

129 FERC ¶ 61,156  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Entegra Power Group LLC  
Gila River Power, L.P.  
Union Power Partners, L.P.  
Harbinger Capital Partners Master Fund I, Ltd.  
Harbinger Capital Partners Special Situations Fund, L.P.

Docket No. EC08-87-001

ORDER GRANTING CLARIFICATION AND DENYING REHEARING

(Issued November 19, 2009)

1. On November 5, 2008, the Commission authorized a transaction under section 203(a)(1) of the Federal Power Act (FPA)<sup>1</sup> in which Entegra Power Group LLC (Entegra), Gila River Power, L.P., and Union Power Partners, L.P. proposed to transfer to Harbinger Capital Partners Master Fund I, Ltd. (Harbinger Master Fund) and Harbinger Capital Partners Special Situations Fund, L.P. (Harbinger Special Situations Fund) (collectively with Harbinger Master Fund, Harbinger) (collectively, Applicants) between 10 and 20 percent of Entegra's outstanding voting securities (Proposed Transaction).<sup>2</sup> Applicants filed a request for clarification and/or rehearing of the November 5 Order. In this order we deny Applicants' request for rehearing and clarify certain conditions that were imposed on the Proposed Transaction.

**I. Background**

2. In the November 5 Order, the Commission authorized the Proposed Transaction under FPA section 203(a)(1), finding it to be consistent with the public interest with the conditions imposed. In granting authorization, the Commission disagreed with Applicants' contention that, despite a 21 percent ownership stake in Calpine Corporation (Calpine) and approval to acquire up to 40 percent of Calpine, Harbinger does not have

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<sup>1</sup> 16 U.S.C. § 824b (2006).

<sup>2</sup> *Entegra Power Group LLC*, 125 FERC ¶ 61,143 (2008) (November 5 Order).

the ability to control Calpine. Thus, the Commission attributed Calpine's generation to Harbinger in analyzing the Proposed Transaction. The November 5 Order explained that, under the Applicants' analysis attributing Calpine's generating assets to Harbinger, the Proposed Transaction would result in increased market concentration in the Entergy balancing authority area, and that consummation of the Proposed Transaction would result in screen failures under the Delivered Price Test (DPT) analysis in five of the seven time periods evaluated under the Available Economic Capacity (AEC) scenario, which raised horizontal market power concerns in the Entergy balancing authority area.

3. Although the Commission determined that the Proposed Transaction raised horizontal market power concerns in the Entergy balancing authority area, the Commission authorized the Proposed Transaction subject to certain restrictions, which are designed to guard against the harm to competition that would otherwise result from Harbinger's proposed acquisition of Entegra's voting securities. Specifically, in order to ensure that Harbinger's acquisition of voting securities of Entegra does not give Harbinger the ability to control Entegra, the Commission authorized the Proposed Transaction subject to the following conditions:

(i) Harbinger will not seek to exercise control over Entegra; (ii) Harbinger will not seek representation on Entegra's board of directors and will not hold any seat on Entegra's board of directors; (iii) Harbinger will not become Entegra's largest shareholder; (iv) Harbinger will not act in concert with one or more minority shareholders to achieve the ends described in (i) or (ii); (v) Harbinger will continue to be able to represent that, notwithstanding its beneficial ownership of twenty percent of the shares of Entegra, it has not acquired the securities of Entegra with any purpose, or with the effect of, changing or influencing the control of the issuer, or in connection with or as a participant in any Proposed Transaction having that purpose or effect; and (vi) Harbinger will not cast any votes or take any action that directly or indirectly dictates the price at which power is sold from Entegra's generating facilities, or directly or indirectly specifies how and when power generated by the facilities will be sold.

4. Based on the conditions restricting Harbinger's ability to control Entegra, the November 5 Order found that the Proposed Transaction will have no adverse effect on competition in terms of horizontal market power because it would not result in Harbinger controlling Entegra's generating assets, and therefore would not result in the consolidation of generation assets that would increase concentration in any relevant geographic market. The Commission also determined that the Proposed Transaction did not raise any vertical market power concerns, will not adversely affect rates because it will not result in Harbinger controlling Entegra's generating assets, and would not have any adverse effect on federal or state regulation. Further, based on the facts presented, the Commission found that the Proposed Transaction would not result in cross-

subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company.

## **II. Request for Rehearing**

5. In their request for rehearing of the November 5 Order, Applicants assert that the Commission erred in finding that Harbinger is able to exercise control over Calpine for market power purposes, and therefore erred in attributing Calpine's generating assets to Harbinger for purposes of the Commission's horizontal market power analysis.<sup>3</sup> They argue that the Commission made no finding that Harbinger has the ability to control the price at which power from Calpine's facilities is sold, or how and when such power is sold. Applicants contend that the Commission erred in: (1) assuming that Harbinger's Schedule 13D filing with the Securities and Exchange Commission (SEC)<sup>4</sup> indicates that Harbinger intends to influence control over Calpine; (2) assuming that Harbinger's ownership of approximately 21 percent of Calpine's outstanding voting securities and authorization to hold up to 40 percent of those securities would in fact allow Harbinger to exert control over Calpine; and (3) relying on a statement in Calpine's Form 10-K Annual Report filed with the SEC for the fiscal year that ended December 31, 2007 to the effect that ownership interests in Calpine are highly concentrated and identifying this as a risk

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<sup>3</sup> Applicants' December 5, 2008 Rehearing Request at 9-14 (citing *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (*FPA Section 203 Supplemental Policy Statement*); *Horizon Asset Mgmt., Inc.*, 125 FERC ¶ 61,209 (2008) (*Horizon*); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *order on clarification*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 73 Fed. Reg. 79610 FERC Stats. & Regs. ¶ 31,285 (2008); *Milford Power Co.*, 118 FERC ¶ 61,093 (2007) (*Milford*); *R.W. Beck Plant Mgmt., Ltd.*, 109 FERC ¶ 61,315 (2004) (*R.W. Beck*); *Bechtel Power Corp.*, 60 FERC ¶ 61,156 (1992) (*Bechtel*); *LS Power Development, LLC*, 125 FERC ¶ 61,146 (2008) (*LS Power*).

<sup>4</sup> Under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (2000 & Supp V 2005), and the SEC's regulations under that statute, 17 C.F.R. § 240.13d-1 *et seq.*, when any person acquires, directly or indirectly, beneficial ownership of five percent or more of any class of voting equity securities of a publicly-held company, that person must (subject to certain exceptions not relevant here) file a disclosure report with the SEC on Schedule 13D. 17 C.F.R. § 240.13d-1(a). A Schedule 13D filing must disclose any plans or proposals that the reporting person may have relating to the issuer concerning, among other matters, the acquisition of additional securities of the issuer, merger proposals, changes in the issuer's present board of directors, or other material changes to the issuer's business or corporate structure.

factor related to Calpine's emergence from Chapter 11 bankruptcy.<sup>5</sup> Applicants also argue that the Commission has not explained why Harbinger's holding a minority shareholder interest in Calpine would enable Harbinger to control the Calpine generators' sales of electric energy or exercise market power as to the capacity of those generators.<sup>6</sup>

6. Applicants further argue that, even assuming that Harbinger controls Calpine for market power purposes, the Commission erred in finding that the increases in market concentration resulting from the Proposed Transaction could lead to a reduction in competition for supply contracts and could lead to increased wholesale power prices. Applicants contend that the Commission erred in finding that Applicants had: (1) failed to demonstrate that there is sufficient excess capacity in the Entergy balancing authority area, and (2) failed to explain why generation is being built at a time of surplus capacity.<sup>7</sup>

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<sup>5</sup> *Calpine Corporation*, Form 10-K Annual Report, at 27, Risk Factors: Risks Relating to Emergence from Chapter 11, Item 1A (filed Feb. 29, 2008) <http://sec.gov/Archives/edgar/data/916457/000119312508042308/d10k.htm#toc19164> 3. In the November 5 Order, the Commission explained that the fact that the investment firm SPO Advisory Corp., a minority shareholder, holds two seats on the board of directors, including the Chairman of the Board, suggests that minority shareholders SPO Advisory Corp. and Harbinger acting together, or Harbinger acting together with other minority shareholders, are able to exercise control over Calpine. November 5 Order, 125 FERC ¶ 61,143 at P 33.

<sup>6</sup> Applicants' December 5, 2008 Rehearing Request at 11-13.

<sup>7</sup> *Id.* at 14-23 (citing *Inquiry Concerning the Commission's Merger Policy Statement Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, *order on reconsideration*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009); *AEP Power Marketing*, 124 FERC ¶ 61,274, at P 24 (2008); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008); *Boralex Livermore Falls LP*, 122 FERC ¶ 61,033, *reh'g denied*, 123 FERC ¶ 61,279, at P 25 (2008); *Okla. Gas & Elec. Co.*, 124 FERC ¶ 61,239 (2008); *Entergy Gulf States, Inc.*, 121 FERC ¶ 61,182, at P 61 (2007); *Duke Energy Corp.*, 113 FERC ¶ 61,297 at P 81 (2005); *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944 (D.C. Cir. 1999)).

7. Applicants argue that they demonstrated that, notwithstanding Harbinger's share of uncommitted capacity, the "non-Harbinger" combined cycle generation facilities in the Entergy balancing authority area have substantial idle capacity that can readily be called into service. They contend that there would be ample capacity even if Calpine, Harbinger and Entegra were to withdraw all of their capacity from the Entergy balancing authority area market, and they argue that the competitive response would more than exceed the amount withheld, thereby eliminating any potential gains from higher prices so as to offset the lost sales.<sup>8</sup> Applicants therefore argue that there is no basis upon which to conclude that the Proposed Transaction will allow the Applicants to withhold capacity and increase prices.

8. In addition, Applicants contend that the Commission erred in disregarding that capacity from available first-tier markets would amount to an additional 3,601 MW of capacity that can be delivered into the Entergy balancing authority area.<sup>9</sup> They argue that there is no evidence that there are "relevant transmission constraints" in the Entergy balancing authority area or that load serving entities in the Entergy balancing authority area have found it necessary to have significant new power production built. They therefore conclude that notwithstanding an increase in Harbinger's market share in the Entergy balancing authority area to a maximum of 28.5 percent during the summer on-peak period, and an increase in market concentration to moderately concentrated levels during certain periods if the Proposed Transaction is consummated, there is ample uncommitted capacity available to counter any attempt by Harbinger and Entegra to exert market power in generation.<sup>10</sup>

9. Applicants also object to all of the conditions imposed on the Proposed Transaction in Ordering Paragraph (F) of the November 5 Order, except condition (vi), which provides that Harbinger will not cast any votes or take any action that directly or indirectly dictates the price at which power is sold from Entegra's generating facilities, or directly or indirectly specifies how and when power generated by the facilities will be sold. Applicants consider condition (vi) to be consistent with Commission precedent, but they contend that the other conditions are "novel" and maintain that the Commission did not explain why the conditions are needed and how they will prevent Harbinger from

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<sup>8</sup> *Id.* at 16-17.

<sup>9</sup> *Id.* at 18.

<sup>10</sup> *Id.* at 22-23.

controlling Entegra.<sup>11</sup> Applicants base their argument on the premise that the Commission's definition of control is limited to day-to-day control over facility operations and sales of power. They contend that the remaining conditions imposed under the November 5 Order are unnecessary because Harbinger does not have day-to-day control over Entegra's facility operations and sales of power and, therefore, cannot exercise horizontal market power.<sup>12</sup>

10. Specifically, Applicants argue that condition (i) of Ordering Paragraph (F), which provides that Harbinger will not seek to exercise control over Entegra, is vague and, if intended to apply to all matters on which a shareholder might vote, unduly burdensome, unworkable, and unnecessary.<sup>13</sup> Applicants contend that the term "control" in condition (i) is subject to various interpretations, and that if it is limited to control over day-to-day control over facility operations and sales of power, then condition (i) is redundant because it does not differ in substance from condition (vi). Applicants also maintain that a broad reading of control in this context would preclude Harbinger from taking actions that any shareholder is normally entitled to take and that are unrelated to the operation or control of jurisdictional facilities, and this shows the practical impossibility of complying with condition (i).

11. By way of example, Applicants ask whether they may vote on such matters as dividend policy or merger actions without being deemed to "seek to exercise control" over Entegra. Applicants inquire whether the phrase "seek to exercise control" applies to every action a minority shareholder might take to have its voice heard by management, and if so does condition (i) either alone or in combination with condition (iii) (the prohibition on Harbinger becoming the largest shareholder of Entegra) prevent Harbinger from even discussing any issues affecting the business of Entegra with any other

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<sup>11</sup> *Id.* at 23 (citing *Jupiter Energy Corp. v. FERC*, 407 F.3d 346, 349 (5th Cir. 2005); *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 369 (5th Cir. 1997); *Panhandle Pipeline Co. v. FERC*, 613 F.2d 1120 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 889 (1990); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 951 (1st Cir. 1993); *Atchison, Topeka & Santa Fe Railroad Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *Blanket Authorization Under FPA Section 203*, Order No. 708, 73 Fed. Reg. 11003 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,265 (2008)).

<sup>12</sup> *Id.* at 23-24 (citing *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 55; *Entegra Power Group LLC*, 118 FERC ¶ 61,181 (2007); *PDI Stoneman, Inc.*, 104 FERC ¶ 61,270, at P 15-17 (2003)).

<sup>13</sup> *Id.* at 27 (citing *Legg Mason, Inc.*, 121 FERC ¶ 61,061, at P 17 (2007); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Brinderson-Newberg Joint Venture v. Pac. Erectors, Inc.*, 971 F.2d 272 (9th Cir. 1992)).

shareholder. Applicants state that any conversation has the potential to influence the thinking of the listener and therefore could later be viewed as seeking to exercise control.

12. Applicants further contend that the term “seek to exercise” is ambiguous. Applicants ask whether (i) a conversation between a Harbinger representative and a member of Entegra’s management team; (ii) submitting a memorandum to the board of directors about an issue of concern to Harbinger as a minority shareholder that is unrelated to the operation of jurisdictional facilities; or (iii) issuance of a public statement by Harbinger addressing a decision of Entegra constitute seeking to exercise control. Applicants also ask about the level of granularity and the precise types of actions by Harbinger that are covered by condition (i).

13. Applicants also object to condition (ii), which prohibits Harbinger from seeking representation on Entegra’s board of directors or holding any seat on Entegra’s board of directors. They argue that it is vague, unduly burdensome, unworkable, and unrelated to the purposes the Commission seeks to achieve. Applicants argue that the Commission has not explained what it means to “seek representation” or how seeking representation would affect Harbinger’s ability to exercise horizontal market power. Applicants also contend that the Commission has not explained why having a representative on Entegra’s board would give Harbinger control for market power purposes, if decisions of the board are by majority vote and absent a showing that the board does not determine pricing or availability of power from the generating subsidiaries. Applicants contend that condition (ii) cannot be reconciled with other orders issued by the Commission in similar circumstances,<sup>14</sup> and they argue that based on the result in *LS Power*, the prohibition on any Harbinger representatives on the board of directors of Entegra is discriminatory and unnecessary. Further, Harbinger requests that the Commission permit it to hold a majority of the seats on Entegra’s board of directors so long as Harbinger remains in compliance with condition (vi).<sup>15</sup>

14. Applicants argue that condition (iii), which requires Harbinger not to become Entegra’s largest shareholder, pertains to matters that are not under its exclusive

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<sup>14</sup> *Id.* at 31-32 (citing *LS Power*, 125 FERC ¶ 61,146 at P 13; *Iroquois Gas Transmission System, LP*, 78 FERC ¶ 61,108 (1997) (*Iroquois*); *Dominion Transmission Inc.*, 95 FERC ¶ 61,370 (2001) (*Dominion*)).

<sup>15</sup> Condition (vi) requires that Harbinger not cast any votes or take any action that directly or indirectly dictates the price at which power is sold from Entegra’s generating facilities, or directly or indirectly specifies how and when power generated by the facilities will be sold. Entegra does not join in Harbinger’s request that the Commission permit it to hold a majority of the seats on Entegra’s board of directors. *Id.* at n.64.

control.<sup>16</sup> Applicants state that other shareholders may sell portions of their shareholdings to third parties, and as a result, hold interests that are smaller than Harbinger's. Thus, Applicants argue that Harbinger can become Entegra's largest shareholder solely as a result of actions by parties over which it has no control. Applicants contend that this situation is analogous to secondary market transactions.<sup>17</sup>

15. Applicants contend that condition (iv), which prohibits Harbinger from acting in concert with one or more minority shareholders to achieve the ends described in conditions (i) and (ii), is vague, unduly burdensome, unworkable, and unrelated to the purposes sought to be achieved. Applicants maintain that condition (iv) could be interpreted as barring Harbinger from having conversations with another shareholder about Entegra. They argue that if control is interpreted to include any action by Harbinger that could affect the business of Entegra, including such things as dividend policy, suggesting changes to its organizational documents, or discussing decisions to be made by the board or management team, condition (iv) could bar Harbinger from having a conversation with another shareholder about Entegra, which would have the effect of Harbinger becoming a "mute" investor.<sup>18</sup>

16. Applicants argue that condition (v), which requires Harbinger to be able to represent that it has not acquired the securities of Entegra for control purposes, is ambiguous and unnecessary. Applicants note that the Commission characterized this condition as analogous to a Schedule 13G filing, but state that the Commission did not indicate whether SEC precedent construing the term "control" in the context of Schedule 13G filings would apply.<sup>19</sup> Applicants state that if the meaning of control for purposes of

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<sup>16</sup> Harbinger notes that Entegra no longer has Class A Units, as referred to in footnote 70 of the November 5 Order, but rather has a single class of Units. *Id.* at n.65 (citing *Entegra Power Group LLC*, 119 FERC ¶ 62,218 (2007)).

<sup>17</sup> Applicants' December 5, 2008 Rehearing Request at 34 (citing *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 36).

<sup>18</sup> *Id.* at 35-36.

<sup>19</sup> *Id.* at 37 (citing 17 C.F.R. § 240.12b-2 (2009)). Under the SEC's rules requiring disclosure of beneficial ownership of five percent or more of any class of voting equity securities of a publicly-held company (see n.4, *supra*), a "passive" investor may file a short-form Schedule 13G in lieu of Schedule 13D if such investor "[h]as not acquired the securities with any purpose, or with the effect of, changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect," and such investor's ownership interest in the specified class of the issuer's securities is less than 20 percent. 17 C.F.R. § 240.13d-1(c).

this condition is different than the meaning of control for Schedule 13G purposes, in the absence of some alternative meaning, it is not clear how to comply. They contend that condition (v) is unduly burdensome because Harbinger is required to make this certification quarterly, even if its ownership interest in Entegra remains the same from quarter to quarter, and that it is not clear what Harbinger's reporting obligation is in the event that Harbinger acquires less than the full 20 percent of Entegra. Applicants also argue that the condition is unnecessary because the absence of a Schedule 13G filing does not demonstrate that an entity has control over the availability and price of output from jurisdictional facilities and because condition (vi) (which requires that Harbinger not control price and sale of power) achieves the same purpose. In addition, Applicants argue that, because condition (v) employs the "novel approach" of imposing a de facto Schedule 13G type filing requirement on a non-public company, the Commission should not seek to impose this condition without first seeking public comment in a rulemaking proceeding. Applicants question the Commission's justification for imposing a Schedule 13G filing requirement in the section 203 context if the SEC does not require a Schedule 13G to be filed by non-public companies.<sup>20</sup>

17. Applicants contend that the requirement in Ordering Paragraph (H) that they file with the Commission, no later than 45 days after the end of each quarter, a report certifying that Harbinger is in compliance with the conditions imposed in the November 5 Order is unduly burdensome and unnecessary. They argue that requiring periodic certified reports when material facts have not changed serves no regulatory purpose, and they contend that this requirement is unworkable as to Entegra because Entegra will have no knowledge of whether Harbinger is in compliance with the conditions, and therefore cannot provide a certified report of Harbinger's compliance.

18. Finally, Applicants contend that the requirement in Ordering Paragraph (K) directing the Applicants to file a quarterly report listing Harbinger's outstanding shares of Entegra, stated in terms of the number of shares held as a percentage of outstanding shares is unnecessary because Entegra already makes quarterly filings providing this information.<sup>21</sup> Therefore, Applicants argue that this requirement should be deleted.

### **III. Commission Determination**

19. We reject Applicants' argument that the Commission erred in finding that Harbinger has the ability to control Calpine. Applicants base their argument in this regard on a narrow reading of Commission precedent that focuses solely on control over

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<sup>20</sup> *Id.* at 38.

<sup>21</sup> *Id.* at 39 (citing *Entegra Power Group LLC*, 123 FERC ¶ 61,006, at P 27 (2008)).

day-to-day facility operations. The Commission explained a number of years ago that it interprets key terms in section 203 broadly and that it rejects narrow readings such as advocated here by Harbinger.<sup>22</sup> The Commission specifically identified “control” as one of the terms that should not be read narrowly. More recently, but consistent with *Enova*,<sup>23</sup> the Commission has stated that its “guiding principle is that an entity controls the facilities of another when it controls the decision-making over sales of electric energy, including discretion as to how and when power generated by these facilities will be sold.”<sup>24</sup> The Commission has also stated that “‘control’ has been found even where that control is not absolute or unfettered.”<sup>25</sup> Harbinger’s focus on day-to-day power sale activities and operational controls is thus an overly narrow reading of the Commission’s authority. As explained in the *FPA Section 203 Supplemental Policy Statement*, the Commission’s findings regarding control in Order No. 697, *Milford, R.W. Beck*, and *Bechtel* provide examples of instances where control has been found,<sup>26</sup> but they are not the only instances in which control may be found. Moreover, this approach is consistent with Commission policy under other sections of the FPA. In Order No. 697, the Commission explained that “the determination of control is appropriately based on a review of the totality of the circumstances on a fact-specific basis. No single factor or factors necessarily results in control. The electric industry remains a dynamic, developing industry, and no bright-line standard will encompass all relevant factors and possibilities that may occur now or in the future.”<sup>27</sup> While Applicants are correct that control over day-to-day operations is the issue most commonly mentioned by the Commission in this connection, our long-established policy has not been so restricted. Rather, we have held that the term “control” should be interpreted broadly to ensure there is no “jurisdictional void” that would allow relevant matters to “escape Commission oversight.”<sup>28</sup> Nonetheless, as discussed below, with regard to Applicants’ objections to Ordering Paragraph (F), including condition (i), which prohibits Harbinger from seeking

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<sup>22</sup> *Enova Corporation and Pacific Enterprises*, 79 FERC ¶ 61,107, at 61,489 – 61,496 (1997) (*Enova*).

<sup>23</sup> *Id.* at 61,489.

<sup>24</sup> *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 53 (2007) (emphasis added).

<sup>25</sup> *Id.* P 51.

<sup>26</sup> *Id.* P 51-56.

<sup>27</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 174.

<sup>28</sup> *Enova*, 79 FERC ¶ 61,107 at 61,489.

to exercise control over Entegra, we provide clarification regarding which activities Harbinger is prohibited from engaging in as a condition of the authorization granted in the November 5 Order.

20. Applicants' argument that the November 5 Order did not explain why Harbinger's holding a minority shareholder interest in Calpine would enable Harbinger to control the Calpine generators' sales of electric energy or exercise market power as to the capacity of those generators,<sup>29</sup> is also based on a narrow reading of Commission precedent that focuses solely on control over day-to-day facility operations. Contrary to Applicants' argument, in the November 5 Order the Commission explained that several facts indicate that Harbinger's minority shareholder interest could enable Harbinger to control Calpine. It stated that Harbinger's Schedule 13D filings with the SEC indicate that Harbinger may take an active role with regard to its investment in Calpine<sup>30</sup> and that Harbinger's ownership of approximately 21 percent of Calpine's outstanding voting securities and authorization to hold up to 40 percent of those securities allows Harbinger to exert control over Calpine. The Commission also noted that Harbinger has filed a Schedule 13D and taken an active role in operational strategy or had contact with the company board of directors with regard to its investments in Cablevision Systems Corporation, Cleveland Cliffs, and the New York Times Company, in each of which Harbinger holds a minority shareholder interest. Harbinger has not persuaded us that it will not take similar actions with respect to Calpine absent the conditions we have imposed. Further, as the Commission recently explained in *Horizon*, the relevant inquiry in the context of section 203 acquisitions is whether voting rights could (but may not

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<sup>29</sup> Applicants' December 5, 2008 Rehearing Request at 11-13.

<sup>30</sup> November 5 Order, 125 FERC ¶ 61,143 at P 33. Harbinger's Schedule 13D filing states that "[Harbinger] reserve[s] the right to be in contact with members of the Issuer's management, the members of the Issuer's Board of Directors, other significant shareholders and others regarding alternatives that the Issuer could employ to increase shareholder value." *Harbinger Capital Partners Master Fund I, Ltd.*, Form Schedule 13D, General Statement of Acquisition of Beneficial Ownership, (filed Feb. 11, 2008) <http://www.sec.gov/Archives/edgar/data/916457/000091957408000713/0000919574-08-000713.txt> ; *Harbinger Capital Partners Master Fund I, Ltd.*, Form Schedule 13D, General Statement of Acquisition of Beneficial Ownership, (filed Feb. 15, 2008) [http://www.sec.gov/Archives/edgar/data/916457/0000919574080001884/d856484\\_13d-a.txt](http://www.sec.gov/Archives/edgar/data/916457/0000919574080001884/d856484_13d-a.txt) ; *Harbinger Capital Partners Master Fund I, Ltd.*, Form Schedule 13D, General Statement of Acquisition of Beneficial Ownership, (filed May 21, 2008) [http://www.sec.gov/Archives/edgar/data/916457/000091957408003441/d885189\\_13d-a.txt](http://www.sec.gov/Archives/edgar/data/916457/000091957408003441/d885189_13d-a.txt).

necessarily) result in the exercise of control over a public utility company.<sup>31</sup> The facts relevant to Harbinger's investment position with respect to Calpine and other investments lead us to conclude that Harbinger *could* have the ability to control Calpine because Harbinger is authorized to hold up to 40 percent of the voting shares of Calpine and Harbinger in other similar situations has taken actions to position itself to exercise control, including to affect the outcome of specific transactions.

21. Moreover, Applicants misconstrue our holding in *Horizon*. In that case, the Commission held that “[w]ere the Commission to interpret new section 203(a)(2) to exclude the types of investment activities engaged in by Horizon or by similar investment advisors that, like Horizon, are holding companies, it is possible that such holding companies could exercise control over public-utility companies or transmitting utilities in a way that harms energy customers.”<sup>32</sup> Applicants assert that the reference to harm to energy consumers indicates that the Commission's analysis of control focuses only on control over jurisdictional facilities involving pricing and output. This argument is without merit and is based on an overly narrow interpretation of the Commission's statement.<sup>33</sup> In the quoted statement, the Commission was clearly addressing the harms to energy customers that could result from control over public utilities, and not just control over jurisdictional facilities.

22. Likewise, Applicants' reliance on *LS Power* to support their argument that the Commission erred in finding that Harbinger has the ability to control Calpine is misplaced. In *LS Power*, the Commission did not make a finding regarding control. Rather, it concluded that even if LS Power Development, LLC and Luminus Management, LLC (together, LS Power) controlled Dynegy Inc. (Dynegy) and Calpine, there would not be an adverse effect on competition. Thus, *LS Power* is distinguishable in that, unlike the Proposed Transaction, the Commission found that the transaction in *LS Power* would have no adverse effect on competition because there would be no market screen failure even if Dynegy's and Calpine's generation were attributed to LS Power.

23. Because Applicants' argument that the Commission erred in finding that Harbinger has the ability to control Calpine is based on a misreading of Commission precedent, we will reject Applicants' attempt to limit the definition of control, and therefore will deny rehearing of this issue.

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<sup>31</sup> *Horizon*, 125 FERC ¶ 61,209 at P 32.

<sup>32</sup> *Id.* P 31 (citation omitted).

<sup>33</sup> Applicants' December 5, 2008 Rehearing Request at n.21.

24. We also will deny Applicants' request for rehearing of our determination that increases in market concentration resulting from the Proposed Transaction could lead to a reduction in competition for supply contracts and could lead to increased wholesale power prices. As the Commission explained in the November 5 Order, consummation of the Proposed Transaction would result in increased market concentration in the Entergy balancing authority area, and would result in screen failures under the DPT analysis in five of seven time periods evaluated under the AEC scenario. The Commission therefore found that the Proposed Transaction raises horizontal market power concerns in the Entergy balancing authority area due to Harbinger's ability to exercise control over Entegra.

25. The Commission also found that Applicants' contention that, despite the screen failures, other factors indicate that the Entergy balancing authority area is not supply constrained and that consummation of the Proposed Transaction would therefore not raise horizontal market power concerns was without merit. On rehearing, Applicants again argue that uncommitted capacity, from both inside the Entergy balancing authority area and from first-tier markets,<sup>34</sup> would prevent increased wholesale power prices from occurring as a result of the Proposed Transaction. However, uncommitted capacity could prevent such price increases only if that capacity is made available where it is needed. Certain aspects of the Entergy balancing authority area raise uncertainty as to whether uncommitted capacity would be made available where it is needed. In this regard, Applicants note that generators in the Entergy balancing authority area market operate at a low average capacity factor in all seasons.<sup>35</sup> However, these low capacity factors suggest that generators had to be built at numerous locations because uncommitted capacity could not be made available where needed, due to the lack of sufficient transmission capacity.<sup>36</sup> Similar concerns are raised by the construction of new generators in the Entergy balancing authority area.<sup>37</sup> Applicants have not explained why any new generator construction would occur in a market if, as they argue, large amounts

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<sup>34</sup> Applicants have not demonstrated how much transmission capacity is available to move uncommitted capacity from first-tier markets into the Entergy balancing area market.

<sup>35</sup> The seasonal average capacity factor for generators was reported as varying between 11 and 20 percent for combined cycle generators and between 5 and 9 percent for gas turbine generators. *See* Cavicchi Aff. at Exhibit AJC-11.

<sup>36</sup> In their request for rehearing, Applicants have not demonstrated that there is sufficient transmission capacity available to prevent the exercise of market power even if there is excess generation capacity.

<sup>37</sup> Cavicchi Aff. ¶ 75; Applicants' December 5, 2008 Rehearing Request at 21-22.

of uncommitted capacity are available and that capacity can be made available where needed. Another explanation for the amount of uncommitted capacity in the Entergy balancing authority area that Applicants have not addressed is that load serving entities found it necessary to build or acquire existing generation plants instead of relying on the purchase of uncommitted capacity,<sup>38</sup> perhaps due to existing capacity rights to transmission capacity. This is another indication that uncommitted capacity may not be made available where needed in the Entergy balancing authority area.<sup>39</sup>

26. We reject Applicants' argument that the Commission did not provide adequate reasoning to justify the imposition of conditions on the Proposed Transaction. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>40</sup> Section 203 also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."<sup>41</sup> Here, the Commission found that Harbinger has the ability to control Calpine, and therefore determined that the Proposed Transaction raises horizontal market power concerns in the Entergy balancing authority area. The Commission has authority under FPA section 203(b) to impose conditions on its approval of a transaction if necessary to ensure that the transaction is in the public interest, and to require compliance filings to show that the conditions have been satisfied to ensure that a transaction is consistent with the public interest.<sup>42</sup> Thus, in order to fulfill its statutory obligation under FPA section 203(b) to ensure that the Proposed Transaction will not harm competition in the Entergy balancing authority area, and therefore will be consistent with the public interest, the Commission imposed conditions on the Proposed Transaction designed to guard against the harm to competition that would otherwise result from Harbinger's proposed acquisition of Entegra's voting securities.

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<sup>38</sup> November 5 Order, 125 FERC ¶ 61,143 at P 37 (citing Cavicchi Aff. ¶¶ 73 and 75).

<sup>39</sup> *Id.*

<sup>40</sup> *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

<sup>41</sup> 16 U.S.C. § 824b(a)(4) (2006).

<sup>42</sup> 16 U.S.C. § 824b (2006).

27. While Applicants assert without explanation that the conditions will discourage investments in the energy sector contrary to Commission policy, the Commission has a statutory obligation to ensure that the Proposed Transaction does not harm competition and, therefore, is consistent with the public interest. Because the Proposed Transaction raises horizontal market power concerns, the Commission has a basis to deny the Applicants' request for authorization for the Proposed Transaction. However, consistent with our policy to encourage investment in the energy sector while at the same time protecting customers, instead of denying the requested authorization, the Commission found that the Proposed Transaction could be authorized with conditions that will protect against the potential harm to competition.

28. Applicants argue that condition (i) of Ordering Paragraph (F), which prohibits Harbinger from seeking to exercise control over Entegra, is so vague as to be unworkable. Applicants contend that this condition could preclude Harbinger from taking actions that any shareholder is normally entitled to take and that are unrelated to the operation or control of the jurisdictional facilities.<sup>43</sup> Similarly, Applicants assert that condition (v), which requires Harbinger to be able to represent that it has not acquired the securities of Entegra for control purposes, is ambiguous and unnecessary. To be sure, conditions (i) and (v) were intended as general limitations on Harbinger's attempts to exercise control over Entegra in ways or by means not specifically contemplated by conditions (ii), (iii) and (vi). However, there are other activities or actions by Harbinger (including its officers, employees and shareholders), not specifically contemplated by conditions (ii), (iii) and (vi), that we believe are relevant to the issue of control. These include, for example, seeking to influence the management or conduct of the day-to-day operations of Entegra, including but not limited to decisions to purchase or sell electric energy, ancillary services, or inputs to electric power production by Entegra, schedule power production and/or plant availability at any jurisdictional facility owned by or under the control of Entegra, or schedule maintenance or outages at any jurisdictional facility owned by or under the control of Entegra; requesting or receiving disclosure of non-public information, either directly or indirectly, concerning the matters referred to above; seeking to nominate or designate managerial, operational, or other personnel of Entegra; seeking to set or influence the price at which power, fuel or any other product is sold or purchased in the marketplace by Entegra; or seeking to determine or influence whether generation, transmission, distribution, or other physical assets of Entegra are made available or withheld from the marketplace. We clarify here that, with the exception of the limitation on voting imposed under condition (vi) of Ordering Paragraph (F), which

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<sup>43</sup> Although the Entegra Class A Units confer "full voting rights" on Harbinger (November 5 Order, 125 FERC ¶ 61,143 at n.70), there is no other information in the record concerning the exact nature or extent of Harbinger's voting or other rights as a member of Entegra.

Applicants concede is consistent with Commission precedent, the November 5 Order does not otherwise limit or restrict Harbinger's right to vote its shares on any matter properly submitted to a vote of shareholders of Entegra.

29. Applicants also argue that the Commission did not explain how condition (ii) of Ordering Paragraph (F), which prohibits Harbinger from seeking representation on Entegra's board of directors and from holding any seat on Entegra's board of directors, would affect Harbinger's ability to exercise horizontal market power. As discussed above, we will retain this condition, but will address Applicants' concerns regarding the reason for the condition. As with Applicants' argument that they are not able to control Calpine, this argument is based on a narrow reading of Commission precedent that focuses solely on control over day-to-day facility operations. As we explained above, Harbinger has filed a Schedule 13D and taken an active role in operational strategy or had contact with the company board of directors with regard to its investments in other companies in which it holds minority shareholder interests.<sup>44</sup> Also as explained above, the Commission takes a broad view of its responsibilities under section 203. For these reasons, we deny Harbinger's request that it be permitted to hold any seats on Entegra's board of directors, and we deny Harbinger's request "that the Commission permit it to hold a majority of the seats on Entegra's board of directors so long as Harbinger remains in compliance with condition '(vi).'"<sup>45</sup> Further, we clarify that the purpose of condition (ii) is to ensure that Harbinger may not control Entegra by controlling its board. Accordingly, no person who directly or indirectly receives compensation from Harbinger may be a member of Entegra's board, or take an action to become a member of Entegra's board.<sup>46</sup> We also clarify that the term "seek representation" refers to actions taken by Harbinger with the purpose of acquiring or gaining a seat or seats on Entegra's board of directors (or equivalent governing body), and/or proposing the nomination of and/or nominating for election to the board of directors of Entegra any employee, officer, or

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<sup>44</sup> See *supra* P 20.

<sup>45</sup> Applicants' December 5, 2008 Rehearing Request at 32.

<sup>46</sup> We disagree with Applicants' argument that condition (ii) cannot be reconciled with *LS Power*. As explained above, in *LS Power* the Commission concluded that even if LS Power Development, LLC and Luminus Management, LLC controlled Dynegy Inc. and Calpine, there would not be an adverse effect on competition. Thus, the facts presented in *LS Power* (where the Commission did not make a finding on control) are distinguishable from the Proposed Transaction. The two other orders relied on by Applicants, *Iroquois* and *Dominion*, do not involve findings regarding control that pertain to transactions for which authorization was requested under FPA section 203, and therefore are also distinguishable from the situation presented by the Proposed Transaction.

shareholder of Harbinger, or proposing a director or slate of directors in opposition to the nominee or slate of nominees proposed by the management of Entegra.<sup>47</sup>

30. With regard to Applicants' argument that condition (iii), which requires Harbinger not to become Entegra's largest shareholder, pertains to matters that are not under Harbinger's exclusive control, we recognize that because Harbinger could become Entegra's largest shareholder without acquiring additional shares of Entegra's securities and as a result of another shareholder selling its shares of Entegra's securities, that condition (iii) pertains to matters beyond Harbinger's control. Therefore, we clarify that Harbinger is not required to sell its shares of Entegra securities if it becomes Entegra's largest shareholder as a result of the action of another shareholder. However, Harbinger is prohibited from acquiring additional shares in Entegra that would result in Harbinger becoming Entegra's largest shareholder. In making this clarification, however, we also clarify that Harbinger is prohibited from acting in concert with other shareholders to achieve largest shareholder status.

31. We reject Applicants' argument that condition (iv), which prohibits Harbinger from acting in concert with one or more minority shareholders to achieve the ends described in conditions (i) or (ii), will have the effect of Harbinger becoming a mute investor. Harbinger may take actions, alone or in concert with other shareholders, that seek to preserve or enhance shareholder value and that are not otherwise prohibited.

32. We will modify the requirement contained in Ordering Paragraph (H) that Applicants must file with the Commission, no later than 45 days after the end of each calendar quarter, a report certifying that Harbinger is in compliance with each of the conditions, so that Harbinger will only be required to file this report on an annual basis. We find that permitting Harbinger to file the report on an annual basis, rather than quarterly, will balance the need for the Commission to monitor Harbinger's compliance with the conditions imposed in the November 5 Order due to the horizontal market power issues raised by the Proposed Transaction, against the administrative burden on Harbinger to file such reports. The Commission has the responsibility to impose conditions on its approval of the transaction, if necessary to ensure that the transaction is in the public interest,<sup>48</sup> and to require compliance filings to show that the conditions have been satisfied. We clarify that only Harbinger must file the report required in Ordering Paragraph (H), since Entegra will not necessarily know whether Harbinger is in

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<sup>47</sup> As discussed above, Harbinger indicated in its Schedule 13D filed with the SEC with regard to its investment in the New York Times Company, that it proposed the nomination of and nominated for election to the board of directors of certain individuals. *See* November 5 Order, 125 FERC ¶ 61,143 at n.60.

<sup>48</sup> 16 U.S.C. § 824b (2006).

compliance with the conditions. We also clarify that Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in the November 5 Order within 30 days of such change.

33. We reject Applicants' argument that the requirement in Ordering Paragraph (K) directing Applicants to file a quarterly report listing Harbinger's ownership of the outstanding shares of Entegra, stated in terms of the number of shares held and as a percentage of outstanding shares, is unnecessary because Entegra already makes quarterly filings providing this information.<sup>49</sup> Applicants must submit the report required in Ordering Paragraph (K). However, to the extent that the quarterly filings that Entegra is already required to submit include the same information required by Ordering Paragraph (K), Entegra can include the docket number in this proceeding on those quarterly filings, and is therefore not required to file a separate quarterly report in this proceeding. Thus, with this clarification, Entegra will not be required to submit duplicate quarterly reports.

The Commission orders:

Applicants' request for rehearing is hereby denied, and Applicants' request for clarification is hereby granted, as discussed above.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>49</sup> *Entegra Power Group LLC*, 123 FERC ¶ 61,006, at P 27 (2008).