission's concerns about affiliate abuse. However, citing to concerns as to the potential for cross-subsidization and market power gained through affiliate relationships and finding that AEM did not provide sufficient evidence to show that its benchmark analysis was appropriate, the Commission ordered an evidentiary hearing.

48. In the context of Section 203 cases where affiliated generators seek Commission authorization to transfer their assets to their affiliated franchised utility, we have expressed concern that the ability of a franchised utility to acquire its affiliate's generation when market demand declines gives the affiliate a "safety net" that generators not affiliated with a

³⁰Id. at 62,168.

³¹Id. at 62,169.

³²Id. See also Ocean State, 59 FERC at 62,333.

³³See, e.g., Boston Edison Re: Edgar Electric Company, 55 FERC ¶ 61,382 (1991) (Edgar); Ocean State Power II, 59 FERC ¶ 61,360 (1992), reh'g denied, 69 FERC ¶ 61,146 (1994).

franchised utility lack.³⁴ We have explained that the existence of such a "safety net" gives the franchised utility a competitive advantage in making market-based sales from its generation or that of its affiliates that is not available to generators unaffiliated with the franchised utility. This in turn may negatively affect the incentive for new merchant generators to invest in new facilities in that market.

49. In Cinergy and Ameren, we concluded that this "safety net" could be a barrier to entry that harms the competitive process in general and raises prices to the customers in the long run because affiliated merchant generation with a safety net option will not be subject to the price discipline of a competitive market. While the Commission did not withhold approval of the transaction in Cinergy, we stated that "in light of the generic concerns raised by this case, the Commission will in the future modify its approach to analyzing competitive effects of intra-corporate transactions of this nature."³⁵ The Commission found that the transaction at issue in Ameren presented those types of competitive concerns, noting that the transactions proposed in Ameren would change the competitive landscape by means that do not reflect the exercise of competitive forces in the market, *i.e.*, the interaction of independent sellers with an independent buyer.³⁶ On this basis, the Commission concluded that a hearing was necessary to determine, among other things, whether the applicants in that case had adequately considered competing alternatives.

50. Cases involving sales between affiliates, such as the power purchase agreements at issue here, present similar concerns. As we noted in Cinergy and Ameren, our Section 205 review of affiliate transactions under Edgar is intended to prevent affiliate abuse and to ensure prices that would be consistent with competitive outcomes. Where, as here, affiliates seek Commission authorization to transact with each other at market-based rates, "it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted."³⁷

³⁴See Cinergy Services, Inc. on behalf of PSI Energy, Inc., CinCap Madison, LLC and CinCap VII, LLC, 102 FERC ¶ 61,128 at P 23-24 (2003) (Cinergy); Ameren Energy Generating Co. and Union Electric Co., d/b/a AmerenUE, 103 FERC ¶ 61,128 (2003) (Ameren).

³⁵Cinergy, 102 FERC ¶ 61,128 at P 24.

³⁶Ameren, 103 FERC ¶ 61,128 at P 38.

³⁷Edgar, 55 FERC at 62,167.

51. Accordingly, the Commission must examine affiliate transactions to ensure that they do not adversely impact either customers or wholesale competition. We note that protestors have raised concerns expressing strong doubts regarding Entergy Services' characterization that its RFP process was non-discriminatory. Protestors contend that Applicants have not demonstrated that the RFP criteria are unbiased and that Entergy Services implemented the selection factors in a fair and non-discriminatory manner, and that Entergy Services has not shown that the PPAs are just and reasonable.

52. As discussed above, Protestors have raised issues of material fact concerning Entergy's RFP process and the potential for affiliate abuse that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing ordered below. Entergy's reliance on the RFP to price the non-RFP PPAs raises similar concerns and no showing has been made concerning the impact that the PPAs may have on wholesale competition. The Commission's preliminary analysis indicates that Entergy's PPAs have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept the proposed PPAs for filing, suspend them for a nominal period, to become effective on June 1, 2003, as requested, subject to refund, and establish a hearing on the justness and reasonableness of the PPAs.³⁸

53. As a matter of policy, the Commission carefully scrutinizes all transactions involving public utilities and their affiliates, including the potential adverse impacts of those transactions on customers or wholesale competition. Where, as here, there is insufficient evidence to determine whether affiliate transactions will adversely affect wholesale competition, the Commission examines these matters in evidentiary hearings. We emphasize that in deciding to set this matter for hearing, it is not our intention to second-guess state decisions regarding the best way to supply retail load requirements. Instead, we are acting pursuant to our obligation under the FPA to ensure that wholesale rates remain just and reasonable and are not unduly discriminatory.

54. The hearing should determine: (a) whether in the design and implementation of the RFP process Entergy Services unduly preferred Entergy affiliates; (b) whether the analysis

³⁸We recognize that there are other Entergy proceedings currently set for hearing (See, e.g., 98 FERC ¶ 61,135 (2002)). Given the procedural status of those proceedings and the variety of issues involved, we will not consolidate this proceeding with those other proceedings. On the other hand, however, we recognize that some efficiencies could be gained from consolidation. Accordingly, we will leave to the Chief Administrative Law Judge's discretion whether to consolidate some or all of these proceedings, in whole or in part, and, if he chooses to consolidate any or all of the proceedings, in whole or in part, how the consolidation should occur.

of the RFP bids unduly favored Entergy's affiliates, particularly with respect to evaluation of nonprice factors; (c) whether Entergy Services selected the affiliates based upon a reasonable combination of price and nonprice factors; (d) whether Entergy Services' reliance on bids made in the RFP to support the prices for the non-RFP PPAs adequately demonstrates that Entergy Services did not unduly favor its affiliates when selecting the winning bids; (e) whether, and to what extent, the PPAs impact wholesale competition; and (f) whether the PPAs are just and reasonable and not unduly discriminatory.

E. Consolidation of Dockets

55. Because the filings in Docket No. ER03-583-000,et al., ER03-681-000, et al., ER03-682-000, et al., and ER03-744-000, et al. raise common issues of law and fact, we will grant the requests to consolidate them for purposes of hearing and decision. However, we will deny Tractebel's request to also include Docket No. ER03-753-000, as that rate filing is a separate and distinct matter.

F. Request For Privileged Treatment of PPAs and Protective Order

56. Applicants have filed the PPAs with the Commission under seal, requesting privileged treatment pursuant to Section 388.112 of the Commission's Regulations.³⁹ Applicants submit that the PPAs contain confidential, proprietary, and highly commercially sensitive information. We will deny Applicants' request for privileged treatment. The Commission has held that the longstanding benefits of public access to filings under Section 205 of the FPA outweigh the potential competitive disadvantage of public disclosure. We have also stated that long-term service agreements are not entitled to confidential treatment as trade secrets, commercial or financial information obtained from a person, or privileged or confidential under Section 388.107 of our regulations.⁴⁰

57. In light of our rejection of privileged treatment regarding the PPAs, we will dismiss as moot Calpine's request for a protective order with regard to the PPAs. For purposes of the evidentiary hearing established in this order, the Presiding Judge can determine whether and to what extent a protective order is otherwise necessary.

³⁹18 C.F.R. § 388.112 (2003).

⁴⁰See Southern Company Services, Inc., et al., 100 FERC ¶ 61,328 (2002); Order No. 2001, FERC Stats. & Regs. ¶ 31,127 (2002).

G. Other Matters

58. Consistent with the procedures the Commission adopted in Order No. 2001,⁴¹ EWOM, EPI, Entergy Arkansas, Entergy Louisiana and Entergy Gulf must include certain contractual and transaction information regarding the PPAs in their Electric Quarterly Reports.⁴² Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.⁴³

59. Entergy's compliance with our order in AEP, is beyond the scope of this proceeding; we will deal with that issue in Docket No. ER91-569-009, which is pending rehearing. Tractebel's request that we investigate Entergy's purported contravention of our Standards of Conduct for Transmission Providers and TECO's request that we investigate Economic Dispatch on Entergy's system are also beyond the scope of this proceeding.

60. Finally, given our decision to set these proceedings for evidentiary hearing, we will deny Calpine's request for an extension of time to respond to Applicant's data request response. Calpine, and all intervenors, will have an opportunity to participate and present their case during the course of the hearing.

The Commission orders:

(A) As discussed in the body of this order, the PPAs submitted by Applicants are hereby accepted for filing, suspended for a nominal period, to become effective on June 1, 2003, subject to refund.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the

⁴¹See Revised Public Utility Filing Requirements, Order No. 2001, 67 FR 31043, FERC Stats. & Regs. ¶ 31,127 (April 25, 2002); reh'g denied, Order No. 2001-A, 100 FERC ¶ 61,074 (2002); reconsideration and clarification denied, Order No. 2001-B, 100 FERC ¶ 61,432 (2002); Order No. 2001-C, 101 FERC ¶ 61,314 (2002).

⁴²Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information.

⁴³The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2003).

Department of Energy Organization Act and by the Federal Power Act, particularly Sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act, (18 C.F.R., Chapter 1) a public hearing shall be held in Docket No. ER03-583-000, et al., as discussed in this order.

(C) A Presiding Administrative Law Judge (ALJ), to be designated by the Chief Administrative Law Judge for that purpose, pursuant to 18 C.F.R. § 375.304 (2003), must convene a prehearing conference in this proceeding to be held within approximately fifteen (15) days after issuance of this order, in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. The prehearing conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided for in the Commission's Rules of Practice and Procedure.

(D) The proceedings in Docket No. ER03-583-000, et al., ER03-681-000, et al., ER03-682-000, et al. and ER03-744-000, et al. are hereby consolidated for purposes of hearing and decision.

(E) Applicants' request for privileged treatment of the PPAs is hereby denied.

(F) EWOM, EPI, Entergy Arkansas and Entergy Gulf are hereby directed to include required contractual and transaction information regarding the PPAs in their Electric Quarterly Reports.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.