

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Consumers Energy Company
Entergy Nuclear Palisades, LLC

Docket Nos. EC06-155-000

Entergy Nuclear Palisades, LLC
Entergy Nuclear Power Marketing, LLC

ER06-1410-000
ER06-1411-000

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND SETTING
FOR HEARING AND SETTLEMENT JUDGE PROCEDURES DISPOSITION OF
JURISDICTIONAL FACILITIES AND ACQUISITION OF GENERATING FACILITY

(Issued February 21, 2007)

1. On August 25, 2006, Consumers Energy Company (Consumers) and Entergy Nuclear Palisades, LLC (Entergy Palisades) (jointly, section 203 Applicants) filed an application under section 203 of the Federal Power Act (FPA)¹ for Consumers to sell, and Entergy Palisades to acquire, the 798 megawatt (MW) (net)² Palisades Nuclear Power Plant (Palisades Facility) and its associated jurisdictional facilities.³ The Commission has

¹ 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005 § 1289, Pub. L. No. 109-58, 119 Stat. 594, 982-93 (2005) (EPAAct 2005).

² The nameplate capacity rating of the Palisades Facility is 812 MW. The Palisades Facility's maximum net generating capacity is approximately 798 MW.

³ On November 21, 2006 and December 27, 2006, the Commission staff issued letters requesting more information from section 203 Applicants. Section 203 Applicants submitted the information on December 8 and 12, 2006 and January 12, 2007.

reviewed the proposed transaction under the Commission's Merger Policy Statement⁴ and our rules implementing EPC Act 2005's amendments to section 203.⁵ As discussed below, we find that protesters have raised an issue of material fact as to whether the proposed transaction may have an adverse effect on rates and thus may not be consistent with the public interest. We will, therefore, set the application for a trial-type evidentiary hearing on the limited issue of the effect on rates. In the alternative, we note that section 203 Applicants have the option of committing to hold Edison Sault Electric Company (Edison Sault), the only wholesale requirements customer of Consumers whose rates could be affected by the transaction,⁶ harmless from rate increases through December 31, 2007, the date after which Consumers states that its contract with Edison Sault is open for renegotiation.

2. On August 25, 2006, Entergy Services, Inc. (Entergy Services) also filed, on behalf of Entergy Palisades, an application for market-based rate authority with an accompanying market-based tariff⁷ under which Entergy Palisades will make sales of electric capacity and energy and ancillary services to wholesale customers at market-

⁴ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs., Regulations and Preambles July 1996-December 2000 ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,984 (2000), FERC Stats. & Regs., Regulations Preambles, July 1996-December 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001) (Merger Filings Requirements Rule).

⁵ *Transactions Subject to FPA Section 203*, Order No. 669, 71 Fed. Reg. 1348 (2006), FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. ¶ 28,422 (2006), FERC Stats. & Regs. ¶ 31,214 (2006), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (2006), FERC Stats. & Regs. (2006).

⁶ Consumers states that it only has two wholesale requirements customers: Edison Sault and Alpena Power Company (Alpena). The proposed transaction involving the Palisades Facility will not affect Alpena's rates because the specific annual level of its capacity charges are set in the contract, and the energy charges are based on coal plant costs. Section 203 Applicants October 2 Answer at 6 and n.8.

⁷ Entergy Nuclear Palisades requests an effective date for its market-based rate tariff as of the closing date of the proposed transaction.

based rates in the market region administered by the Midwest Independent Transmission System Operator, Inc. (the Midwest ISO). The proposed market-based rate tariff provides for the sale of electric capacity and energy and ancillary services at market-based rates, the reassignment of transmission capacity, and the resale of firm transmission rights. Entergy Palisades also requests waivers commonly given to similar market-based rate applicants. As further discussed below, the Commission conditionally accepts Entergy Palisades' application for market-based rate authority, subject to the compliance filings ordered herein.⁸

3. In the same filing, Entergy Services also submitted, on behalf of Entergy Nuclear Power Marketing, LLC (Entergy Nuclear Marketing), proposed tariff revisions to allow Entergy Nuclear Marketing to make market-based rate sales of electric capacity and energy and ancillary services to wholesale customers at market-based rates in the market region administered by the Midwest ISO market. It also proposed to revise its tariff with respect to sales in the Entergy Operating Companies'⁹ home control area in compliance with an April 19, 2006 Order.¹⁰ The Commission conditionally accepts Entergy Nuclear Marketing's proposed revisions to its market-based rate tariff, subject to the compliance filings ordered herein.¹¹

I. Background

A. Description of the Parties

1. Consumers

4. Consumers is a combination gas and electric utility in the Midwestern United States and is the principal subsidiary of CMS Energy Corporation, an integrated energy

⁸ Entergy Nuclear Palisades, LLC, FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-3.

⁹ The Entergy Operating Companies include Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, LLC, Entergy Mississippi, Inc., and Entergy New Orleans, Inc., each of which serves wholesale and retail power customers and transmission customers in the Southeastern United States.

¹⁰ *Entergy Nuclear Power Marketing, LLC*, Docket No. ER06-653-000 (April 19, 2006) (unpublished letter order) (April 19 Order).

¹¹ Entergy Nuclear Power Marketing, LLC, FERC Electric Tariff, Substitute Original Volume No. 1, First Revised Sheet No. 1 (Supersedes Original Sheet No. 1).

company whose principal area of business is in the Midwestern United States. Consumers provides natural gas and electricity to approximately 9.5 million residents in all Lower Peninsula counties in Michigan.

2. Entergy Palisades

5. Entergy Palisades is a limited liability company and a wholly-owned indirect subsidiary of Entergy Corporation (Entergy), a utility holding company. It is affiliated with the Entergy Operating Companies. Entergy Palisades was formed to acquire the Palisades Facility, a nuclear power plant located near South Haven, Michigan.

3. Entergy Nuclear Power Marketing

6. Entergy Nuclear Marketing is a wholly-owned indirect subsidiary of Entergy. It was formed to market wholesale electric capacity and energy and ancillary services.¹²

B. Proposed Transaction

7. Entergy Palisades has an Asset Sale Agreement to buy the Palisades Facility from Consumers. The Palisades Facility is interconnected with the transmission facilities of Michigan Electric Transmission Company (METC), which is under the control of the Midwest ISO. Entergy Palisades also will acquire the Big Rock Independent Spent Fuel Storage Installation (Spent Fuel Facility), which stores spent nuclear fuel that had been generated from the former Big Rock Point Nuclear Power Plant (Big Rock Facility). Section 203 Applicants state that the Spent Fuel Facility is not jurisdictional because no jurisdictional activities occur there.¹³ They state that the Big Rock Facility has been completely dismantled and its components removed from the site. Entergy Palisades will pay Consumers \$380,000,000, plus or minus any adjustments to the purchase price required by the Asset Sale Agreement.¹⁴

¹² Entergy Nuclear Marketing's currently effective market-based rate tariff applies only to sales in the markets administered by the New York Independent System Operator, Inc. and ISO New England.

¹³ However, if the Commission believes that the transfer of the Spent Fuel Facility is subject to section 203 of the FPA, section 203 Applicants request authorization for this part of the proposed transaction. Section 203 Application at 3.

¹⁴ *Id.* at 7.

8. In addition, Entergy Palisades will assume Consumers' obligations for the long-term storage of spent nuclear fuel from the Palisades Facility, eventual decommissioning of the Palisades Facility in accordance with Nuclear Regulatory Commission (NRC) regulations, and restoration of the site.¹⁵ Section 203 Applicants note that Consumers will transfer at least \$250 million of its external decommissioning trust fund (Palisades Decommissioning Fund) to the external decommissioning trust fund of Entergy Palisades to be used for decommissioning the Palisades Facility. Consumers, however, will retain, subject to NRC approval¹⁶ and a favorable private letter ruling from the Internal Revenue Service (IRS), a portion of the Qualified Fund and all of the Non-Qualified Fund.¹⁷ Further, section 203 Applicants state that Consumers will use a portion of the Non-Qualified Fund subject to Commission jurisdiction, about \$11 million, to complete the decommissioning of the dismantled Big Rock Facility.¹⁸

9. Section 203 Applicants also include in their application for informational purposes a long-term power purchase agreement (PPA) between Consumers and Entergy Palisades. Under the PPA, Entergy Palisades will sell the entire capacity and energy output of the Palisades Facility to Consumers for a fifteen-year term beginning on the closing date of the asset sale. Entergy Palisades intends to assign the PPA to Entergy Nuclear Marketing before or at the time of consummation.¹⁹

¹⁵ *Id.*

¹⁶ As stated in their October 11 Answer, section 203 Applicants filed an application with the NRC for approval of the proposed transaction under the Atomic Energy Act, 42 U.S.C. §§ 2011 – 2259, as a license transfer governed by Part 50.80 of the NRC's Regulations, 10 C.F.R. § 50.80. Palisades Nuclear Plant, NRC Docket No. 50-255 (Sept. 6, 2006) (NRC License Transfer Proceeding).

¹⁷ The Palisades Decommissioning Fund is composed of a Qualified Fund and a Non-Qualified Fund. The Qualified Fund meets the requirements of Internal Revenue Code Section 468A and Treas. Reg § 1.468A-5.

¹⁸ *Id.* at n.12.

¹⁹ Entergy Palisades will provide Entergy Nuclear Marketing with the capacity and energy from the Palisades Facility committed to Consumers under the PPA, and Entergy Nuclear Marketing will provide the scheduling, coordination, and other marketing-related services needed to serve Consumers under the PPA. *Id.* at 8.

C. Application for Market-Based Rate Authority

10. Entergy Palisades and Entergy Nuclear Marketing (jointly, Section 205 Applicants) request that Entergy Palisades' tariff and Entergy Nuclear Marketing's tariff revisions become effective when Entergy Palisades acquires the Palisades Facility.²⁰

11. Additionally, Entergy Palisades requests waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except for sections 35.12(a), 35.13(b), 35.15 and 35.16. It also requests waiver of Part 41, Part 101, and Part 141 of the Commission's regulations concerning accounting and reporting requirements.²¹

II. Notice and Responsive Pleadings

12. Notice of section 203 Applicants' August 25, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 53,437 (2006), with interventions and protests due on or before September 15, 2006. The Michigan Public Service Commission (Michigan Commission) filed a notice of intervention. Public Citizen, Inc. (Public Citizen) and the Association of Businesses Advocating Tariff Equity (ABATE), an association of Michigan industrial customers, filed motions to intervene and protest. Judy Diane Kamps (Ms. Kamps), a residential customer of Consumers, filed comments and objections. Michigan Environmental Council (MEC) and Public Interest Research Group in Michigan (PIRGIM) (jointly, MEC/PIRGIM) filed a motion to intervene and protest and a request for hearing procedures. Van Buren County, Covert Public Schools, Covert Township, Lake Michigan College, Van Buren District Library, Van Buren Intermediate School District, and South Haven Community Hospital (collectively, Local Units), several municipalities near the Palisades Facility, filed comments. Edison Sault and Cloverland Electric Cooperative (jointly, Edison Sault/Cloverland) filed a motion to intervene out-of-time and protest. On October 2, 2006, section 203 Applicants filed an answer. On October 11, 2006, section 203 Applicants filed an answer to Edison Sault/Cloverland's protest. On December 5, 2006, the Michigan Commission made an informational filing regarding Consumers' accounting treatment of the Palisades Facility.

13. On November 21, 2006, Commission staff issued a deficiency letter directing section 203 Applicants to disclose all existing pledges and encumbrances of utility assets owned by the applicants and all their affiliates as of August 25, 2006, as required by

²⁰ Section 205 Application at 16.

²¹ *Id.*

Order No. 669-A and the Commission's regulations.²² On December 8 and 12, 2006, Consumers and Entergy Palisades separately filed timely responses to the deficiency letter (Response to Deficiency Letter I). Notice of section 203 Applicants' December 8 and 12, 2006 filings was published in *Federal Register*, 71 Fed. Reg. 78,414 (2006), with interventions and protests due on or before December 29, 2006. MEC/PIRGIM filed a revised motion to intervene and protest in response to Response to Deficiency Letter I.

14. On December 27, 2006, Commission staff issued a deficiency letter directing Section 203 Applicants to answer questions related to accounting entries. On January 12, 2007, section 203 Applicants filed timely responses to the deficiency letter (Response to Deficiency Letter II). Notice of the Response to Deficiency Letter II was published in the *Federal Register*, 72 Fed. Reg. 4499 (2007), with interventions and protests due on or before January 31, 2007. None was filed.

15. Notice of section 205 Applicants' August 25, 2006 filing was published in the *Federal Register*, 71 Fed. Reg. 53,436 (2006), with interventions and protests due on or before September 15, 2006. Consumers filed a motion to intervene. The Michigan Commission filed a notice of intervention. MEC/PIRGIM filed a motion to intervene and protest, and also a request for hearing procedures.²³ On October 2, 2006, section 205 Applicants filed an answer to MEC/PIRGIM's protest and motion for hearing procedures.

III. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Also, given the early stage of this proceeding, the lack of undue prejudice or delay and their interest, we find good cause to grant, under Rule 214, the untimely motion to intervene of Edison Sault/Cloverland.

17. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2006), prohibits answers to protests, unless otherwise permitted by the decisional authority. We will accept the answers filed by section 203 Applicants in the section 203 proceeding and the answer filed by section 205 Applicants in the section 205

²² See *supra* note 5.

²³ MEC/PIRGIM's protest in the section 205 proceeding raises issues similar to those raised in their protest of the section 203 proceeding.

proceeding because they have provided information that assisted us in our decision-making process.

18. Public Citizen and MEC/PIRGIM contend that there has been insufficient time to review the section 203 application. In particular, Public Citizen states that the ten days between the notice and the comment date was insufficient.²⁴

19. We do not find the notice period to be unreasonable. Other intervenors have submitted timely comments, and we also have taken into consideration protests and comments filed after the comment date.

B. Section 203 Proposed Transaction

1. Standard of Review

20. Section 203(a) of the FPA provides that the Commission must approve a transaction if it “will be consistent with the public interest.”²⁵ The Commission’s analysis of whether a transaction is 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.²⁶ In addition, EAct 2005 amended section 203 to specifically require that the Commission also determine 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.²⁷ For the reasons discussed below, we will set the proposed transaction for hearing to determine the effect on rates, unless the section 203 Applicants commit to hold their wholesale customers harmless from any rate increase resulting from the transaction. We find that the statutory standard is met in all other respects.

²⁴ Public Citizen Protest at 1; MEC/PIRGIM Protest at 11.

²⁵ 16 U.S.C. § 824b (2000).

²⁶ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

²⁷ EAct 2005 § 1289, 119 Stat. 982-83, to be codified at 16 U.S.C. § 824b(a)(4).

2. Effect on Competition

a. Section 203 Applicants' Analysis

21. Section 203 Applicants argue that the proposed transaction will not adversely affect competition. It will not have any adverse horizontal effects on competition because the output of the Palisades Facility will be sold to Consumers under a long-term PPA. Therefore, the concentration will be unchanged as a result of the proposed transaction. Moreover, even if the PPA contract did not exist, section 203 Applicants state that the effect of the proposed transaction would be slightly deconcentrating because Entergy Palisades and its affiliates'²⁸ pre-transaction capacity is smaller than Consumers' post-transaction capacity. Therefore, section 203 Applicants conclude that the effect of the proposed transaction is *de minimis*.²⁹

22. As for vertical competition, section 203 Applicants state that Entergy Palisades and its affiliates own no transmission assets other than those necessary to connect to the grid and no natural gas transportation assets in the Midwest ISO market. Accordingly, section 203 Applicants conclude there are no adverse vertical effects on competition.³⁰

b. Commission Determination

23. The proposed transaction will not increase market concentration and will not result in the combination of electric transmission or fuel supplies with electric generation assets. In addition, no party disputes these statements or claims that the proposed transaction will have an adverse effect on competition. Therefore, we agree with section 203 Applicants that there will be no adverse horizontal or vertical market power effects.

²⁸ Section 203 Applicants state that an affiliate of Entergy Palisades owns 40 MW of generation capacity in the Midwest ISO market that is sold under a long-term contract. Section 203 Applicants state that this is the only capacity owned by Entergy Palisades and its affiliates in the Midwest ISO.

²⁹ Section 203 Application at 12.

³⁰ *Id.* at 14.

3. Effect on Rates

a. Section 203 Applicants' Analysis

24. Section 203 Applicants argue that the proposed transaction will not have any effect on wholesale rates. Consumers commits to hold its wholesale customers harmless by agreeing that it will not seek to include the costs of consummating the proposed transaction in its transmission revenue requirement or in its rates for cost-based wholesale customers unless it demonstrates that transaction-related savings equal or exceed the transaction-related costs so included.³¹ Section 203 Applicants state that the Commission said in its Merger Policy Statement and subsequent orders that this kind of commitment resolves concerns regarding the effect of a transaction upon rates.³²

b. Protests

25. ABATE argues that the proposed transaction will have an adverse effect on the rates of Michigan customers. It states that if the Palisades Facility were not sold, it would remain as a low-cost resource in Consumers' rate base, and Michigan customers would receive cost-based nuclear power until Consumers' license expires in 2011, with the possibility of extension until 2031.³³ However, if the Palisades Facility is sold, Entergy Palisades will be able to sell the cheap power from the Palisades Facility at market-based rates to different customers; in other words, the customers who now receive that low-cost power will no longer do so. Further, ABATE states that, if the Commission authorizes the transaction, the Michigan Commission will face a "Hobson's choice" of either approving the PPA with the adverse rate effects on Michigan customers or rejecting the PPA, which would mean a loss of 18 percent of the generating capacity of Consumers.³⁴ This would force Consumers to buy more expensive power at prevailing market rates and

³¹ *Id.* at 15.

³² *Id.*, citing *Ameren Corp.*, 108 FERC ¶ 61,094, at P 68 (2004); *Tucson Elec. Co.*, 103 FERC ¶ 61,200, at 64,163 (2003); *Northwest Natural Gas Co.*, 98 FERC ¶ 61,134, at 61,388 (2002); *Consolidated Edison, Inc.*, 91 FERC ¶ 61,225, at 61,825-26 (2000), *reh 'g denied*, 94 FERC ¶ 61,079 (2001).

³³ ABATE notes that Consumers has filed an extension with the NRC to extend its license to 2031. ABATE Protest at 3.

³⁴ *Id.* at 4.

to pass those added costs to Michigan customers. Therefore, ABATE requests that the Commission either reject the section 203 application or set it for hearing.

26. MEC/PIRGIM argue that the proposed transaction, including the proposed power rates under the PPA, is unjust and unreasonable.³⁵ They state that unlike new incremental generating capacity, the Palisades Facility has long been supported by customer rates on a cost-of-service basis under Michigan Commission regulation, that it is one of Michigan's major base load generating units, and that it is an integral part of Consumers as a regulated utility in Michigan.³⁶ They assert that the increase in the cost of power to be supplied to Michigan customers from the Palisades Facility is unjust and unreasonable. Therefore, they urge the Commission to reject the proposed transaction or establish an evidentiary hearing. They assert that transferring the capacity and energy of Palisades from a cost-of-service ratemaking basis under Michigan Commission's jurisdiction to market-based rates not subject to Michigan Commission jurisdiction is contrary to the public interest.³⁷ MEC/PIRGIM also state that the Commission should rule on the proposed transaction only after several proceedings involving the transaction before the Michigan Commission have been resolved.³⁸

27. Edison Sault/Cloverland also argue that the sale of the Palisades Facility will lead to rate increases. They state that the contract between Consumers and Edison Sault includes an energy charge that is based on Consumers' actual system fuel cost.³⁹ They note that, because nuclear costs for the Palisades Facility are relatively low, they have experienced increases in their monthly energy costs from Consumers when the Palisades Facility is not in operation.⁴⁰ They contend that the removal of the Palisades fuel costs by the sale will cause Consumers' average system fuel costs to increase, resulting in an increase in the cost-based rate that Edison Sault/Cloverland pay. Therefore, Edison

³⁵ MEC/PIRGIM argue this in both protests to the section 203 and section 205 filings.

³⁶ MEC/PIRGIM Protest at 7.

³⁷ *Id.* at 7.

³⁸ *Id.* at 8.

³⁹ Edison Sault buys electricity from Consumers at cost-based rates under a long-term service agreement. Cloverland purchases electricity from Edison Sault at cost-based pass-through rates. Sault/Cloverland Protest at 2-3.

⁴⁰ *Id.* at 3-4.

Sault/Cloverland request that the Commission either set the issue of rates for hearing or direct Consumers to hold Edison Sault/Cloverland harmless from any rate increase as a result of the proposed transaction.⁴¹

c. Section 203 Applicants' Answers

i. Section 203 Applicants' October 2 Answer

28. Section 203 Applicants state that most of the issues raised by protesters involve retail rates, which are not subject to the jurisdiction of the Commission. They state that the PPA between the Applicants is a central component of the transaction that the Michigan Commission has authority to approve or disapprove. They further note that they are not seeking Commission approval of the PPA as part of their section 203 proceeding; instead, PPA is included with the application for informational purposes only.⁴²

29. Section 203 Applicants also contend that there will be no adverse effect on wholesale rates. First, they argue that their customers do not have a right to continued access to the low-cost power from the Palisades Facility; none of their cost-based wholesale contracts is linked directly or indirectly with the Palisades Facility. They also state that they have taken steps to ensure that their cost-based wholesale customers will be held harmless from the costs of consummating the proposed transaction unless there are net benefits from the transaction.⁴³

30. Section 203 Applicants argue that ABATE and MEC/PIRGIM err in raising a retail issue before the Commission when such issues should be addressed in the Michigan Commission proceeding. Moreover, they dispute ABATE's contention that retail rates will be increased because Entergy Palisades will move to higher market-based rates. They argue that such a claim is speculative, noting that PPA is a fifteen-year fixed price contract. Further, section 203 Applicants argue that before the PPA expires in 2022, the Commission "will have ample authority and opportunity to monitor Entergy Palisades' market profile and prevent [it] from charging unjust and unreasonable rates at any time."⁴⁴

⁴¹ *Id.* at 5.

⁴² Section 203 Applicants' October 2 Answer at 14.

⁴³ *Id.* at 6.

⁴⁴ *Id.* at 8.

ii. October 11 Answer

31. Section 203 Applicants reiterate that there will be no adverse effect on jurisdictional rates due to the proposed transaction. They acknowledge that Consumers' contract with Edison Sault has an energy charge that is based on the lower of Consumers' average system fuel cost or the energy charge under Consumers' cost-based power sales tariff. However, they state that the contract does not restrict Consumers on its use of sources of generation, fuel costs, or any purchase agreement it may choose to enter into.⁴⁵ Furthermore, section 203 Applicants argue that Edison Sault/Cloverland have not produced any evidence that the proposed transaction will result in higher average system fuel costs and therefore higher rates under Edison Sault's contract with Consumers. Even if such evidence is presented, they claim that Edison Sault/Cloverland are not entitled to a guarantee from the Commission that their rates will never increase.⁴⁶ Finally, they state that the Edison Sault contract is open to price renegotiation after December 31, 2007. If a price cannot be agreed upon, either party can make a unilateral filing under section 205 of the FPA and terminate the contract.⁴⁷

d. Commission Determination

32. In the Merger Policy Statement, the Commission expressed concern about the effect of section 203 transactions on rates. The Merger Policy Statement states that applicants should propose ratepayer protection mechanisms to ensure that a merger will not adversely affect wholesale rates. The applicant bears the burden of proof to demonstrate that its customers will be protected. The most expeditious means of addressing ratepayer protection is for the parties to negotiate an agreement on ratepayer protection mechanisms. The Commission has generally accepted as sufficient broad hold harmless provisions that state that rates will not change because of a merger,⁴⁸ or an open season to allow captive ratepayers to freely choose another supplier. The Commission

⁴⁵ October 11 Answer at 5. Section 203 Applicants note that, in contrast to Edison Sault's contract, Consumers has a long-term PPA with Alpena that contains energy charges that are based on Consumers' average fuel costs at certain named coal-fired plants. *Id.* at 6.

⁴⁶ *Id.* at 7.

⁴⁷ *Id.*

⁴⁸ See *Westar Energy, Inc.*, 115 FERC ¶ 61,228, at P 90 (2006); *Trans-Elect Inc., et al.*, 110 FERC ¶ 61,389, P 17-19 (2005).

also stated that it will consider setting a case for hearing if the parties cannot agree on ratepayer protection measures.⁴⁹

33. We find that there is a disputed issue of material fact concerning the transaction's effect on wholesale rates. Section 203 Applicants have stated that they will hold their wholesale customers harmless *with respect to transaction costs* unless they can demonstrate net benefits from the transaction. However, the Merger Policy Statement is not so narrow; we are concerned about any rate increases that result from a transaction, including a customer's loss of access to low-cost nuclear power. We therefore find that there is an issue regarding the effect on rates that requires the development of a more complete evidentiary record.

34. In the alternative, we note that section 203 Applicants have the option of committing to hold Edison Sault harmless from rate increases. Section 203 Applicants claim that when prices under the contract between Edison Sault and Consumers are to be renegotiated, either party will be able to terminate the contract if price negotiations reach an impasse. If that characterization of the contract is accurate, then the hold harmless commitment needs to last only until the date after which the contract is open for renegotiation. We view the price negotiation and option of termination as an open season, which the Commission has found to be acceptable ratepayer protection.⁵⁰ If section 203 Applicants choose this alternative, they are directed to make a filing within 15 days of the date of this order.

35. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁵¹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding;

⁴⁹ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,112; *see also Old Dominion Electric Coop.*, 110 FERC ¶ 61,274, at 23 (2005).

⁵⁰ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124. *See also PSEG Waterford Energy, LLC*, 112 FERC ¶ 61,308, at P 16-17 (2005).

⁵¹ 18 C.F.R. § 385.603 (2006).

otherwise, the Chief Judge will select a judge for this purpose.⁵² The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

36. With respect to the effect on retail rates, the proposed transaction does not raise concerns that are relevant to our analysis. MEC/PIRGIM state that having the output of the Palisades Facility sold at wholesale under market-based rates instead of at cost-based rates under the Michigan Commission's jurisdiction is contrary to the public interest unless protective measures are adopted. However, our duty under section 203 of the FPA is to analyze the effect of the proposed transaction on wholesale rates; the Commission does not have jurisdiction over retail rates. Such retail rate issues can be raised in the pending proceeding before the Michigan Commission. We note that the Michigan Commission has not requested that we act on the effect of the proposed transaction on retail rates.

37. Finally, section 203 Applicants state that they are not seeking approval of the PPA as part of their section 203 proceeding, but rather filed it with their application for informational purposes only. We note that Entergy Palisades' wholesale sales under the PPA will be subject to the Commission's jurisdiction pursuant to sections 205 and 206 of the FPA. In light of our finding below that Entergy Palisades satisfies the Commission's standards for market-based rate authority, Entergy Palisades is not required to file the PPA (which does not involve an affiliate transaction). However, Entergy Palisades is required to file Electric Quarterly Reports (EQRs) in compliance with Order No. 2001,⁵³ as discussed below.

⁵² If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

⁵³ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). See 18 C.F.R. § 35.10b (2006). Failure to file an EQR (without an appropriate request for extension), or failure to report an agreement in an EQR, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

4. Effect on Regulation

38. Section 203 Applicants claim that the proposed transaction will not affect the ability of the Commission to regulate them. Consumers will remain subject to the Commission's jurisdiction, and Entergy Palisades will become subject to the Commission's jurisdiction when it begins operation as a public utility. The regulatory status of the subsidiaries and affiliates of the Section 203 Applicants will not change as a result of the proposed transaction.⁵⁴

39. We find that neither state nor federal regulation will be impaired by the proposed transaction. We note that the Michigan Commission has intervened in this proceeding, and is conducting its own proceeding concerning the proposed transaction.

5. Cross-subsidization and Encumbrance of Assets

40. FPA section 203(a)(4),⁵⁵ as amended by EPAct, requires that the Commission find that a proposed transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge or encumbrance will be consistent with the public interest. Section 203 Applicants state that the proposed transaction will not result in the cross-subsidization of a non-utility associate company or in the pledge or encumbrance of utility assets for the benefit of an associate company.

41. As required by Order Nos. 669 and 669-A,⁵⁶ section 203 Applicants confirm that the transaction will not result in: (1) transfers of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) new issuances of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate

⁵⁴ Section 203 Application at 15-16.

⁵⁵ 16 U.S.C. § 824b(a)(4) (2000).

⁵⁶ *See supra* note 5.

company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA. Further, in their Response to Deficiency Letter I, section 203 Applicants and their affiliates disclose their existing pledges and encumbrances of utility assets, as required under Order No. 669-A and 18 C.F.R. § 33.2(j)(1)(i) (2006).

42. We find that section 203 Applicants have provided adequate assurances that the proposed transaction will not result in cross-subsidization. We note that no party has argued otherwise.

6. Proposed Use of Palisades Decommissioning Fund

43. Section 203 Applicants state that the total amount of the Palisades Decommissioning Fund is \$566 million. As stated above, section 203 Applicants note that Consumers will transfer some or all of its Qualified Fund, but at least \$250 million, to external decommissioning trust funds of Energy Palisades to be used for decommissioning of the Palisades Facility. However, Consumers will retain, subject to NRC approval and a favorable private letter ruling from the IRS, a portion of its Qualified Fund and all of its Non-Qualified Fund. Section 203 Applicants state that the Non-Qualified Fund includes a Jurisdictional Amount of \$11 million attributable to Commission-jurisdictional rates and will be used to complete decommissioning of the Big Rock Facility.

a. Protests

44. Ms. Kamps and MEC/PIRGIM argue that Entergy Palisades' nuclear decommissioning fund will be insufficient, requiring Michigan customers to cover any shortfall, essentially requiring them to pay twice for decommissioning the Palisades Facility.⁵⁷ MEC/PIRGIM also assert that the Consumers' arrangement will unnecessarily release Consumers from all responsibility and risk associated with its facilities and thereby transfer said risks to Michigan customers on a long-term basis.⁵⁸ Moreover, Local Units contend that the request that Consumers keep a portion of the decommissioning fund is based on the assumption that Entergy Palisades has fully assumed the decommissioning risk, which may not be correct.⁵⁹ Therefore, Local Units

⁵⁷ Ms Kamps Protest at 2; MEC/PIRGIM Protest at 10.

⁵⁸ MEC/PIRGIM Protest at 10-11.

⁵⁹ Local Units protest at. 3.

request that the Commission withhold approval of section 203 application until it is determined that such funds are not reasonably needed for decommissioning at the Palisades Facility. Further, Edison Sault/Cloverland argue that amounts in the decommissioning fund not needed for decommissioning should be refunded to customers.

b. Section 203 Applicants' Answers

45. In response to concerns about double decommissioning liability, section 203 Applicants explain in their October 2 Answer that Entergy Palisades will assume all liabilities of decommissioning, as provided in section 2.3(h) of the Asset Sale Agreement. This improves the status quo by relieving Consumers' ratepayers of any decommissioning cost burden.⁶⁰ Moreover, they assert that this Commission is not the appropriate forum in which to address such concerns because retail rates are under the jurisdiction of the Michigan Commission, while the adequacy of the decommissioning fund is a question for the NRC.⁶¹

46. Regarding protesters' concerns about the part of the nuclear decommissioning fund that Consumers proposes to retain, section 203 Applicants state that refunds to customers are not warranted for the Jurisdictional Amount because decommissioning funds for the Palisades Facility will be used to cover a portion of the \$50 million shortfall for decommissioning the Big Rock Facility, which is consistent with Commission's regulations. Furthermore, they state that Edison Sault/Cloverland's request that the Jurisdictional Amount be refunded amounts to a request for retroactive refund, and that the Commission has no authority to order retroactive refunds. Section 203 Applicants state that it is inappropriate to order refunds in a section 203 proceeding; such a refund request is more appropriate in a section 206 proceeding. They also argue that the rates charged to wholesale requirements customers have been settled or negotiated rates, and that it is not possible to "specifically identify the portion, if any, of the revenues collected from these customers that is attributable to decommissioning costs."⁶²

⁶⁰ Section 203 Applicants October 2 Answer at 10.

⁶¹ *Id.* at 12.

⁶² Section 203 Applicants October 11 Answer at 10.

c. Commission Determination

47. As discussed above, concerns regarding the effect of the proposed transaction on retail rates are not pertinent to our section 203 analysis; such issues should be raised with the Michigan Commission.

48. Additionally, we agree with section 203 Applicants that the sufficiency of the Palisades Facility's nuclear decommissioning fund is the province of the NRC. Local Units' protest fundamentally raises an argument about the sufficiency of the decommissioning fund.

49. However, the Commission has the responsibility to protect the interests of wholesale ratepayers by ensuring the integrity of nuclear decommissioning trust funds. The Commission's regulations have general provisions governing nuclear decommissioning funds, including the requirement that there be an independent fiduciary; fund investment and management policies; and net worth requirements of fund trustees. Generally, each nuclear unit must have its own fund. The Commission's regulations state that "Absent the express authorization of the Commission, no part of the assets of the [decommissioning] [f]und may be used for, or diverted to, any purpose other than to fund the costs of decommissioning the power plant to which the [f]und relates."⁶³ The Commission stated in Order No. 580-A that an individual nuclear unit's decommissioning fund must stand on its own in part to avoid the possibility that one group of ratepayers will subsidize another group. The Commission also reasoned that requiring each fund to stand alone would ensure the solvency and sufficiency of individual decommissioning funds. Allowing risk diversification by managing several units' funds "could put individual funds at risk."⁶⁴

50. In this particular case, we will authorize Consumers to use a portion of the Palisades Decommissioning Fund to cover shortfalls in the decommissioning of another Consumers facility, subject to the outcome of the NRC License Proceeding. This is an acceptable use of the Palisades Decommissioning Fund because the same group of ratepayers will fund the \$50 million deficit in the decommissioning fund for Consumers' Big Rock Facility; one group of ratepayers is not subsidizing another group of ratepayers. Using the Jurisdictional Amount to complete the decommissioning of the Big Rock

⁶³ 18 C.F.R. § 35.32(a)(6) (2006).

⁶⁴ *Nuclear Plant Decommissioning Trust Fund Guidelines*, Order No. 580, FERC Stats. & Regs. ¶ 31,023 (1995), *order on reh'g*, Order No. 580-A, FERC Stats. & Regs. ¶ 31,055, at 30,630 (1997).

facility will lower the amount that will need to be collected from ratepayers in the future. Allowing this use of the funds will not endanger the solvency of the Palisades Decommissioning Fund or jeopardize any group of ratepayers. The \$11 million Jurisdictional Amount is relatively small compared to the approximately \$566 million total now in the Palisades Decommissioning Fund or the \$250 million minimum to be transferred to Entergy Palisades. In addition, we will condition our decision on the outcome of the NRC License Proceeding, which will determine whether the Palisades Decommissioning Fund is adequate to provide for the decommissioning of the Palisades Facility.⁶⁵

7. Accounting Entries

51. The application includes proposed accounting entries recording Consumer's sale of the Palisades Facility. In the first entry, Consumers proposes to clear the sale through Account 102, Electric Plant Purchased or Sold, and remove the original cost and related accumulated depreciation from its books. Consumers proposes to record the gain on the sale in Account 254, Other Regulatory Liabilities, consistent with an order from the Michigan Commission that required Consumers to return any gain from the future sale of the Palisades Facility to its customers. Consumers' proposed accounting for the sale in the first entry is consistent with Electric Plant Instruction No. 5, paragraph F.⁶⁶

52. In the remaining entries, Consumers provides its proposed accounting for the asset retirement obligations and nuclear decommissioning funds related to the Palisades Facility as well as the Spent Fuel Facility. Consistent with the text of Account 102 in the Commission's Uniform System of Accounts, Consumers must submit its final accounting for the sale of the Palisades facility within six months of the date the transaction is consummated.⁶⁷ In its filing, Consumers must provide details explaining and fully supporting the accounting for the Palisades Facility and Spent Fuel Facility asset retirement obligations and related nuclear decommissioning funds.

⁶⁵ The NRC License Transfer Proceeding may alter the amount of the Palisades Decommissioning Fund ultimately transferred to Entergy Palisades, which may in turn affect the Jurisdictional Amount.

⁶⁶ 18 C.F.R. Part 101 (2006).

⁶⁷ *Id.*

C. Application for Market-Based Rate Authority

53. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.⁶⁸ As discussed below, Entergy Palisades satisfies the Commission's standards for market-based rate authority.

54. In the April 14 Order,⁶⁹ the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen. Section 205 Applicants have prepared both the pivotal supplier and the wholesale market share screen analyses for the Midwest ISO market. They state that they pass both screens.

55. The Commission has reviewed Entergy Palisades' and Entergy Nuclear Marketing's generation market power analyses for the Midwest ISO market and has determined that they pass both the pivotal supplier and wholesale market share screens in the Midwest ISO market. We note that Entergy Nuclear Marketing already has market-based rate authority for certain areas, and in the instant filing, it is requesting authority to make market-based rate sales in the Midwest ISO market.

56. Section 205 Applicants state that neither they nor their affiliates own, operate or control any transmission facilities in the Midwest ISO market other than the limited interconnection facilities needed to interconnect their generating facilities with the Midwest ISO transmission systems. Based on section 205 Applicants' representations, the Commission finds that they satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

57. Section 205 Applicants state that they and their affiliates do not own or control sites for generation development in the Midwest ISO market or other barriers to entry that could be used to restrict entry by other suppliers, nor do they own or control natural gas transportation assets or fuel supplies in the Midwest ISO market. Based on section 205

⁶⁸ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281, at 61,899 (1996); *accord*, *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

⁶⁹ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004).

Applicants' representations, the Commission is satisfied that they cannot erect barriers to entry.

58. Section 205 Applicants state that they and their affiliates in the Midwest ISO market do not have franchised electric service territories. They also state that their tariffs prohibit the sale of electric capacity and energy to any affiliate with a franchised service territory and include codes of conduct that will govern the relation between section 205 Applicants and the Entergy Operating Companies. As a result, section 205 Applicants submit that they satisfy the Commission's standards for affiliate abuse. Section 205 Applicants' codes of conduct conform with the Commission's standard code of conduct. We find that section 205 Applicants have demonstrated that they adhere to the Commission's affiliate code of conduct rules and, therefore, provide no undue preference to their affiliates. Therefore, we find that section 205 Applicants satisfy the Commission's concerns with regard to affiliate abuse.

59. We note that while section 205 Applicants request to make sales of ancillary services at market-based rates in the Midwest ISO, there is no organized market in the Midwest ISO for the sale of ancillary services at market-based rates.⁷⁰ We direct Entergy Palisades to make a compliance filing within 30 days of the date of issuance of this order revising its market-based rate tariff to remove the reference to ancillary services sales in the Midwest ISO market.

60. Similarly, with respect to Entergy Nuclear Marketing, we reject the proposed revision to Paragraph 1 of the tariff that reads "...makes electric capacity, energy, and ancillary services available under this Tariff...for resale within...(c) the Midwest ISO Transmission Provider Region . . ." Instead, we direct Entergy Nuclear Marketing to make a compliance filing within 30 days of the date of this order revising its tariff to add the following: "and (c) energy and capacity within the Midwest ISO Transmission Provider Region, as such term is defined in the Transmission and Energy Markets Tariff of Midwest Independent Transmission System Operator, Inc., FERC Electric Tariff Third Revised Version No. 1, as it may be amended." This revision removes the reference to ancillary services in the Midwest ISO, thus taking into account the fact that there is currently no organized market in the Midwest ISO for the sale of ancillary services at market-based rates.

61. Entergy Palisades proposes to offer ancillary services in geographic markets as the Commission may authorize from time to time in orders that extend such authority to all sellers previously authorized to sell energy and/or capacity at market-based rates,

⁷⁰ See *Deephaven RV Sub Fund Ltd.*, 111 FERC ¶ 61,262 (2005).

provided that Entergy Palisades shall file revised tariff pages as required by section 35.1 of the Commission's regulations as a condition of such sales. Entergy Palisades' request is granted in this regard; however, this grant does not relieve Entergy Palisades of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2006).⁷¹

62. Entergy Palisades also requests authority to resell firm transmission rights and to reassign transmission capacity. We find these provisions consistent with the Commission's requirements.⁷² Accordingly, the Commission will grant this request.

63. The Commission conditionally accepts Entergy Nuclear Marketing's revised market-based rate tariff, which permits sales of electric capacity and energy to wholesale customers at market-based rates in the market region administered in the Midwest ISO market.

64. In the instant section 205 filing, Entergy Nuclear Marketing proposes to remove redundant language that prohibits Entergy Nuclear Marketing from making sales under the tariff at points of delivery on the systems operated by the Entergy Operating Companies. Given the language of the Entergy Nuclear Marketing tariff in Section 1 that specifically identifies the markets in which Entergy Nuclear Marketing is permitted to make sales under the tariff, the limiting language of section 3 of the tariff is extraneous and redundant. We will accept this revision to Entergy Nuclear Marketing's tariff.

65. Entergy Palisades and Entergy Nuclear Marketing are directed to submit a compliance filing amending their tariffs to include the effective date of the tariffs, within 30 days of the date Entergy Palisades acquires the Palisades Facility.

66. We note that MEC/PIRGIM, in their protest to the section 205 filing, state that the "Entergy Palisades Tariff may adversely affect electricity rates and the reliability of service, and that this Commission should therefore deny the request for authorization of certain waivers and blanket authorizations under the Commission's regulations."⁷³ MEC/PIRGM's objections in this regard are unsupported. Our conditional approval here of section 205 Applicants' filing is based on the fact that Applicants satisfy our standards for market-based rate authorization.

⁷¹ *Calhoun Power Co.*, 96 FERC ¶ 61,056 (2001).

⁷² See *Southwestern Public Service Co.*, 80 FERC ¶ 61,245 (1997) and *California Independent System Operator, Inc.*, 89 FERC ¶ 61,153 (1999).

⁷³ MEC/PIRGIM Protest at 11-12.

D. Application for Market-Based Rate Authority; Other Waivers, Authorizations and Reporting Requirements

67. Entergy Palisades requests waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except for sections 35.12(a), 35.13(b), 35.15 and 35.16. Entergy Palisades also requests waiver of Part 41, Part 101, and Part 141 of the Commission's regulations concerning accounting and reporting requirements.⁷⁴

68. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.⁷⁵ We will deny PIRGIM/MEC's request that we not grant certain waivers and blanket authorizations. MEC/PIRGIM have not provided any basis for their argument that we deny the request for certain waivers and blanket authorizations. The Commission typically grants certain waivers and authorizations to market-based rate sellers and we find it appropriate to grant them in this instance. Notwithstanding the waiver of the accounting and reporting requirements here, Entergy Palisades is expected to keep its accounting records in accordance with generally accepted accounting principles.

69. Entergy Palisades is required to file Electric Quarterly Reports (EQRs) in compliance with Order No. 2001. If the effective date of its market-based rate tariff falls within a quarter of the year that has already expired, its EQRs for the expired quarter are due within 30 days of the date of this order.

70. Entergy Palisades must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to

⁷⁴ We note that Entergy Nuclear Marketing was granted these waivers in *Entergy Nuclear Power Marketing, LLC*, Docket No. ER06-653-000 (April 19, 2006) (unpublished letter order).

⁷⁵ It should be noted that the Commission is examining the issue of continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101 and 141) as well as continued applicability of the blanket authorization for the issuance of securities and the assumption of obligations and liabilities, (18 C.F.R. Part 34). *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Notice of Proposed Rulemaking*, 71 Fed. Reg. 33,102 (June 7, 2006), FERC Stats. & Regs. ¶ 32,602, at P 169 (2006).

make sales at market-based rates.⁷⁶ Entergy Palisades has included the change in status reporting requirement in its market-based rate tariff.⁷⁷

71. Entergy Palisades is directed to file an updated market power analysis within three years of the date of this order. The Commission also reserves the right to require such an analysis at any time.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 203 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 I), a public hearing shall be held to determine the effect on rates of the proposed transaction, unless section 203 Applicants provide a ratepayer protection mechanism within fifteen (15) days of the date of this order, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in the Ordering Paragraphs below.

(B) If section 203 Applicants do not provide a ratepayer protection mechanism within 15 days as discussed in Ordering Paragraph (A), pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2006), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within twenty (20) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the

⁷⁶ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

⁷⁷ Entergy Nuclear Marketing's tariff already contains the change in status reporting requirement.

parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a 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 in the Commission's Rules of Practice and Procedure.

(E) The Commission accepts section 203 Applicants' proposal for Consumers to use the Jurisdictional Amount to decommission the Big Rock Facility, subject to the outcome on the NRC License Proceeding, as discussed in the body of the order.

(F) The Commission conditionally accepts Entergy Palisades' application for market-based rate authority, subject to the compliance filing ordered herein, effective the date Entergy Palisades acquires the Palisades Facility as requested.

(G) The Commission conditionally accepts Entergy Nuclear Marketing's tariff revisions, subject to the compliance filing ordered herein, effective the date Entergy Palisades acquires the Palisades Facility.

(H) Section 205 Applicants are directed to make compliance filings within 30 days of the date of issuance of this order, as discussed in the body of this order.

(I) Entergy Palisades and Entergy Nuclear Marketing are directed to submit a compliance filing amending their tariffs to include the effective date of the tariffs, within 30 days of the date Entergy Palisades acquires the Palisades Facility.

(J) Waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15 and 35.16, is hereby granted.

(K) Waiver of Parts 41, 101, and 141 of the Commission's regulations is hereby granted, with the exception of 18 C.F.R. §§ 141.14, 141.15 (2005).

(L) Entergy Palisades is required to file Electric Quarterly Reports (EQRs) in compliance with Order No. 2001. If the effective date of its market-based rate tariff falls within a quarter of the year that has already expired, Entergy Palisades' EQRs for the expired quarter are due within 30 days of the date of this order.

(M) Entergy Palisades is hereby directed to file an updated market power analysis within three years of the date of this order.

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

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.